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Worst Decision of the EU Court of Justice: The Alrosa Judgment in Context and the Future of Commitment Decisions

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Abstract

This Article details the evolution of the commitment decisions, analyzes the logic and the consequences of the Alrosa Court judgment, and offers some suggestions on how to establish a better equilibrium between the legitimate objective of promoting the effectiveness of the Commission by allowing it enough flexibility to end cases when competition could be restored rapidly and without major expense thanks to the cooperation of investigated firms, while respecting the necessity to ensure that the effectiveness of enforcement remains compatible with three goals: developing a robust competition law jurisprudence to ensure legal predictability, particularly in abuse of dominance cases; ensuring that chosen remedies are not only the most effective to solve a case but also the most efficient way to restore competition on the affected markets; and offering investigated firms willing to cooperate with the Commission an adequate level of procedural rights.

KEYWORDS: Alrosa Court, International Law, European Commission, European Court of Justice, Council Regulation No. 1/2003, Article 81, Article 82, European Competition Law

ARTICLE

WORST DECISION OF THE EU COURT OF JUSTICE: THE *ALROSA* JUDGMENT IN CONTEXT AND THE FUTURE OF COMMITMENT DECISIONS^μ

*Frederic Jenny**

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INTRODUCTION

The adoption of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (the "Regulation"), which came into force in 2004, modernized European competition law. One of its provisions (Article 9 of Regulation 1/2003), which

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attracted little notice at the time, modified and improved the conditions under which the European Commission (“EC” or the “Commission”) could end a case by accepting commitments on the part of the investigated firm.¹ The Commission had, in the past, already accepted commitments from investigated firms, but without being able to make those commitments binding. Article 9 of Regulation 1/2003 was a welcome procedural improvement designed to fill this gap by providing the Commission with a procedural tool to make binding commitments that undertakings were willing to offer, if these commitments met the competition concerns of the Commission in cases where the fining of the firms was involved. It was thought that the use of this instrument would allow the Commission to free resources for other types of cases deserving an enforcement decision—Article 7 of the Regulation 1/2003. Contrary to what had been expected, the development of commitment decisions to the detriment of enforcement decisions has become the hallmark of the EU antitrust enforcement regime for all cases except cartel cases because cartels are a hard core violation of EU competition law deserving stiff fines. In the ten years since the adoption of Regulation 1/2003, enforcement decisions have become the exception—even though the level of fines in enforcement decisions has rapidly increased—and commitment decisions have become the norm. One of the major reasons for this development is the *Alrosa* European Court of Justice (“ECJ” or the “Court”) judgment, where the Court adopted an overly formalistic approach, which allows the Commission to enjoy a level of discretion in commitment decisions that it does not have in enforcement decisions, particularly with respect to structural remedies. As a result, the Commission has completely changed its approach to the enforcement of Articles 101 and 102 of the EU Treaty. It has moved from an ex post rigorous economic analysis of firms’ behaviors and of their impact on competition, to an ex ante regulatory approach where investigated firms are expected to offer commitments, whether structural or behavioral, which meet the Commission’s competition concerns in a procedure where the rights of investigated firms are much reduced. The Commission has used this procedure to move from the objective of restoring competition to a wider objective of creating competition conditions by restructuring markets. The uncontrolled use of commitment decisions allowed by the ECJ has

1. This Article does not deal with the cartel settlement procedure introduced by the Commission on June 30, 2008.

weakened legal certainty in the area of competition law and enabled the Commission to bypass the constraints of a “more economic approach” in the name of enforcement effectiveness. This Article details the evolution of the commitment decisions, analyzes the logic and the consequences of the *Alrosa* Court judgment, and offers some suggestions on how to establish a better equilibrium between the legitimate objective of promoting the effectiveness of the Commission by allowing it enough flexibility to end cases when competition could be restored rapidly and without major expense thanks to the cooperation of investigated firms, while respecting the necessity to ensure that the effectiveness of enforcement remains compatible with three goals: developing a robust competition law jurisprudence to ensure legal predictability, particularly in abuse of dominance cases; ensuring that chosen remedies are not only the most effective to solve a case but also the most efficient way to restore competition on the affected markets; and offering investigated firms willing to cooperate with the Commission an adequate level of procedural rights.

I. COMMITMENT PROCEDURES BEFORE REGULATION 1/2003

Prior to the adoption of Regulation 1/2003, the Commission had occasionally settled cases. It had accepted behavioral commitments from parties by using a variety of procedures that led it to issue a negative clearance decision, or to give an exemption or a comfort letter or not to open a case or to terminate proceedings or to decrease the level of sanctions or not to adopt interim measures.² As early as 1975, in its annual report the Commission wrote,

In 1975, as in previous years, a large number of cases were settled without a formal decision being made. Although this procedure is less well known and has less legal value than a formal decision, its importance should not be underestimated, as it enables some cases to be settled with a minimum of administrative intervention.³

2. For an example of the latter possibility, see the commitments in *Hilti AG v. Comm'n*, Case T-30/89, [1991] E.C.R II-1445, ¶ 7.

3. COMMISSION OF THE EUROPEAN COMMUNITIES, FIFTH REPORT ON COMPETITION POLICY 1975, at 9 (1976), available at http://ec.europa.eu/competition/publications/annual_report/.

To take a few examples, in December 1984 the Commission decided in the *Wood Pulp* case⁴ that it would sanction the firms which had exchanged information on prices. To arrive at this decision, the Commission took into account the fact that: “most of the respondents have given an undertaking as to their future behavior which is likely to reduce the artificial transparency of the market and thus to improve the competitive conditions of the relevant market and to lessen the risk of future infringements.” As a result of this undertaking, the firms were granted a significant reduction in the fines imposed.

In 1985 in the *Hilti* case, Bauco (a nail manufacturer) had alleged that Hilti had breached Article 86 and requested interim measures. In particular, Bauco made a variety of allegations: 1) that its customers could not buy Hilti cartridge strips without nails, thus making it difficult for Bauco to sell its own nails; 2) that Hilti had refused to supply cartridge strips to Bauco; 3) that Bauco's attempts to buy, via third parties, cartridge strips from Hilti's independent distributor in the Netherlands were blocked; and 4) that Hilti reduced discounts to Bauco's customers on Hilti goods because they bought Bauco nails. The Commission initiated the procedure pursuant to Article 3(1) of Regulation No 17 and sent a statement of objections to Hilti, the object of which was to lead to interim measures being taken. But rather than exercise its right of defense in the case for interim measures, Hilti offered without prejudice, and the Commission accepted, an undertaking on August 27, 1985 which was to last until the Commission had completed its investigations and made a final determination on the case. For the duration of this undertaking, Hilti declared that it would no longer tie the sale of cartridge strips to that of nails and would not discriminate by discounts against orders for cartridge magazines alone or take any measures with similar effect.⁵

In March 1997 the Commission initiated formal proceedings against SWIFT—a cooperative owned by 2000 banks which managed an international telecommunications network specializing in the supply of data transmission and processing services to financial institutions around the world—after having received a complaint from La Poste (the French Post Office Bank) which had been refused access to the network. The Commission sent a statement of objection in which it considered that SWIFT had infringed Article 86. During

4. Commission Decision No. 85/202/EEC (*Wood Pulp*), 1984 O.J. L 085/1.

5. See *Hilti AG*, [1991] E.C.R II-1439, ¶ 9.

the proceedings, SWIFT offered to grant complete access to any entity which met the criteria laid down by the European Monetary Institute for admission to domestic payment systems, whereas until then such access had been reserved for shareholder members only. This commitment was published in the Official Journal of the European Communities, and the Commission suspended the proceedings against SWIFT. The Commission declared its intention to ensure that the commitment would be honored.

That same year, following complaints from suppliers of maintenance services against the commercial practices of Digital Equipment Corporation (“Digital”), the Commission initiated proceedings against the company for infringing Article 86. According to the Commission’s press release, the commercial practices of Digital “revealed a clear desire to obstruct the ability of independent service suppliers to compete with Digital on the markets for maintenance services and other, hardware services for Digital computers.”⁶ However, Digital proposed formal commitments designed to alter its commercial and pricing policy in the field of software maintenance services and other hardware services and the case was terminated.

Also in 1997, the Commission clearly indicated that it saw the potential advantages of settlement decisions. In its report for 1997, it stated:

As far as proceedings are concerned, the Commission ultimately imposed fines in only one case this year. In the remainder, it was able, after the complaint-notification stage, to accept from the undertakings involved commitments or changes to agreements which put an end to the offending practices. The attitude of undertakings reveals a genuine willingness to accept the principles of competition, but the approach must not be relaxed in future. This is why the Commission will continue to see that proposed commitments are honoured.⁷

The acceptance by the Commission of firms’ commitments, however, had a number of drawbacks, the most important of which was that the commitments were not binding on the parties except when they took the form of conditions attached to an exemption

6. Commission Press Release, IP/97/868 (Oct. 10, 1997)

7. COMMISSION OF THE EUROPEAN COMMUNITIES, XXVIITH REPORT ON COMPETITION POLICY 1997, at 25 (1998).

decision. Thus the 1999 Modernization White Paper suggested that making such settlements binding on the parties would be a welcome improvement to the enforcement toolkit of the Commission.

II. *THE COMMITMENT PROCEDURE IN REGULATION 1/2003
AND ITS UNEXPECTED SUCCESS*

Two recitals of Regulation 1/2003 pertain to commitment decisions and they read:

(13) Where, in the course of proceedings which might lead to an agreement or practice being prohibited, undertakings offer the Commission commitments such as to meet its concerns, the Commission should be able to adopt decisions which make those commitments binding on the undertakings concerned. Commitment decisions should find that there are no longer grounds for action by the Commission without concluding whether or not there has been or still is an infringement. Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case. Commitment decisions are not appropriate in cases where the Commission intends to impose a fine.

(22) Commitment decisions adopted by the Commission do not affect the power of the courts and the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty.

Article 9 of the Regulation allows the Commission to take decisions in order make the commitments offered by firms binding on them. It states:

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

2. The Commission may, upon request or on its own initiative, reopen the proceedings:

- (a) where there has been a material change in any of the facts on which the decision was based;
- (b) where the undertakings concerned act contrary to their commitments; or
- (c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.

Article 23 of the Regulation 1/2003 allows the Commission to impose fines on undertakings and associations of firms which either intentionally or negligently fail to comply with a commitment made binding by a decision pursuant to Article 9.

And Article 27 sets the procedural framework for commitment decisions and states that:

4. Where the Commission intends to adopt a decision pursuant to Article 9 or Article 10, it shall publish a concise summary of the case and the main content of the commitments or of the proposed course of action. Interested third parties may submit their observations within a time limit which is fixed by the Commission in its publication and which may not be less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Finally, Article 5 of the Regulation empowers the competition authorities of the Member States to apply Articles 81(101) and 82(102) of the Treaty to individual cases and for this purpose, to accept commitments.

The adoption of this framework for commitment decisions in the European Union is, to a large extent, a transplant from the United States, albeit an “untailored transplant” according to some critics.⁸ Indeed both the Antitrust Division of the US Department of Justice and the Federal Trade Commission (“FTC”) have the power to accept commitments and have made broad use of this possibility. Following some public criticism of the commitment procedure, a new framework was established in the United States by the Tunney Act of 1974.

As in Europe, the procedure for consent decrees in the United States involves a public consultation and there is no finding of an

8. See George Stephanov Georgiev, *Contagious Efficiency: The Growing Reliance on U.S.-Style Antitrust Settlements in EU Law*, 2007 UTAH L. REV. 971, 973.

infringement or admission of guilt by the firms investigated. Also, settlement decisions cannot serve as *prima facie* evidence of an infringement in a follow-on case.

It is, however, worth mentioning that there are several notable differences between the US system and the European one.

At a substantive level, the commitment decisions of the Antitrust Division of the Justice Department often impose fines whereas the European Commission could not since, as noted previously and according to Regulation 1/2003, in the European Union, commitment decisions are not appropriate in cases where the Commission intends to impose a fine.

In addition, there are also important procedural differences which make the US system of commitment decisions more transparent than its European counterpart.

The high level of transparency of the US system of commitment decisions is quite important, both because it forces the Department of Justice to articulate in great detail the competition issues about which it is concerned and the way in which the commitments meet this concern. The Department of Justice must file the consent decree with a federal district court at least sixty days before the date on which the settlement is to take effect. Furthermore, the Justice Department must file a competition impact assessment describing the general impact of the settlement on competition. This competition impact assessment, together with a summary of the consent decree, must be disseminated to the public for public comments, and the response of the Department of Justice to these comments must be published in the Federal Register. By contrast, in the European Union the Commission makes very few details about its competition concerns public. Also, it does not have to publish a competition impact assessment and it is not required to make the answers to the public consultation publicly available nor to publish an answer to those public comments.

Another difference with the European Union lies in the fact that in the United States, consent decrees are subject to a judicial review process, which was strengthened by the Tunney Act because the legislators were concerned that the weakness of the judicial control would lead to inequitable consent decrees. The district courts must assess whether the consent decree is in the public interest—a notion which is not defined, however. But it would seem that, except in rare cases, the courts tend to apply a low standard of review.

There was little discussion of the provision regarding settlements during the period when other provisions of Regulation 1/2003 were extensively discussed. This limited interest for Article 9 commitment decisions was due to a variety of factors: the fact that commitment decisions had rarely been used; the fact that the new provision brought significant improvements to the procedural framework in which commitment decisions could be implemented; and the fact that no one within the Commission or outside the Commission expected that commitment decisions would come to play a prominent role in competition law enforcement.

The underlying objective for the adoption of a new procedural framework for commitment decisions was to enhance the effectiveness of the Commission.

This goal of streamlining the enforcement process, which permeates a number of innovations contained in Regulation 1/2003, seemed in line with the mood of a period during which the European Commission moved from a formalistic approach to competition law enforcement to a “more economics based” approach. This new approach included the elimination of block exemptions for vertical agreements, the adoption of the significant impediment to effective competition (“SIEC”) test for concentration, a wider acceptance of the necessity to consider the possible efficiency benefits of the practices or transactions examined, and a general acceptance of the desirability to move from a formalistic approach to a case by case examination of the practices or transactions examined. The view that the goal of competition law enforcement was to promote economic efficiency and that the process of competition law enforcement itself had to be efficient was widely accepted. However, as we shall see later, the complementarity between the two goals of moving toward a more economic approach to competition and increasing the effectiveness of the European Commission turned out to be less than perfect.

What no one had quite anticipated at the time of the discussion of Regulation 1/2003 was that the number of commitment decisions would increase as rapidly as it did and that within a few years commitment decisions would outnumber enforcement decisions taken by the European Commission. The rapid increase in the number of commitment decisions was also noticeable in several Member States which have adapted their legal frameworks to allow their National Competition Authorities to close cases by accepting commitments in

conformity with Article 5 of Regulation 1/2003⁹ and have followed the practice of the Commission to progressively rely more and more on commitment decisions.

According to Damien Gerard,¹⁰ following the adoption of Regulation 1/2003 “commitment decisions subsequently emerged as the default antitrust enforcement tool in the modernization era and are still today ‘becoming increasingly frequent.’”

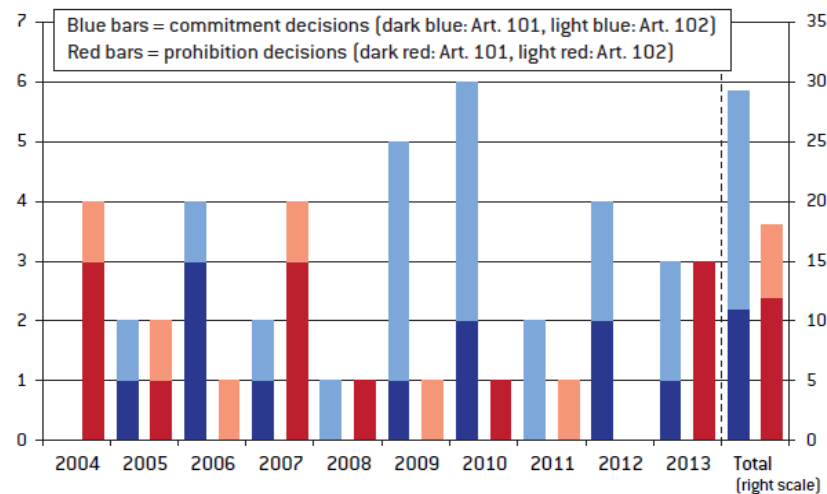
Commitment decisions have become common for the majority of antitrust cases investigated by the Commission over the past decade. During the period from May 2004 to December 2013, 75% (eighteen out of twenty-four) of all abuse of dominance cases were resolved with commitment. Commissioner Almunia has issued a prohibition decision in only one case but has taken ten commitment decisions.¹¹

9. Council Regulation No. 1/2003/EC on the Implementation of the Rules on Competition Laid down in Articles 81 and 82 of the Treaty, 2002 O.J. L 1/1 [hereinafter *Implementation of Competition Rules Regulation*]. Article 5 states: “The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions: (. .) — accepting commitments.”

10. Damien M.B. Gerard, *Negotiated remedies in the modernization era: the limits of effectiveness*, in *EUROPEAN COMPETITION LAW ANNUAL 2013: EFFECTIVE AND LEGITIMATE ENFORCEMENT* (Ph. Lowe & M. Marquis eds., forthcoming 2013).

11. See Mario Mariniello, *Commitments or Prohibitions? The EU Antitrust Dilemma*, 1 BRUEGEL POLICY BRIEF 2 (2014).

Figure 1: European Commission antitrust decisions* (May 2004 – Dec 2013)



Source: Bruegel based on DG Competition case search tool. Note: * excluding cartels. Article 101 TFEU prohibits anti-competitive agreements, Article 102 TFEU prohibits abuse of dominance. See footnote 1.

In the following table Damien Gerard shows that a similar pattern of increasing use of commitment decisions has developed in a number of Member states:

ANTITRUST ENFORCEMENT STATISTICS OF SELECTED NCAs (2007-2012)						
	2007	2008	2009	2010	2011	2012
GERMANY						
Infringements	13		10		6	5
Commitments	7		19		3	5
FRANCE						
Infringements	24*	15*	15*	11*	6*	10*
Commitments	8	7	3	6	5	5
ITALY						
Infringements	11*	5*	6*	6*	9*	9*
Commitments	9	11	9	13	5	3
SPAIN						
Infringements	12*	19*	16*	14*	33*	34*
Commitments	0	3	4	11	2	5

* incl. collusive practices not amenable to commitment decisions

Table 2

While there is wide agreement that a commitment decision can in some instances be a more efficient way to dispose of a case than an

infringement decision because the proposal by the firm(s) involved of a suitable commitment allows both the Commission and the parties to save resources while at the same time eliminating the competition concern raised by the Commission, the rise to prominence of commitment decisions in the EU enforcement mechanism has led a number of competition law specialists to raise three interdependent questions: What could explain the unexpected success of commitment decisions? Should the procedural framework of commitment decisions in the European Union be improved, given what is known about the incentives of the Commission and the parties? Could it be that the popularity of commitment decisions raises a systemic issue in the EU competition law system?

III. *THE CONTEXT OF COMMITMENT DECISIONS*

It is evident that the success of commitment decisions in the European Union is due to the fact that in a large number of cases the parties see a number of advantages in proposing commitments to the Commission. They seek to avoid the risk of a heavy fine, and of a conviction which could facilitate follow-on damage suits. They also avoid significant litigation costs, and they may hope to have a say in the design of the remedy. The Commission, on the other hand, may consider that accepting adequate commitments allows it to terminate cases faster than through enforcement (Article 7) decisions and thus to save scarce resources that it can devote to other cases while dealing adequately with the competition issue raised. Thus it comes as no surprise that this win-win solution is adopted as often as possible to the benefit of the parties involved and of the competition law enforcement system.

However, the adoption of commitment decisions may also be the result of “darker” strategies or of unstated constraints, and their adoption may clash with the efficiency goal of competition law.

A. The Parties’ Incentives to Offer Commitments

From the standpoint of the parties, one may, first, question whether the firms investigated are “free to commit or not to commit” as the Commission puts it,¹² or whether they are, in fact, “coerced”

12. See European Commission, *To Commit or not to Commit? Deciding between prohibition and commitments*, 3 COMPETITION POL’Y BRIEF 1 (2014) [hereinafter Competition Policy Brief].

into proposing commitments because they do not have any alternative. Second, one may also question whether the parties, when they propose commitments, are sufficiently well informed about the competition issue that the Commission is concerned about to be able to propose adequate commitments—*i.e.*, the least costly way to solve the competition issue—or whether imperfect information leads them to propose overly broad commitments which are not necessarily the least costly solution or the most efficient way to resolve the issue.

From the point of view of the Commission, one may question whether the motivation of the Commission in accepting commitments is necessarily and exclusively the desire to save unnecessary costs—which would be consistent with the efficiency goal. Alternatively, the Commission could accept commitments to avoid the effort—or the constraint—of formulating well-defined theories of harm, to force an interpretation of the law which it has reasons to believe would be easily accepted by the European Courts, or to evade the constraints on remedies associated with Article 7 enforcement decisions.

To start with the question of how free firms investigated for abuse of dominance are to commit or not commit, two elements must be kept in mind. First, it is noticeable that the level of sanctions imposed by the Commission, particularly for abuse of dominance,¹³ has greatly increased in recent years.

13. As seen in Table 3 *infra*, commitment decisions are particularly frequent in abuse of dominance cases.

Table 3: Fines for Abuse of Dominance in the European Union (1998–2014)¹⁴

Firms	Dates	Geographical Scope	Starting Amount ('000,000)	Addition	Final Amount ('000,000)
AAMS	June 17, 1998	Italy	ECU 3	100% increase due to the long duration, i.e. 13 years	ECU 6
TACA	September 16, 1998	Catchment areas of the ECU 220 ports in Northern Europe	ECU 220	25% increase due to the duration, i.e. 2 to 3 years	ECU 273
Virgin—British Airways	July 14, 1999	United Kingdom	EU€4	70% increase due to the long duration, i.e. 7 years	EU€6.8
Soda ash—Solvay	December 13, 2000	Community without United Kingdom and Ireland	NA	NA	EU€20
Soda ash—ICI	December 13, 2000	United Kingdom	NA	NA	EU€10

14. See Frances Dethmers & Heleen Engelen, *Fines Under Article 102 of the Treaty on the Functioning of the European Union*, 32 EUR. COMPETITION L. REV. 86 (2011).

Firms	Dates	Geographical Scope	Starting Amount ('000,000)	Addition	Final Amount ('000,000)
Deutsche Post AG	March 20, 2001	Germany	EU€12	70% increase due to the duration for the period between 1974 and 1997 and 30% increase for the period between November 1997 and October 2000	EU€24
Michelin	June 20, 2001	France	EU€8	90% increase due to the duration, i.e. 9 years and 50% increase for aggravating circumstances 11	EU€19.76
De Post/La Poste	December 5, 2001	Belgium	EU€2	25% increase due to the medium duration, i.e. 32 months	EU€2.5
Deutsche Telekom AG	May 21, 2003	Germany	EU€10	40% increase due to the long duration, i.e. > 5 years and 10% reduction for mitigating circumstances	EU€12.6

Firms	Dates	Geographical Scope	Starting Amount ('000,000)	Addition	Final Amount ('000,000)
Wanadoo Interactive	July 16, 2003	France	EU€9	15% increase due to the medium duration, i.e. 19.5 months	EU€10.35
Microsoft	March 24, 2004	EEA	EU€165.7	In order to ensure a sufficient deterrent effect, the initial amount was adjusted upwards by Microsoft March 24, 2004 EEA a factor of 2 and 50% increase due to the long duration, i.e. 5 years and 5 months:	EU€497

Firms	Dates	Geographical Scope	Starting Amount ('000,000)	Addition	Final Amount ('000,000)
Compagnie Maritime Belge	April 30, 2004	Liner services between Northern European Ports and Zaire	EU€3	20% or 15% increase due to the medium duration of the infringements, i.e. on average 2 years and reduction of the basic amount by EUR 50,000 due to the duration of the proceedings.	EU€3.4
Astra Zeneca	June 15, 2005	Belgium, Denmark, Germany, the Netherlands, Norway, Sweden, UK	EU€40	Increase due to the duration of the infringements	EU€60
Prokent-Tomra	March 29, 2006	Austria, Germany, the Netherlands, Norway, Sweden	EU€16	50% increase due to the long duration, i.e. 5 years	EU€24

Firms	Dates	Geographical Scope	Starting Amount ('000,000)	Addition	Final Amount ('000,000)
<i>Wanadoo Espana v Telefonica</i>	July 4, 2007	Spain	EU€90	In order to ensure a sufficient deterrent effect, the initial amount was adjusted upwards by a factor of 1.25; 50% increase due to the long duration, i.e. 5 years and 4 months and 10% reduction due to mitigating circumstances.	EU€151.9
Intel	May 13, 2009	EEA	NA	The starting amount was multiplied by 5.55 to take account of its duration, i.e. 5 years and 3 months.	EU€1060

Firms	Dates	Geographical Scope	Starting Amount ('000,000)	Addition	Final Amount ('000,000)
Telekomunikacja Polska S.A	June 22, 2011	Poland	NA	The fine takes into account the duration and gravity of the infringement and has been calculated on the basis of the average value of TP's broadband sales between 2005 and 2009 in Poland.	EU€127
Motorola	April 29, 2014	Germany		No fines have been imposed on Motorola because there is no EU case law available on the application of Article 102 TFEU to SEP based injunctions, and as national courts have so far reached diverging conclusions on the issue	EU€0

Besides the fact that sanctions against abuse of dominance have been high, no appeal against the substance of an EU decision sanctioning an abuse of dominance has been successful in the last ten years and practically none in the last thirty years.

There are two possible types of review of EU decisions imposing fines.

The first is the possibility of a review of the legality of the decision—based on Article 263 of the Treaty on the Functioning of the European Union (“TFEU” or the “Treaty”)—and a review of the fines—based on Article 261 of the TFEU and Article 31 of Regulation 1/2003.¹⁵ Although the scope of the legality review is fairly wide and includes lack of competence, infringement of an essential procedural requirement, infringement of the Treaty, or misuse of power, the scope of remedies is quite limited. If the Court finds that the Commission has erred on one of the previously mentioned grounds, the courts cannot substitute their interpretation to that of the Commission, and they can only annul the Commission’s decision and send the case back to the Commission.

With respect to questions of law and facts, the courts have full control and they will review the thoroughness, the relevance, the reliability, the consistency, or the comprehensiveness of the Commission’s decision. However, when it comes to highly technical or economic assessments—which are nearly always at the heart of an abuse of dominance decision—the courts limit themselves to assessing whether the evidence is capable of substantiating the conclusions. In other words, they limit themselves to controlling the internal consistency of the decision. This means that they will not substitute their own economic or technical assessment to that of the Commission and that they will not compare the Commission’s highly technical assessment with a competing assessment. This means that the Commission’s theories of harm in abuse of dominance cases

15. Consolidated Version of the Treaty on the Functioning of the European Union art. 263, 2012 O.J. C 326/162 [hereinafter TFEU]

“The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties”

“Regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of the Treaties, may give the Court of Justice of the European Union unlimited jurisdiction with regard to the penalties provided for in such regulations.” *Id.* art. 261. *See* Implementation of Competition Rules Regulation, *supra* note 8, art. 31 (“The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.”)

cannot be challenged through reviews of the legality of decisions. Yet, as John Ratliff states:

[I]f using different economic assessments makes a material difference to a finding and/or a fine, then clearly the decision which assessment is “the valid” one, or “the relevant” one in a particular case should be the subject of close judicial review. This is just part of assessment of the quality of evidence, as the Courts are doing so thoroughly with other facts. The Courts should not be deterred from carrying out their review of such issues, even if that means detailed hearings and calling economic witnesses from both sides to court to explain.¹⁶

On the basis of Article 261 of the TFEU and Article 31 of Regulation 1/2003, the courts have full jurisdiction to review the fines imposed by the Commission—which is the reason most appeals against the Commission’s decisions are made on the basis of a combination of Article 263 of the TFEU and Article 261 of the TFEU. They will make a judgment on the appropriateness of the fines and they have a wide scope of remedy at their disposal since they can cancel, increase or decrease the fine if they find them inappropriate. However, the courts will, for the most part, take a deferential approach vis-à-vis Commission decisions. There is some debate—to which we will come back later—about whether the courts could use the above-mentioned provisions to review—with full jurisdiction—not only the fines imposed by the Commission but also the decisions imposing those fines. However, so far the courts have not reviewed Commission decisions on the basis of Article 261 of the TFEU and Article 31 of Regulation 1/2003.

What this means for firms investigated for a potential abuse of dominance is that they know that, if they choose not to offer a commitment to the Commission, they expose themselves to the risk that the same Commission will sanction them with a very high fine, and impose on them at least some of the remedies to which they were not willing to commit to and possibly some others, without any real chance of being able to contest successfully either the reasoning of the Commission or the amount of the fine. Thus, once the Commission has expressed concerns about their practices, firms investigated for abuse of dominance are in a very uncomfortable

16. JOHN RATLIFF, JUDICIAL REVIEW IN EC COMPETITION CASES BEFORE THE EUROPEAN COURTS: - AVOIDING DOUBLE RENVOI 12 (2009).

position since it is fairly unlikely that the Commission will reverse itself or that it will close the case if they do not offer commitments. Their only possibility is therefore to offer commitments because not offering such commitments is necessarily a losing strategy.

The situation would be quite different if firms had a reasonable possibility of having the courts overturn Commission decisions sanctioning them. In that case they would be faced with two options, each having its own costs and possible benefits. Not offering commitments could be a winning strategy, in spite of the costs incurred, if the firms thought that they could make a good case against the theory of harm proposed by the commission.

Overall, one can question whether commitments are concessions extracted by the Commission which put the firms under investigation in a situation where they do not have the any choice but to modify their behavior or whether they are solutions negotiated by the firms and the Commission to remedy a competition problem in the most efficient way. In the first case, the commitment decisions are akin to enforcement decisions; in the second case, commitment decisions would resemble contracts between the investigated firms and the Commission. Similarly, in the first case the success of the commitment procedure in recent years would be, to a large extent, the result of choices made by the Commission to bear down on some dominant firms with questionable and create a situation where they have to offer commitments while in the second case the success of the commitment procedure would result from its appeal for firms being investigated.

A number of authors have suggested that the first scenario—(the fact that the investigated firms do not really have any other choice but to offer commitments)—is in fact the prevalent one. For example Philip Marsden, commenting on commitment decisions in high technology markets, stated:

[W]hile defendants technically offer the commitments, the reality is often quite different. DG-Competition puts huge pressure on firms to come up with solutions to end investigations. A dynamic exists where the threat of years of investigation with the significant legal and commercial costs, distraction of senior management, ongoing negative publicity, uncertainty, and possibility of huge fines combine to make defendants particularly prone to offer

commitments as a practical matter, no matter what the theory of harm may be or allegations they are facing.¹⁷

Along the same line, P. Lugard & M. Mollmann state:

A look at the Antitrust Manual of Procedures published by the Commission clearly reveals that it considers itself entitled to put commitments on the table: Although the commitments are voluntarily submitted by the parties, the Commission can make proposals during discussions on how to modify certain elements of the text, and may even provide concrete drafting proposals on specific issues. It is up to the parties to decide whether to accept such proposals. (The last phrase may leave a bitter taste for companies that have faced this situation.).¹⁸

B. The Commission's Incentives to Accept Commitments

If we now turn to the Commission's incentives, several commentators have warned against the risk that the Commission may use commitment decisions to pursue a policy insulated from the oversight of the courts. For example, Denis Waelbroeck warned against the development of "a parallel competition policy that completely escapes judicial control and the minimum guarantees to which our rule of law remains attached."¹⁹

What fuels those fears is, first, the fact that commitment decisions, because they are supposed to reflect commitments voluntarily offered by investigated firms, are very unlikely to be challenged in court. In most cases the parties would not have the incentive to challenge commitment decisions for fear that, if they were annulled, the Commission might subsequently adopt an infringement commission. Furthermore, the jurisprudential principle of "estoppel" may make it difficult for firms that have proposed commitments to challenge the decisions making those commitments

17. PHILIP MARSDEN, *THE EMPEROR'S CLOTHES LAID BARE: COMMITMENTS CREATING THE APPEARANCE OF LAW, WHILE DENYING ACCESS TO LAW* 2-3 (CPI Antitrust Chronicle, 2013).

18. P. LUGARD & M. MOLLMANN, *The European Commission's Practice Under Article 9 Regulation 1/2003: A Commitment A Day Keeps the Court Away* 7 (CPI Antitrust Chronicle 2013).

19. Denis Waelbroeck, *Le développement en droit européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions): que va-t-il rester aux juges?* (The Global Competition Law Centre Working Papers Series, GCLC Working Paper 01/08).

binding unless they can prove that they were coerced into proposing such commitments.²⁰ Finally, commitment decisions may be difficult to challenge by third parties, who would have to show that they are directly and specifically affected by the decision.

The fact that commitment decisions are difficult to appeal may be one of the precise reasons why the Commission, eager to further insulate itself from the oversight of the Courts, may favor Article 9 commitment decisions over Article 7 commitment decisions. Indeed, the Commission states: “Prohibition decisions are . . . frequently challenged before EU Courts, which gives judges the opportunity to clarify the law, whereas appeals of Article 9 decisions, including by third parties, are rare.”²¹

Second, as mentioned earlier, Recital 13 of Regulation 1/2003 states that “Commitment decisions are not appropriate in cases where the Commission intends to impose a fine.” Furthermore, in its policy brief just quoted the Commission states: “The Commission is also more likely to opt for a prohibition decision if it is important to set a legal precedent.” Yet, several apparent inconsistencies in the choice of cases ending with Article 9 commitment decisions seem to confirm the suspicion that the Commission uses such decisions either when its theory of harm is not very robust or, more frequently, when it wants to impose conditions which it could not impose using Article 7 decisions or when it wants to regulate industries.

A good example of a case offering some insight as to the likely motivations of the Commission to favor commitment decisions is the Coca-Cola commitment decision of 2005.²² In this decision, the commitments offered by Coca-Cola to abstain, until December 2010, from entering into exclusive agreements with shops and pubs, from offering them target or growth rebates or from forcing them to take less popular products with its stronger products, were made binding on Coca-Cola in Iceland and Norway and all the EU countries where Coca-Cola had a dominant position. One may first wonder why the Commission chose a commitment decision in this case since in previous cases with practices similar to the practices involved—

20. See H. SCHERMERS & D. WAELBROECK, *JUDICIAL PROTECTION IN THE EUROPEAN UNION* 104-108 (Kluwer, 6th ed. 2001).

21. Competition Policy Brief, *supra* note 12, at 2.

22. Commission Decision of 22 June 2005 Relating to a Proceeding Pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/A.39.116/B2 Coca-Cola).

exclusivity agreements, fidelity rebates, or tying—such as the *Michelin* cases or the *British Airways* case, the Commission had, in the past, chosen to impose fines on this kind of practices.²³ But a second feature of this decision may explain why the Commission decided to issue a commitment decision rather than an infringement decision. The Decision states:

(48) In the territories not served by the three anchor bottlers to which this Decision is addressed (Cyprus, Denmark, Finland, parts of Germany, Iceland, Malta, Norway, Portugal, Spain and Sweden), TCCC works with one or more other bottlers to produce and market its drinks. In relation to these other bottlers, TCCC proposed to ensure that, in countries where the commitments are applicable, these other bottlers sign the commitments within 90 days of notification of this Decision to the Parties. As a result, all agreements by those other bottlers will be brought in line by the full implementation date in these countries.

(49) For the countries where the commitments are not applicable from the outset, TCCC proposed to ensure that bottlers other than the anchor bottlers undertook to comply with the commitments in the event that the commitments subsequently became applicable because market share thresholds for the application of the commitments were reached in one or both channels in their respective country.

(50) TCCC undertook to use its best efforts to attain compliance by bottlers other than anchor bottlers. As a means of last resort for ensuring the bottlers' compliance, TCCC proposed to commit to terminate the agreements with any bottlers that refuse to adhere to the commitments.²⁴

In other words, the settlement negotiated in the context of the Coca-Cola decision was made applicable, in countries where the market share of Coca-Cola was superior or equal to 40% and more than twice the size of the market shares of the next competitor, to bottlers which were not parties to the proceedings and was made binding in countries where the commitment was not applicable at the time of the decision if, in the future, the market share of Coca-Cola in

23. *Michelin v. Commission*, Case T-203/01, [2003] E.C.R. II-4071; *British Airways v. Commission*, Case C-95/04, [2007] E.C.R. I-2331.

24. *Coca-Cola*, *supra* note 22, ¶¶ 48–50.

those countries were to surpass 40% and be more than twice the size of the market shares of the next competitor.

It is clear that, if the Commission had imposed through an enforcement decision, remedies having the same scope and reach as the commitments offered by Coca-Cola, it would have run two risks: the legal risk of re-opening the controversy over whether fidelity rebates granted by dominant firms should be considered per se violations of Article 102, and the risk of being overturned by the courts on procedural grounds and/or for lack of proportionality between the remedy and the violation.

By using a commitment decision, the Commission was able not only to restore competition on the investigated national markets where Coca-Cola had implemented the restrictive vertical agreements about which the Commission was concerned, but also to impose the remedies proposed by Coca-Cola on firms that were not parties to the proceedings and to make these commitments binding on national markets the Commission had not had time to investigate.²⁵ Clearly, the Commission could not have achieved such a result through an enforcement decision without running a serious risk that the courts would have found the remedies to be disproportional to the violation.

There are a number of other cases for which it has been alleged that the Commission might have been motivated to adopt a commitment decision for reasons not so much related to a concern for procedural economy but in order either to avoid the scrutiny of the Courts or to be able to accept much broader remedies than it would have been able to impose through an (Article 7) enforcement decision.

25. It is also suggested by some authors that in the *Coca-Cola* case, the commitments were negotiated before the establishment of a preliminary assessment and that the preliminary assessment was ex post tailored to the negotiated settlement. See Denis Waelbroeck, *Le développement en droit européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions): que va-t-il rester aux juges?* (The Global Competition Law Centre, GCLC Working Paper 01/08); Dans l'affaire Coca-Cola (n. JOCE, n° C 289, 26 novembre 2004, p. 10), les engagements ont été offerts avant toute communication des griefs, et même avant toute évaluation préliminaire »; see also Christopher J. Cook, *Commitment Decisions: The Law and Practice under Article 9*, 29 *WORLD COMPETITION* 209, 215-216 (2006); Heike Schweitzer, *Commitment Decisions under Art. 9 of Regulation 1/2003: The Developing EC Practice and Case Law* (EUI Working Papers in LAW, No. 2008/22).

For example, between 2004 and 2014 the Commission took eleven commitment decisions in the energy sector.²⁶ In four of those decisions structural commitments were made binding on the firms which had offered them.²⁷ The adoption of structural remedies in four commitment decisions in the energy sector over a period of six years merits two comments from a legal and a policy point of view.

From a legal point of view, Recital 13 of Regulation 1/2003 states:

Structural remedies should only be imposed either where there is no equally effective behavioral remedy or where any equally effective behavioral remedy would be more burdensome for the undertaking concerned than the structural remedy. Changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a

26. See Commission Decision of 12 April 2006 Relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/B-1/38.348 – REPSOL C.P.P.); Commission Decision of 10 November 2007 Relating to a proceeding pursuant to Article 82 of the EC Treaty (Case COMP/B-1/37966 Distrigaz); Commission Decision of 26 November 2008 Relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/39.388 - German Electricity Wholesale Market and COMP/39.389 - German Electricity Balancing Market); Commission Decision of 18 March 2009 Relating to proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/39.402 – RWE Gas Foreclosure); Commission Decision of 3 December 2009 Relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/39.316 – Gaz de France); Commission Decision of 17 March 2010 Relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/39.386 – Long-term contracts France); Commission Decision of April 4 2010 Relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case 39351 – Swedish Interconnectors); Commission Decision of 4 May 2010 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/39.317 – E.ON Gas); Commission Decision of 29 September 2010 Relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (‘TFEU’) and Article 54 of the EEA Agreement (Case COMP/39.315 – ENI); Commission Decision 19 June 2012 Relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (COMP/39736 - SIEMENS/AREVA); Cez, Electricity, Com 39.727, April 2013.

27. Commission Decision of 26 November 2008 Relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/39.388 - German Electricity Wholesale Market); Commission Decision of 18 March 2009 Relating to proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/39.402 – RWE Gas Foreclosure) Commission Decision of 29 September 2010 Relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (‘TFEU’) and Article 54 of the EEA Agreement (Case COMP/39.315 – ENI); Cez, Electricity, Com 39.727.

substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.

Article 7 of the Regulation states: “Structural remedies can only be imposed either where there is no equally effective behavioral remedy or where any equally effective behavioral remedy would be more burdensome for the undertaking concerned than the structural remedy.” Thus, if the Commission can impose structural remedies in infringement decisions, it can do so only under very restrictive conditions as there is a clear preference for behavioral remedies in Regulation 1/2003. This may explain why no structural remedy has ever been imposed in an Article 7 decision. The Commission, on the other hand, may feel less constrained in Article 9 decisions since Article 9 makes no distinction between behavioral and structural commitments and since the risk of an appeal against an Article 9 (commitment) decision is much lower than the risk of an appeal against an Article 7 (infringement) decision. Thus it is likely that if the Commission seeks structural changes on a market, it will prefer to have the investigated firms offer such structural changes as commitments rather than trying to impose them through an enforcement decision.²⁸

From the policy point of view, in 2006 the Commission completed an inquiry in the energy sector. As the Commission describes it:

After nearly two years of intensive investigation, the Commission identified in its final report serious shortcomings in the electricity and gas markets, e.g. too much market concentration in most national markets, a lack

28. The Commission does not hide its preference for structural remedies, which may explain its preference for commitment decisions. In its memo on commitments decisions (MEMO/04/217, 17. September 2004, Commitment decisions (Article 9 of Council Regulation 1/2003 providing for a modernised framework for antitrust scrutiny of company behaviour) it states: “There are two types of commitments: Behavioral commitments include a commitment by a company to provide certain services or goods under specified conditions. *See e.g.* Commission Decision of 13 December 2011 Relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/C-3/39692 – IBM Maintenance Services). Structural commitment includes the divestiture of assets, for example of an electricity transmission network. *See supra* note 24. In principle, the Commission can accept both types of commitments. Experience has shown that usually structural commitments tend to be more effective than behavioral ones. In each case, the Commission will assess whether the commitments proposed by the company effectively solve the competition problem identified. The commitments will always be tailored to the nature of the competition problem.”

of liquidity preventing successful new entry, too little integration between Member States' markets, an absence of transparent, available market information leading to distrust in the pricing mechanisms, an inadequate current level of unbundling between network and supply interests which has negative repercussions on market functioning and investment incentives, customers being tied to suppliers through long-term downstream contracts, and current balancing markets and small balancing zones which limit competition and thereby ease costs for the final consumer.²⁹

As a follow-up, the Commission launched a number of investigations under the EC Treaty rules, notably Article 82, in the electricity and gas markets.

As is clear from the above quotation, the Commission very much wanted to change the structure of the energy sector—both vertically and horizontally—as well as contractual relationships between suppliers and buyers in order to promote competition in the energy sector and used commitment decisions to further this goal. The aforementioned report states:

The Commission has already adopted a landmark decision concerning two cases in the electricity sector (the E. ON. and the RWE decisions). On the basis of unprecedented structural commitments addressing horizontal and vertical concerns, (the E. ON) decision is expected to open two separate markets to competition. In another key case in the gas sector (the RWE case), an undertaking has also provided structural commitments to bring the investigation to an end.

Thus the remedies adopted in those cases not only restored competition—as is normally the case in prohibition decisions—but also sought to modify the future structure of the market to make it more competitive and to force the entrance of new competitors. This use of the commitment decision to restructure energy markets was all the more important because the Commission was encountering stiff opposition from Member States in its attempt to push regulatory separation.

29. Commission Communication to the European Parliament and the Council on the function of Regulation 1/2003, SEC (2009) 574 (final) [hereinafter Commission Communication on Regulation 1/2003].

Indeed in the Third Internal Energy Market Package, which came into force in 2009—and had been negotiated for several years—the Commission was unable to impose ownership unbundling as the sole way to achieve structural separation of network operation from production and supply activities. In the Directive 2009/72/EC (the “Electricity Directive”) and the Directive 2009/73/EC (the “Gas Directive”), ownership unbundling is only one of three options. Two other options are allowed: unbundling can also be realized without ownership unbundling through the establishment of an independent system operator (“ISO”) or an independent transmission operator (“ITO”).

Commenting on the *E. ON.* case, in which E. ON. had proposed to sell its electricity transmission system network to an operator with no interests in electricity generation and/or supply businesses and to commit to divest a sizeable generation capacity to competitors, Jean-François Bellis stated:

The Commission effectively managed to secure from E.ON voluntary but legally binding structural commitments through competition enforcement at a time when its parallel negotiations with Member States on regulatory unbundling of their energy companies was struggling.³⁰

Some commentators have also questioned the motives behind the commitment decisions in high tech sectors—such as IT or consumer electronics products. Indeed, the Commission has issued a number of commitment decisions in this sector such as *Microsoft* (Tying) (2009), *Rambus* (2009), *IBM* (Maintenance Services) (2011), and *Samsung* (Essential Patents) (2014).

Two competing views can be expressed with respect to the wisdom of commitment decisions in the high tech sector. On the one hand, competition issues in the high tech sector justify swift action and remedies tailor-made to the realities of the market because of the importance of the innovative process and the fast moving nature of these markets. On the other hand, high tech markets are often quite complex and novel, which means both that there is a need for reviewable enforcement decisions which may then guide economic actors on these markets and that interventions—or the acceptance of

30. Jean-François Bellis, *Commitment Decisions in Article 102 TFEU Cases – An Alternative to Infringement Decisions with Fines?* Presentation to the Brussels School of Competition (2013).

commitments—based on “competition concerns” which are not fully articulated may entail a high risk of type I errors. In short, there is debate about whether the need for legal precedent should take precedence over the need for swift action in such a sector and whether the Commission, for strategic reasons, has overused the commitment decisions mechanism.

Competition Commissioner Almunia, who is known to favor commitment decisions, has repeatedly stated his belief that commitment decisions are appropriate for high tech markets. For example in a statement made in 2012 on the *Google* case he said:

I believe that these fast-moving markets would particularly benefit from a quick resolution of the competition issues identified. Restoring competition swiftly to the benefit of users at an early stage is always preferable to lengthy proceedings, although these sometimes become indispensable to competition enforcement. In this case, Google Inc. has repeatedly expressed to me its willingness to discuss any concerns that the Commission might have without having to engage in adversarial proceedings. This is why I am today giving Google an opportunity to offer remedies to address the concerns we have already identified.³¹

Yves Botteman and Agapi Patsa extensively discuss the various facets of the case for the use of commitment decisions in high tech sectors.³² They offer three arguments in favor of commitment decisions: 1) As illustrated by *Intel*, establishing an antitrust violation in dynamic and fast evolving markets may be particularly daunting and time-consuming for antitrust authorities with the risk that the remedies will be obsolete by the time the Commission has made a decision; 2) As shown by *Microsoft* remedies, an infringement decision may be prone to implementation problems and, ultimately, result in litigation over the defendant’s precise obligations whereas this is less likely to happen in case of commitment decisions since the commitments will have been offered by the firm investigated; 3) In fast-evolving markets with a dynamic competitive process, type I

31. Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy, Statement of VP Almunia on the Google Antitrust Investigation (May 21, 2012).

32. See Yves Botteman & Agapi Patsa, *Towards a More Sustainable Use of Commitment Decisions in Article 102 TFEU Cases*, J. ANTITRUST ENFORCEMENT 1, 1-28 (2013).

errors may be more costly than type II errors since the anti-competitive issue may resolve itself, given the often transitory nature of market power in fast-evolving markets. Therefore tailor-made commitments (remedies) offered early on by the investigated firm may be superior to injunctions in the context of enforcement decisions.

However, the case for the benefits of quick resolution of competition issues in high tech markets through the use of commitment decisions may be weaker than what Yves Botteman and Agapi Patsa suggest, for various reasons.

The most obvious one is that the time it takes to arrive at commitment decisions, particularly in abuse of dominance cases—high tech cases are predominantly abuses of dominance cases—has thus far been not been significantly shorter than the time it takes to arrive at enforcement decisions. Thus the alleged rationale of “increased effectiveness” of the competition law enforcement system does not seem to have a sound basis—in general or in the high tech sector—for justifying commitment decisions in this sector. As Mario Mariniello explains:

The key benefit of a commitment decision is arguably to provide a quicker response to an ongoing infringement. An analysis of the Commission’s decisions generally confirms this but also suggests more caution. The time from the opening of a proceeding to the adoption of the decision is on average 17 percent longer for prohibition decisions than commitment decisions: 28.5 versus 24.3 months. This changes though if decisions are categorized according to the nature of the infringement. Commitment decisions are particularly popular in abuse of dominance cases (breaches of Article 102 of the EU Treaty). However, in these cases, commitment decisions have taken on average longer than prohibition decisions: 26 months against 22.7 months. That is: cases resulting in commitment decisions have been 15 percent slower than prohibitions. While this surprising result could be due to the lack of statistically significant figures (there have been only six Article 102 prohibition decisions since May 2004, and it cannot be excluded that a prohibition was adopted in those cases exactly because it was believed that they would not require a long investigation), it nevertheless suggests that the greater

speed normally attributed to commitment decisions is not to be taken for granted.³³

The skepticism about the fact that in high tech abuse of dominance cases commitment decisions are faster than enforcement is particularly topical in the *Google* case which was initiated in November 2010 and has not yet reached the decision stage. In any case, the benefits, in term of increased effectiveness of the Commission, of commitment decisions in high tech sectors seem to be, at best, modest.³⁴

Furthermore, in their defense of commitment decisions in high tech sectors, Bottemans and Patsa assume that the incentives of the Commission are strictly to remedy the competitive concerns raised by potentially anti-competitive behavior, that the theory of harm underlying the competitive concern is clearly articulated in the preliminary assessment, and that the investigated firms have the choice to offer or not to offer commitments. For reasons discussed previously, there are reasons to doubt that this is an accurate description of the commitment process in general and in the high tech sector in particular. Because the competitive issues raised are often new and particularly complex and the law is uncertain, the risk of type I errors is particularly high in the high tech sector. Philip Marsden addresses these issue when he states that:

When commitments decisions espouse novel theories of harm in fast-moving markets, they create important precedents, considered relevant by the industry as a whole who otherwise have little direct relevant case law or Commission guidance. However, with little pressure on the Commission to provide a well reasoned and evidenced decision when commitments are given, rules can end up being set for an industry based only on case-specific facts and the interactions of a case team, a defendant, and at most some self-interested third parties.³⁵

Thus for the Commission the desire to intervene actively and without facing the risk of an appeal or the constraints of an

33. See Mariniello, *supra* note 11.

34. There are exceptions, however. The Universal International Music/MCPS case took less than eight months.

35. PHILIP MARSDEN, THE EMPEROR'S CLOTHES LAID BARE: COMMITMENTS CREATING THE APPEARANCE OF LAW, WHILE DENYING ACCESS TO LAW 4 (CPI Antitrust Chronicle, 2013).

enforcement decision, even at the cost of maintaining a degree of legal unpredictability, may be a more important determinant of the choice of commitment decisions in the high tech sector than the desire to save resources.

Finally, there is a hypothesis worth mentioning to explain the intensive use of commitment decisions by the Commission, particularly in the area of abuse of dominance. As we know, the pressure on the European Union to follow a “more economic approach” to antitrust enforcement in the area of Article 82 has grown regularly over the past decade. The publication of the Economic Advisory Group On Competition Policy Report on “an economic approach to Article 82” in 2005 was followed by the publication in 2009 of the Commission Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings,³⁶ which officialized this evolution. But the Commission, like all competition authorities, has found over time that the economic approach to abuses of dominance is particularly challenging. It is much more difficult and much more resource intensive to establish the proof of an abuse of dominance when one follows an economic approach than when one follows a more legalistic approach to competition law enforcement.

Mario Merinello³⁷ examines the decisions published (English versions) between May 2004 and December 2013, and compares the average length of commitment decisions—twenty-one pages—with the average length for prohibition decisions—160 pages. As an illustrative example, he compares the commitment decision in *Rambus*—seventeen pages, four of which are dedicated to the “practices raising concerns”—and the *Intel* prohibition—518 pages, 225 of which are dedicated to the analysis of the abuse of dominance of Intel).

Commitment decisions offer an easy way to bypass both the complexity of articulating a theory of harm that would withstand the scrutiny of courts and economic experts and the risk that there would be a court challenge to the decision.

The reason commitment decisions are both shorter and easier for the Commission is that in commitment decisions, the Commission

36. See Commission Communication—Guidance on the Commission's enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings; Commission Communication on Regulation 1/2003, *supra* note 29.

37. See Mariniello, *supra* note 10.

does not spell out the full details of the theory of harm that led it to believe that the behavior implemented by the company is harmful for consumers.

As Botteman and Patsa say: “The EC may prefer to obtain early voluntary concessions to spending more time and effort on a case that may progressively reveal evidentiary and theoretical weaknesses, thereby depriving the EC and the market of any antitrust remedy.”³⁸ In 2004 John Temple Lang expressed the same idea in detailing the Commission’s reasons for considering commitments.³⁹ Among other reasons, he stated:

The Commission is aware that the law under Article 82 is unclear, and even interpretative guidelines may not succeed in clarifying it. Rather than have a long and difficult Commission procedure and a case in the Court of First Instance, with an uncertain result, the Commission should be satisfied to obtain a commitment which will immediately make the market more competitive.

Yet using commitment decisions in complex cases in which the law is not clear in order to avoid the difficulties and the costs of elaborating a robust theory of harm or in order to reduce the chances of an appeal can run against the public interest for a variety of reasons: commitment decisions do not have the dissuasive effect of prohibition decisions; aggrieved parties cannot rely on them to bring damage claims; and they prevent the development of a coherent jurisprudence through court reviews which could offer legal predictability. This is a heavy social cost, which should be compared to the private benefits to the Commission and the firms concerned of having simpler and less costly decisions.

Altogether, uneasiness about the risk that the Commission could misuse or overuse commitment decisions exists because of problems at three levels: the lack of clear procedural arrangements for the adoption of commitment decisions in Regulation 1/2003, practices of the Commission which do not seem to be always in line with Regulation 1/2003 or with the basic principles of the rights of defendants, and lack of oversight of the substance of enforcement decisions by the Courts.

38. See Botteman & Patsa, *supra* note 32.

39. John Temple Lang, *Commitment Decisions and Settlements with Antitrust Authorities and Private Parties under the European Antitrust Law*, in CORP. L. INST., INT’L ANTITRUST L. & POL., 274–76 (Barry Hawk ed., 2006).

Clearly the provisions of Regulation 1/2003 regarding commitment decisions do not provide for a level of transparency of the process leading to commitment decision that would adequately protect the firms investigated and prevent misuse or overuse of the procedure.⁴⁰ No standard is set for the “competition concerns” which the Commission can invoke in its preliminary assessment. No provision allows the defendants and to contest the competition concerns raised by the Commission before entering into the commitment negotiation phase. No indication is given in the Regulation on how the proportionality principle should apply to the commitments sought or accepted by the Commission, which allows the Commission to request commitments which go beyond the elimination of anticompetitive practices but modify the structure of the market. The question of whether commitment decisions by the parties can be appealed is open to controversy.

Furthermore, the practice of the Commission may not always be in line with the principles set out in Regulation 1/2003 or the procedural rights of defendants. There appears to be evidence that in certain cases the remedies are negotiated before the preliminary concerns of the Commission are formulated, which seems to contradict both Recital 13 and Article 9.1 of Regulation 1/2003. In such cases it is difficult to see how the commitment can meet concerns which have not yet been articulated.⁴¹ Equally, in spite of the fact that Recital 13 of the Regulation 1/2003 states that “Commitment decisions are not appropriate in cases where the Commission intends to impose a fine.” The Commission seems to use commitment decisions for cases for which it has imposed fines in

40. See, e.g., Memorandum from Eur. Comm’n on Antitrust: Commitment Decisions – Frequently Asked Questions 2 (Mar. 8, 2013), available at http://europa.eu/rapid/press-release_MEMO-13-189_en.htm. The Commission states:

The Commission then market tests the offered commitments. A notice is published in the Official Journal of the European Union with a concise summary of the case and the main content of the commitments. Depending on the results of the market test, undertaking(s) may amend the commitments before the Commission makes them binding through a commitment decision.

Id.

One of the issues is the extent to which the defendants can have access to the answers given during the market test.

41. The [Preliminary Assessment] serves as a basis for the parties to put forward appropriate commitments *or to better define previously discussed commitments.*” (emphasis added).

similar previous cases and threatens to impose fines unless the commitments offered by the firms investigated meet its approval.

Finally, as long as the standards of review of European Courts for the substance of enforcement decisions are as low as they presently are, investigated firms have no real choice but to offer commitments to solve the case against them because the Commission will, in any case, have the final say.

IV. THE ALROSA JUDGMENT

Having extensively discussed the broad context of commitment decisions and the concerns which have been raised about the possibility of misuse of the procedure, we now turn to the *Alrosa* judgment.⁴² This judgment is particularly important for two reasons. First, it is the first judgment of the European Court of Justice on a commitment decision; second, the judgment was rendered in 2010 at a time when most of the controversial issues about commitment decisions which we have mentioned had already been publicly discussed for some time. It is therefore of interest to see whether the Court of Justice was willing and able to deal with the challenges mentioned previously—granted that the Court was limited by the arguments of the parties—and what are the practical consequences of this judgment on the future of commitment decisions.

We shall, first, briefly summarize the facts and the commitment decision of the European Commission before commenting on the Court of First Instance (General Court) (“CFI”) and the European Court of Justice Judgments.

A. Facts of the Case

De Beers is the largest rough diamond supplier in the world with a market share of more than 40%. Alrosa, a Russian state-owned entity, is the second largest diamond mining company in the world, accounting for over 98% of Russian diamond production.

On March 5, 2002, De Beers and Alrosa, in accordance with Articles 2 and 4 of Regulation No 17 of February 6, 1962, jointly applied to the Commission for negative clearance or, failing this, an individual exemption under Article 81(3) of the EC Treaty in respect

42. Case C 441/07 P, *Alrosa v. Comm’n* [2010] E.C.R. I-05949.

of a Trade Agreement, which was concluded in the context of longstanding trading relations between Alrosa and De Beers, and pursuant to which Alrosa would provide for five years a fixed supply of rough diamonds to De Beers for a value of US\$800 million (EU€640 million) per annum. Alrosa had the option to reduce the amount of diamonds sold to De Beers to US\$700 million during the last two years of the agreement. The diamonds sold to De Beers amounted roughly to 50% of Alrosa's production and to 100% of its exports out of the Commonwealth of Independent States ("CIS"), formerly the Soviet Union.

On January 15, 2003 the Commission opened proceedings under Articles 81(101) and 82(102) of the EC Treaty—which deal with restrictive business practices and abuse of dominance—by sending two statements of objections under similar case numbers—COMP/E-3/38.381 and COMP/E-2/38.381. The first statement of objection was addressed to De Beers and Alrosa and raised concerns about collusion under Article (81)101 of the TFEU. The second statement of objection was sent to De Beers only and raised concerns about a possible abuse of a dominant position under Article 102.

In the statements of objection sent to De Beers, the Commission considered that the relevant market was the worldwide market for rough diamonds. It took the view that De Beers, which until a few years before the investigation began accounted for over 80% of the worldwide supply of rough diamonds, held a dominant position on the worldwide rough diamonds market for a variety of reasons. It controlled the market by imposing quotas on its production partners and by keeping large stocks; it was still considered the price leader of the diamond industry at the time of the investigation; and it was protected by high barriers to entry because of the cost and difficulty of discovering and exploiting new diamond mines.

The Commission argued in its statements of objection that its investigation had shown that De Beers and Alrosa had established their long-lasting trade relationship in order to jointly regulate volume, assortment, and prices for rough diamonds sold on the world market. It then considered that the exclusive supply commitment laid down in the trade agreement between De Beers and Alrosa would result in strengthening De Beers' market power by excluding Alrosa from the market for the supply of rough diamonds and, consequently, that it would deprive other purchasers of access to the significant source of supply which Alrosa represented. The Commission was of

the opinion, on the one hand, that De Beers' continuous purchase relationship with Alrosa constituted a recourse to methods inconsistent with normal competition and having an anticompetitive effect—in violation of Article 82(102). The Commission also believed that the notified Trade Agreement would lead to de facto distribution exclusivity to the benefit of De Beers, and as a consequence, De Beers would eliminate an alternative and independent source of supply for potential customers in violation of Article 81(101).

In March 2003 De Beers and Alrosa produced a joint reply to the Article 81 EC Statement of Objection (“SO”), and De Beers replied separately to the Article 82 EC SO. An oral hearing took place in July 2003.

On September 12, 2003 Alrosa offered individual commitments, inter alia, to stop selling to De Beers as of 2013, but it later withdrew these commitments because they were not viable from a business perspective.

With the entry into force of Regulation No 1/2003 on May 1, 2004, the application made by De Beers and Alrosa lapsed in accordance with Article 34(1) of that Regulation. However, in accordance with Article 34(2) of that Regulation, the initiation of proceedings under Article 9(3) of Regulation No 17 by the Commission Decision of January 14, 2003, which corresponds to that existing under Article 2(1) of Commission Regulation (EC) No 773/2004 of April 7, 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty and Articles 53 and 54 of the European Economic Area (“EEA”) Agreement, which continued to have effect.

On December 14, 2005 De Beers submitted the “De Beers Individual Commitments” in response to the Commission’s request and the statements of objections pursuant to Article 82(102) of the EC Treaty.⁴³

On January 25, 2006 De Beers SA submitted an amended commitment proposal. The commitment then offered by De Beers—and accepted by the Commission—was that De Beers would

43. The statements of objections were deemed to constitute the preliminary assessment within the meaning of Article 9(1) of Regulation (EC) 1/2003. See Commission Decision No. 2006/520/EC (*Alrosa*), 2006 O.J. L 205/24.

completely phase out its purchasing relationship with Alrosa over a three-year period.

On January 26, 2006 these individual commitments were forwarded by the Commission to Alrosa, together with an invitation to submit comments.

On February 6, 2006 Alrosa presented observations on the individual commitments proposed by De Beers and raised questions about the access to the file and the rights of the defense, in particular, the right to be heard.

On February 22, 2006 the Commission adopted its commitment decision making the De Beers Individual Commitments binding on De Beers.⁴⁴

This description of the case suggests a few commentaries. First, the Commission's aim was to ensure that a contract between De Beers and Alrosa, which had voluntarily been brought to the attention of the Commission by the parties in order to obtain an exemption, would not restrict competition. From that point of view the case fitted the object of commitment decisions as stated in Regulation 1/2003: "to bring an infringement to an end" where fines are not appropriate. The fact that the case was solved through a commitment decision shows the close relationship between what used to be exemption decisions under Regulation 17/63 and the new regime of commitment decisions.

Second, the competition issue raised in this case was new because there was no jurisprudence on the conditions under which supply contracts of firms holding a dominant position with one of their competitors could lead to foreclosure. As we have already seen, one of the questions debated in the legal literature is whether such novel cases should lead to commitment decisions or whether they should be adjudicated through infringement decisions in order to develop an explicit jurisprudence under the oversight of the Courts. This was not the course of action chosen by the Commission and the decision does not offer a complete framework of analysis of the foreclosure effects of such agreements. Some of the issues which were raised in the appeal against the decision are linked to the lack of precision of the theory of harm in the commitment decision.

Third, the case shows the active role the Commission plays in the negotiation of commitments voluntarily offered by the

44. *See id.* (relating to a proceeding pursuant to Article 82 [EC] and Article 54 of the EEA Agreement).

investigated firms. Indeed, after the failed market test of the joint commitment, the Commission, as it acknowledges in paragraph 42 of its decision,⁴⁵ requested a commitment from the parties to cease all commercial transactions between them.

Fourth, the Commission had four possibilities at its disposal to solve the competition problem raised by the Alrosa/De Beers trade agreement. It could have issued an infringement decision—with or without a fine⁴⁶—with an injunction for violation of Article 81(101), or an infringement decision—with or without a fine—with an injunction for violation of Article 82(102); it could have accepted a commitment decision on the basis of preliminary concerns regarding a possible violation of Article 81(101).

The possibility of choosing an action on the basis of Article 81(101) or Article 82(102) comes from the fact that a horizontal or vertical agreement entered into by a dominant firm with another firm—whether a trade agreement between two competitors, as in the present case, between a supplier and a customer, or between a patent holder having market power and a generic producer, etc.—could, in most cases, be scrutinized either as a unilateral act of the dominant firm or as an agreement between the dominant firm and its competitors.

In the end, the choice of the legal basis was dictated by the fact that because of the opposition of Alrosa to the commitment requested by the Commission after the failed market test of the original joint commitment, an action on the basis of Article 81 would necessarily have implied an enforcement decision with an injunction on the parties to discontinue all sales from Alrosa to De Beers, and a near certain appeal on the part of Alrosa which could have raised a proportionality issue on review since Recital of Regulation 1/2003 states: “This Regulation should make explicit provision for the Commission's power to impose any remedy, whether behavioral or structural, which is necessary to bring the infringement effectively to amend, having regard to the principle of proportionality.” It could have been difficult for the Commission—which had initially

45. *Id.* (“These observations, together with the Commission’s own analysis, led the Commission to suggest amendments to the proposed commitments.”)

46. Indeed the second sentence of Recital 11 of Regulation 1/2003 states: “Provided there is a legitimate interest in doing so, the Commission should also be able to adopt decisions which find that an infringement has been committed in the past even if it does not impose a fine.” Council Regulation 1/2003 on the Implementation of Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2002 O.J. L 001.

considered that the sale of by Alrosa to De Beers of diamonds worth US\$275 million per year would meet its competition concern—to justify that the complete cessation of all commercial transactions for an indefinite period was the minimum remedy acceptable to alleviate the competition problem identified.⁴⁷

Once the choice was made to act on the basis of Article 82(102), the choice between an enforcement decision and a commitment decision against Alrosa depended partly on the desire of the Commission not to issue an enforcement decision with an injunction because such a course of action could have allowed Alrosa to challenge the proportionality of the remedy and partly on the fact that De Beers was willing to offer a commitment to cease to buy any diamond from Alrosa.

The question of the proportionality of the remedy to the competition problem raised by the agreement between De Beers and Alrosa was therefore central to the choice both of the substantive ground chosen and the type of decisions chosen.

B. The Court of First Instance (General Court) Appraisal

Alrosa promptly appealed the EC commitment decision on June 29, 2006 to have it annulled. The CFI Judgment dealt with three questions:

1. Did Alrosa have standing to appeal a decision in a case in which it was not a party—the Commitment decision was based on concerns raised about a possible infringement by De Beers of its dominant position?
2. Was the commitment that was imposed by the Commission excessive and in breach of Article 9 of Regulation No 1/2003, Article 82 EC—in breach of contractual freedom and of the principle of proportionality?
3. Did the Commission infringe Alrosa's right to be heard?

The CFI examined the question of whether the decision, of which Alrosa was not an addressee, was of direct and individual concern to it, within the meaning of the fourth paragraph of Article 230 of the EC.⁴⁸ The CFI found that the decision produced a direct

47. Commission Press Release, IP/06/204, Frequently Asked Questions (Feb. 22, 2006).

48. The fourth paragraph of Article 230 EC states: "Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to

and immediate effect on Alrosa in so far as it restricted the ability of De Beers to obtain supplies of rough diamonds from Alrosa. Therefore the CFI concluded that Alrosa was directly concerned by the decision. It also found that Alrosa was individually concerned by the decision inasmuch as it was adopted at the conclusion of proceedings in which Alrosa participated to a decisive extent.

Having found that Alrosa had standing, the main issue discussed in the CFI judgment—which deserves a commentary—is the second issue—*i.e.*, whether the commitment was excessive and in breach of the principle of proportionality).

The starting point of the CFI is that “[s]ince offers made by undertakings are themselves without binding legal effect, it is the decision of the Commission taken under Article 9 of Regulation No 1/2003, and that decision alone, which has legal consequences for the undertakings.”⁴⁹ Second, the CFI found that the commitment decisions cannot be considered to be the result of a freely negotiated agreement between the Commission and the proponent of the commitment. It is an administrative enforcement decision. The CFI states in this regard:

Because the effect of that decision is to bring to an end the proceedings to establish and penalise an infringement of the competition rules, it cannot be considered as being a mere acceptance on the Commission's part of a proposal that has been freely put forward by a negotiating partner, but constitutes a binding measure which puts an end to an infringement or a potential infringement, as regards which the Commission exercises all the prerogatives conferred on it by Articles 81 EC and 82 EC, with the only distinctive feature being that the submission of offers of commitments by the undertakings concerned means that the Commission is not required to pursue the regulatory procedure laid down under Article 85 EC and, in particular, to prove the infringement.⁵⁰

Third, the CFI considers that “the objective of Article 7(1) of Regulation No 1/2003 is the same as that of Article 9(1) of that regulation and is indissociable from the main objective of Regulation

another person, is of direct and individual concern to the former.” Consolidated Version of the Treaty Establishing the European Community art. 230, 2002 O.J. C 325/33.

49. *Cf.* Alrosa v. Comm'n, Case T-170/06, [2007] E.C.R. II-2607, ¶ 86.

50. *Id.* ¶ 87.

No 1/2003, which is to ensure the effective application of the competition rules laid down under the Treaty.”⁵¹ If the Commission has a margin of discretion in the way it can ensure the effective application of the competition rules since it can choose an Article 7 infringement decision or an Article 9 commitment decision, then: “the existence of that margin of discretion as to the choice of procedure to be followed does not relieve the Commission of the obligation to comply with the principle of proportionality when it decides to make commitments offered under Article 9(1) of Regulation No 1/2003 binding.”⁵²

Fourth, the content of the principle of proportionality which applies *equally* to Article 7 (infringement) decisions or to Article 9 (commitment) decisions have the same objective that:

[R]equires that the measures adopted by Community institutions must not exceed what is appropriate and necessary for attaining the objective pursued (Case T-260/94 *Air Inter v Commission* [1997] ECR II-997, paragraph 144, and *Van den Bergh Foods v Commission*, paragraph 201); when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Case 265/87 *Schräder* [1989] ECR 2237, paragraph 21, and Case C-174/05 *Zuid-Hollandse Milieufederatie and Natuur en Milieu* [2006] ECR I-2443, paragraph 28).⁵³

The Commission did not deny that the proportionality principle applied to Article 9 decisions or that it had a duty to reject commitments offered by the parties which were “manifestly

51. *Id.* ¶ 96.

52. *Id.* ¶ 97.

53. *Id.* ¶ 98. Some authors have expressed reservations about the parallel drawn by the Court of First Instance (General Court) between the infringement and commitment decisions. For example Damien Gerard considers that “commitment and infringement decisions differ inasmuch as the former do not entail a finding of infringement but aim to address concerns at the end of an, ideally, collaborative learning process.” *Negotiated Remedies in the Modernization Era: the Limits of Effectiveness*, in *EUROPEAN COMPETITION LAW ANNUAL 2013: EFFECTIVE AND LEGITIMATE ENFORCEMENT* (Ph. Lowe & M. Marquis eds., 2013). Damien Gerard, however, considers that it would not be unacceptable for the Commission to have more flexibility in the application of the proportionality principle if due process safeguards, a mandatory judicial review over the entry of commitment decisions and an effective review process of the substance of infringement decisions and of the commitment decisions were in place. But he acknowledges that those conditions are far from being met in the current system. *Id.*

excessive”⁵⁴ but it argued that the proportionality principle should be applied differently under Article 7(1) and under Article 9(1) of Regulation 1/2003 because of the “specific nature” of Article 9(1), which allows the Commission to terminate a case, without making a finding of infringement, when the undertakings concerned have voluntarily offered commitments which meet the competition concerns of the Commission. The Commission argued that the specific nature of Article 9(2) implies that there is no need to base such a decision on a statement of reasons such as that required for a decision pursuant to Article 7 of Regulation No 1/2003, “in particular where it proves difficult to determine the nature or extent of the commitment necessary to meet the concerns expressed by the Commission.”⁵⁵ Furthermore, the Commission argued that if the proportionality principle were to be applied in the same way to Article 7 and Article 9(2) decisions, “the Commission would have to carry out an assessment in Article 9 decisions, as for a decision taken pursuant to Article 7 of Regulation No 1/2003, and would thus forego a part of the efficiency gains which the legislature sought to obtain through Article 9 of that regulation.”⁵⁶

Those arguments were clearly and strongly rejected by the Court of First Instance (General Court) which then carefully delineated what the Commission was expected to provide in Article 9 decisions and how the principle of proportionality should be applied to such decisions. The Court of First Instance stated:

In cases to which Article 7(1) of Regulation No 1/2003 applies, the Commission has to establish the existence of an infringement, which implies a clear definition of the relevant market and, where relevant, of the abuse for which the undertaking in question is alleged to be responsible. It is true that, under Article 9(1) of that regulation, the Commission is not required formally to establish the existence of an infringement, as, moreover, recital 13 in the preamble to Regulation No 1/2003 indicates, but it must none the less establish the reality of the competition concerns which justified its envisaging the adoption of a decision under Articles 81 EC and 82 EC and which allow it to require the undertaking concerned to comply with certain commitments. This presupposes an analysis of the

54. *Alrosa*, [2007] E.C.R. II-2607, ¶ 80.

55. *Id.* ¶ 78.

56. *Id.*

market and an identification of the infringement envisaged which are less definitive than those which are required for the application of Article 7(1) of Regulation No 1/2003, although they should be sufficient to allow a review of the appropriateness of the commitment.⁵⁷

Fifth, with regard to the proportionality of the commitment, the Court of First Instance stated that the test was the same as for enforcement decisions: is the commitment appropriate and necessary to eliminate the competition concern identified by the Commission? It also stated:

[W]hen there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Case 265/87 Schröder [1989] ECR 2237, paragraph 21, and Case C-174/05 Zuid-Hollandse Milieufederatie and Natuur en Milieu [2006] ECR I-2443, paragraph 28).⁵⁸

The Court of First Instance then concluded that:

It follows that the Commission cannot, without going beyond the powers conferred on it both by the competition rules of the EC Treaty and by Regulation No 1/2003, adopt on the basis of Article 7(1) of that regulation a decision prohibiting absolutely any future trading relations between two undertakings unless such a decision is necessary to re-establish the situation which existed prior to the infringement (see, to that effect, Case T-24/90 Automec v Commission [1992] ECR II-2223, paragraphs 51 and 52).⁵⁹

Sixth, a further discussion concerned the standard that the Court of First Instance (General Court) should use to assess whether the commitment proposed by De Beers and made binding by the Commission was appropriate, necessary, and the least onerous of the commitments which could have met the Commission's concern.

The Commission argued that the judicial review of commitment decisions should be limited:

[T]o verifying whether or not there has been a manifest breach of the principle of proportionality and, more generally, whether or not there has been a manifest error in

57. *Id.* ¶ 100.

58. *Id.* ¶ 98.

59. *Id.* ¶ 103.

the complex economic assessment carried out to determine whether the commitments offered by the undertakings concerned meet the concerns expressed in the preliminary assessment.⁶⁰

The Court of First Instance disagreed with the Commission on the question of whether commitment decisions, by nature, involved complex technical or economical assessment. The Court of First Instance noted⁶¹ that the Commission had admitted that in accepting the commitment proposed by De Beers it had not engaged in a complex economic assessment to compare various possible alternative commitments in order to assess which one was least costly. Consequently, the Court of First Instance concluded that it did not have to limit itself to a manifest error of appreciation standard in reviewing the proportionality of the commitment made binding.⁶²

Seventh, the Court of First Instance, applying the same proportionality test as the one used for enforcement decisions, found that the total cessation of the commercial relationship between De Beers and Alrosa was not necessary to avoid the foreclosure effect, and the horizontal restriction to competition of the trade agreement between De Beers and Alrosa. The Court of First Instance stated:

Prima facie, the most appropriate way of bringing an abuse of this kind to an end would therefore have been to prohibit the parties from entering into any agreement allowing De Beers to reserve to itself the whole, or even a material part, of Alrosa's production exported outside the CIS, in order for Alrosa to re-establish its independence on the market and for third-party access to an alternative source of supply to be guaranteed, without it being necessary to prohibit all purchases by De Beers of diamonds produced by Alrosa.⁶³

Finally, the Court of First Instance (the General Court) dealt with the question of whether the rights of Alrosa—which was not a party to the Article 82 proceedings which led to the commitment decision but was a party to the Article 81 proceedings and had, in that capacity, submitted a joint commitment with De Beers which had been rejected by the Commission—had been violated by the Commission. It considered that Alrosa should have been accorded the

60. *Id.* ¶ 81.

61. *Id.* ¶ 123.

62. *Id.* ¶ 125.

63. *Id.* ¶ 128.

rights given to an “undertaking concerned,” because it was De Beers’ contracting partner in the trade agreement which the Commission was reviewing, because it was an undertaking concerned in the Article 81 EC case and because of its involvement in the joint commitment proposal. The Court of First Instance then found that Alrosa had, in the circumstances of the case:

[A] right to be heard on the individual commitments proposed by De Beers which the Commission envisaged making binding in the proceedings initiated under Article 82 EC and that it was not given the opportunity to exercise that right fully, even though the extent to which such an irregularity might have affected the Commission's decision cannot be precisely determined in the present case.⁶⁴

The judgment of the Court of First Instance directly or indirectly addressed some of the concerns which had been aired in the literature on the procedure for commitment decisions. In particular, the judgment touches on the concern that investigated firms, which are under pressure to avoid an enforcement decision, may be prone to propose overly broad commitments; the concern that the Commission’s preliminary assessments should not be so imprecise as to prevent the Court from exercising its proportionality test; the concern that the Commission may pursue a regulatory agenda that it could not pursue in the context of Article 7 decisions; the concern that the reviewing courts adopt an excessively low standard of review; and a concern about the procedural rights of third parties.⁶⁵

64. *Id.* ¶ 203.

65. Heike Schweitzer, *Commitment Decisions Under Art. 9 of Regulation 1/2003: The Developing EC Practice and Case Law*, (Eur. Univ. Inst. Dep’t of Law, EUI Working Papers LAW 2008/22). Schweitzer underlines the usefulness of the Court of First Instance decision when she states:

“Before the CFI handed down the Alrosa judgment, it was completely unclear within which legal limits the Commission could decide to make commitments binding – and whether there were any such limits at all. How seriously must the Commission investigate competition infringements, and how precisely must it define its competitive concern, before entering into commitment negotiations? What information must the “preliminary assessment” entail, as compared to a full “statement of objection” which is required in an infringement proceeding under Art. 7(1) of Reg. 1/2003? Can the Commission accept, and make binding, any commitments that the undertakings concerned voluntarily offer, or does it have to inquire into the proportionality of the commitments? If so, how intense does this analysis have to be? Can the Commission make binding commitments in geographic or product markets that did not form part of its investigation—as apparently happened in the Coca-Cola

First, there is a recognition that commitment decisions are administrative decisions similar to Article 7 enforcement decisions rather than simply reflecting an agreement freely negotiated between the Commission and the firm offering a commitment. Second, the Court of First Instance judgment implies that the Commission cannot use the commitment decision to push a regulatory agenda by accepting structural—or behavioral—commitments that it could not have obtained through Article 7 enforcement decisions for lack of proportionality. Third, the judgment makes it clear that commitment decisions must include an analytical framework which is sufficiently developed to allow an effective judicial review of the proportionality of the measure adopted. This requires the Commission to have delineated the market and to have a clear view of the theory of harm which is the basis of its competition concerns. Fourth, the Court of First Instance (the General Court) restricts the circumstances where it will limit itself to a manifest error of appreciation standard of review of the proportionality of the commitments to cases where it is established that the Commission has undertaken a comparison of the various possible commitments involving complex technical or economic analysis. Fifth, the Court of First Instance adopts a relatively broad view of undertakings concerned by a commitment decision and upholds the procedural rights of some third parties which should be given the same rights as the concerned undertakings.

Two types of commentaries were made following the adoption of the Court of First Instance Judgment. A small number of authors were of the opinion that the Court of First Instance had erred in limiting too greatly the discretion of the Commission. For example, Firat Cengiz noted that:

[I]n *Alrosa*, the General Court did not adhere to the limits of judicial review implied by the objective proportionality analysis. The Court placed itself in the position of the

case? Can the Commission trade off a fine it would normally impose for a like infringement of competition rules against a far-reaching remedy that it can not be sure courts would accept? ... Another set of questions relates to the procedural rights in commitment decision procedures: do the undertakings concerned, as well as third parties, enjoy essentially the same rights as in an infringement proceeding under Art. 7 of Reg. 1/2003, in particular as regards the right to be heard and the right to access to the file, or can these rights be curtailed for reasons of procedural efficiency? Furthermore, can a commitment decision be appealed by the undertakings that have offered the commitments, or does the voluntary nature of commitments impede such a complaint?"

Commission, conducted its own alternative factual and economic analysis, and actively searched for less onerous measures than those made binding by the Commission's decision. As a result, by any standard the Court's analysis and consequent judgment overly intruded on the Commission's discretion.⁶⁶

However, this criticism is not fully justified. An EU court conducts an objective analysis in the judicial review of the principle of proportionality when it assesses the appropriateness and necessity of a measure in relation to the specific aim pursued by the EC Commission. First, the Court of First Instance stated that it would limit itself to a manifest error of appreciation standard of review of the proportionality principle, if—and only if—the Commission had engaged in a complex technical or economic analysis. Thus the Court of First Instance did not deny the discretion of the Commission when it uses complex technical or economic arguments—such as, for example, in all merger cases.

The Court of First Instance argued that the Commission had stated that it had not conducted such a complex technical or economic analysis in assessing the appropriateness and the necessity of the De Beers commitment. Therefore deference to the discretion of the Commission was not justified in this case and to establish whether the cessation of all commercial relations between De Beers and Alrosa was necessary to meet the competition concern expressed by the Commission, the court legitimately examined whether a less drastic reduction than the cessation of all commercial practice, like the joint commitments offered by De Beers and Alrosa, could have met the concern of the Commission. Second, it should also be pointed out that, even under a manifest error of appreciation standard, respectful of the discretion allowed to the Commission, the question of whether the commitment made binding by the Commission is the least onerous of the commitments offered which meet the concern of the Commission would require, on the part of the Court of First Instance, consideration of the effectiveness and of the cost of the various commitments offered by the parties and therefore the consideration of “complex” counterfactuals.

66. Firat Cengiz, *Judicial Review and the Rule of Law in the EU Competition Law Regime After Alrosa*, 7 *EUR. COMPETITION J.*, No.1, 127, 150 (2011).

A significant number of other commentators such as Damien Gerard had a more positive view of the Court of First Instance judgment. He stated on his blog:

There was something refreshing in the judgment rendered in 2007 by the General Court (GC) in the Alrosa case (T-170/06). If somewhat excessive in the formulation of some of its grounds, the GC had displayed a clear willingness to control the exercise of the Commission's discretion in Article 9 (commitments) proceedings and to fill in the legal black hole of the (third?) parties' due process rights. In doing so, it had endeavoured to go beyond legal formalism and brought its reasoning to a level of transparency not often encountered.

In any case, the judgment of the Court of First Instance seems to have had two sorts of effects on the Commission. First, the Commission seems to have slowed down its recourse to commitment decisions. For a period of twenty-six months between July 11, 2007, when the Court of First Instance published its *Alrosa* judgment, and September 17, 2009, when Advocate General Kokott's opinion to the European Court of Justice, in which she advocated the overturn of the decision of the Court of First instance, became public, only four commitment decisions were adopted by the Commission; whereas four commitment decisions were adopted in the four months that followed the publication of Advocate General Kokott's opinion. Second, the Commission seems to have (somewhat) disciplined itself in trying to avoid having its decisions appealed for lack of proportionality and/or for over-reaching.

As Suzanne Rab, Daphne Monnoyeur, and Anjali Sukhtankar suggest: "A comparison of cases post-*Alrosa* suggests the Commission was alive to the risk of challenge based on the proportionality of commitments but that the backdrop of third party complaints in specific cases could also be a relevant factor."⁶⁷ They observe that in *Distrigaz*, where the Commission adopted its first commitment decision after the *Alrosa* Court of First Instance judgment, the Commission specifically addressed the issue of proportionality of the commitments and explicitly stated that the proceedings could be reopened if new facts established that the

67. Suzanne Rab et al., *Commitments in EU Competition Cases Article 9 of Regulation 1/2003, its Application and the Challenges Ahead*, 1 J. EUR. COMPETITION L. & PRAC., No. 3, 171, 183 (2010).

commitments were no longer proportionate. This may have been prompted by the fact that one of the third parties argued that consumers preferred longer contracts to shorter ones. However, in cases where the Commission did not fear an appeal by a third party, such as in the motor vehicle case, it continued not addressing the issue of proportionality of the remedy.⁶⁸

C. The Decision of the European Court of Justice

The Commission appealed the Court of First Instance judgment in the *Alrosa* case. The hopes of those who thought that the Court's effective oversight of the use of commitment decisions, on the one hand, would ensure that the Commission would not go beyond what was necessary to bring an end to the infringements it was concerned about and, on the other hand, would ensure that a broad interpretation of the rights of defendants and third parties would prevail, were quickly dashed: First, by the publication on September 17, 2009 of Advocate General Kokott's opinion to the European Court of Justice in which she sided with the Commission and advocated overturning the Court of First Instance (General Court) judgment; and second, by the judgment of the European Court of Justice which was delivered on June 29, 2010. The European Court of Justice annulled the decision of the General Court and made the following main points:

Article 9 commitment decisions are "a new mechanism introduced by Regulation No 1/2003 which is intended to ensure that the competition rules laid down in the EC Treaty are applied effectively, by means of the adoption of decisions making commitments, proposed by the parties and considered appropriate by the Commission, binding in order to provide a more rapid solution to the competition problems identified by the Commission, instead of proceeding by making a formal finding of an infringement. More particularly, Article 9 of the regulation is based on considerations of procedural economy, and enables undertakings to participate fully in the procedure, by putting forward the solutions which appear to them to be the most appropriate and capable of addressing the Commission's concerns."⁶⁹

68. Commission Decision 2007/788 Relating To a Proceeding Pursuant To Article 81 of the EC Treaty, 2007 O.J. (L 317) 76.

69. *Comm'n v. Alrosa*, Case C-441/07 P, [2010] E.C.R. I-05949, ¶ 35.

What is important to determine how the proportionality principle should be applied to Article 7 infringement decisions and to Article 9 commitment decisions is the dissimilarity of the mechanisms of the two provisions and the dissimilarity of the means of action they allow the Commission to take. If the two provisions provide for different mechanisms and different means of action, then they have different objectives—unlike what the Court of First Instance (General Court) stated—and they have different underlying concepts. In its paragraph 38, the ECJ states:

The specific characteristics of the mechanisms provided for in Articles 7 and 9 of Regulation No 1/2003 and the means of action available under each of those provisions are different, which means that the obligation on the Commission to ensure that the principle of proportionality is observed has a different extent and content, depending on whether it is considered in relation to the former or the latter article.⁷⁰

And in its paragraph 46 the ECJ states:

Those two provisions of Regulation No 1/2003, as noted in paragraph 38 above, pursue different objectives, one of them aiming to put an end to the infringement that has been found to exist and the other aiming to address the Commission's concerns following its preliminary assessment.⁷¹

Finally, in its paragraph 50 the Court asserts that the two provisions have different underlying concepts.

Because Article 9—unlike Article 7—does not require the Commission to make a finding of infringement, its task is simply to examine if the commitments proposed by the firms under investigation meets the competition concerns of the Commission. Therefore:

Application of the principle of proportionality by the Commission in the context of Article 9 of Regulation No 1/2003 is confined to verifying that the commitments in question address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately. When carrying out that assessment, the

70. *Id.* ¶ 38.

71. *Id.* ¶ 46.

Commission must, however, take into consideration the interests of third parties.

The Commission is not required to seek out less onerous or more moderate solutions than the commitment offered to it.⁷² Its only obligation, when a commitment is offered, is to assess whether this commitment addresses its concern. Firms which propose commitments that go beyond what the Commission could impose do so consciously, and they are willing to do this in exchange for the benefits of avoiding an infringement decision and a possible fine. In its paragraph 48 the ECJ states:

Undertakings which offer commitments on the basis of Article 9 of Regulation No 1/2003 consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the regulation after a thorough examination. On the other hand, the closure of the infringement proceedings brought against those undertakings allows them to avoid a finding of an infringement of competition law and a possible fine.⁷³

Therefore making such commitments binding does not breach the principle of proportionality—as it should be applied for Article 9 commitment decisions. The only questions which the Commission should address are the following: Does the commitment proposed address the concerns of the Commission, and have the firms offered less onerous commitments? The Commission does not have to ask itself whether there could be less costly commitments than the one offered by the firms.

The standard of judicial review to be applied with respect to the proportionality principle is solely a manifest error of appreciation standard. In paragraph 42, the ECJ states: “Judicial review for its part relates solely to whether the Commission’s assessment is manifestly incorrect.”⁷⁴ It follows from Article 9(1) of Regulation No 1/2003 that the Commission has wide discretion to make a proposed commitment binding or to reject it and that the Commission is not required to give reasons for rejecting a commitment and/or for suggesting or not suggesting that the parties offer a new commitment.⁷⁵ It is only if it

72. *Id.* ¶ 61.

73. *Id.* ¶ 48.

74. *Id.* ¶ 42.

75. *Id.* ¶ 94-95.

was established that the Commission, without an objective reason, had made a single factual situation the subject of two separate sets of proceedings that Alrosa would have to be accorded the rights enjoyed by an undertaking concerned in relation to the proceedings brought under Article 82 against De Beers.⁷⁶

The ECJ decision suggests a number of comments. First, it is undoubtedly true, as the ECJ mentions, that the commitment decisions were adopted in order to ensure that the competition rules laid down in the EC Treaty be applied effectively. One of the ways to allow for more effective enforcement of the competition rules laid down in the Treaty is to allow the Commission to accept commitments proposed by the parties which meet its competition concerns. But the objective of the competition rules laid down in the Treaty is, as Recital 9 of Regulation 1/2003 reminds us, the protection of competition on the market.

Second, there are two possible enhanced risks associated with Article 9 commitment decisions compared to enforcement decisions. The first one is that the Commission errs in the formulation of its competition concerns—for example by having an unjustified concern; the second one is that the remedies offered and accepted go beyond what is strictly necessary—what is the least costly way—to meet the competition concern, in which case the remedies may unduly restrict the ability of some firms to compete—either the firms which have offered the commitments or some of the firms affected by the commitment. Indeed, an effective remedy against one actual or potential violation of the EU competition law may not necessarily improve competition on the market. For example, in a case like the one at hand, if the commitment offered by De Beers were to make it impossible for Alrosa to sell rough diamonds on the international market, the risk of collusion between De Beers and Alrosa on this market would be eliminated but competition on the international market would not necessarily increase, and the foreclosure effect would not necessarily disappear since De Beers would have an even more dominant position on the market. Such a commitment would be effective but would not meet the objective of the competition rules laid down in the Treaty—which is the protection of competition on the markets. Thus the effectiveness of the commitment mechanism cannot be assessed just by looking at the appropriateness of the

76. *Id.* ¶ 89.

commitments to meet the concerns expressed by the Commission. It is also necessary to control whether they are the least burdensome on the undertakings, because only if they are the least burdensome is the possible contradiction between commitment decisions and the objective of competition law minimized.

Enforcement decisions limit the risk of type I or type II errors but are more costly both for the enforcement agency and for the firms concerned; commitment decisions may entail a larger risk of deviation from what would maximize competition but are, in principle, less costly to achieve. Because they entail a larger risk of deviation from what would protect competition—either because the Commission may have misread the competitive situation, because it tries to regulate a market for the future by using law enforcement tools, or because the parties have proposed commitments which go beyond what would be the most efficient way to solve the competition problem—which are preceded by a fuller contradictory debate, a more transparent procedure and which are, to a limited extent, appealable on the merits—commitment decisions should be more closely scrutinized in the review process than enforcement decisions.

Third, the limits attached to the discretion of the Commission in designing remedies in Article 7 (enforcement) decisions have a dual legal and economic purpose. Article 7 affirms the applicability of the legal principle of proportionality in administrative decisions taken on the basis of the competition provisions of the Treaty—*i.e.*, that competition remedies should be appropriate and necessary—but it also gives a specific economic interpretation of what the principle should mean in the context of competition enforcement decisions. It specifies that between two behavioral remedies, the least burdensome for the undertaking concerned should be preferred and that structural remedies—which are likely to overshoot the goal of eliminating the particular behavioral infringement concerned—should be used only if there are no equally effective behavioral remedies or if such remedies would end up being more burdensome than the structural remedy. Those constraints on the freedom of the Commission are designed to minimize the cost of the remedies to the undertakings and to third parties in order to allow them to enjoy the maximum freedom of competition on the markets compatible with the elimination of the violation. The proportionality requirement applied to enforcement decisions contributes to making the effective enforcement of

competition law consistent with the goal which underlies the competition provisions of the EC Treaty.

Yet, after having stated that the commitment decisions and the infringement decisions have different objectives, the Court tells us that for commitment decisions under the proportionality principle the Commission has no duty to verify that the commitments it accepts minimize the burden on the undertakings.⁷⁷ In other words, if the commitment proposed terminates the violation but unnecessarily limits the strategic freedom of the interested undertakings to compete on the market, the Commission does not have a duty to suggest another commitment which would be less costly for the undertakings and for society. This interpretation of the proportionality principle is uniquely focused on the appropriateness of the commitment and disregards entirely the issue of the consistency between the effectiveness of the solution and the objectives of competition law.

Such a disregard for the compatibility between effectiveness and the pursuit of the goal of competition law is particularly difficult to accept in the specific circumstances of the case since the Court of Justice acknowledges that it was the Commission—and not the parties—which designed the commitment and that it chose to ask for the cessation of all commercial relations between De Beers and Alrosa, knowing full well that this remedy was more than what was necessary to remedy its competition concern. Indeed, paragraph 86 states that:

At the meeting of 27 October 2005, Alrosa (. . .) was informed of the nature of the commitments which the Commission expected the parties to give following the negative result of the consultation with third parties, namely cessation of all relations with effect from 2009 and a new offer of commitments on that basis.⁷⁸

And in paragraph 55 of its judgment the ECJ states that:

[The Commission] explained that, after carrying out the economic assessment, it had been unable to determine the precise level of sales which would safely address all its concerns as regards competition. It therefore accepted a

77. *Id.* ¶ 61 (“[T]he Commission is not required itself to seek out less onerous or more moderate solutions than the commitments offered to it . . .”).

78. *Id.* ¶ 86.

commitment which gave it a saving of time compared to a complex investigation's own concern.⁷⁹

In other words, the Commission, which is primarily in charge of enforcing EU law can, in the name of effectiveness, request commitments which it knows are over reaching and which may unnecessarily limit the freedom of the interested undertakings to compete on the market, thus contradicting the objectives of EU law without having a duty, at least when it requests commitments, to ensure that the remedy requested is the least burdensome for the undertakings.

Fourth, the European Court of Justice tries hard to justify the fact that enforcement decisions and commitment decisions have different objectives to counter the argument of the Court of First Instance (the General Court) according to which “the objective of Article 7(1) of Regulation No 1/2003 is the same as that of Article 9(1) of that regulation and is indissociable from the main objective of Regulation No 1/2003, which is to ensure the effective application of the competition rules laid down under the Treaty.”⁸⁰ However, the reasoning of the Court is not very convincing and seems to be overly legalistic.

The European Court of Justice starts from the fact that the two procedures have different “mechanisms” and different “means of action,” to infer that they have different “objectives”—and that they have different underlying concepts.⁸¹ But the inference that two different means of action and two different mechanisms imply different objectives is far from obvious since common experience suggests that there may be different ways and different mechanisms to arrive at the same objective.⁸² The argument of the ECJ on this

79. *Id.* ¶ 55.

80. *Alrosa v. Comm'n* Case T-170/06, [2007] E.C.R. II-02601, ¶ 95.

81. *Alrosa*, [2010] E.C.R. I-05949, ¶¶ 38, 50.

82. The TTIP negotiations underway between the European Union and the United States provide an extremely good example of the fact that different mechanisms and means are used to arrive at the same objective. Indeed, an important part of these negotiations is concerned with the regulatory environment of both entities—for example, in dangerous chemicals or in automobiles. Thus both the United States and the European Union try to protect the lives of their citizens and therefore have the same objective when it comes to automobile safety. But they try to achieve this goal by different means. The European Union has a strict ban against driving without a safety belt and an energetic enforcement of the ban. In the United States, most seat belt legislation is left to the states. New Hampshire does not have any legislation forcing drivers to wear a seat belt. In other states, driving without a seat belt is either a primary or a secondary violation depending on the state. But in the United States, there are regulations

ground is unconvincing because it does not explain why, in this particular case, the fact that Article 7 and Article 9 have different mechanisms and different means of action implies that they have different objectives even though they are two methods to close a case while ensuring that the violation—actual or potential—is brought to an end, and while the Commission can choose between these two procedures.

The ECJ emphasizes the “contractual” nature of commitment decisions to buttress its argument that commitment decisions have a different mechanism than enforcement decisions, and that in commitment decisions, the task of the Commission is confined to examining, and possibly accepting, the commitments offered by the undertakings concerned in the light of the problems identified by it in its preliminary assessment and having regard to the aims pursued. The European Court of Justice judgment states:

Undertakings which offer commitments on the basis of Article 9 of Regulation No 1/2003 consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the regulation after a thorough examination. On the other hand, the closure of the infringement proceedings brought against those undertakings allows them to avoid a finding of an infringement of competition law and a possible fine.⁸³

Advocate General Kokott had emphasized the implication of the fact that in Article 9 procedures, commitments are offered by the undertakings. She stated—paragraph 55 of her conclusions—that because commitments are offered by undertakings: “necessity may be presumed as a matter of course in relation to the interests of the undertaking which has offered the commitments (in this case De Beers).”⁸⁴ She added that: “such a presumption cannot be made where the interests of third parties (in this case Alrosa) are affected.”⁸⁵ The Court followed this lead and stated:

on the design of cars to make driving safe, which do not exist in Europe. The question raised in the TTIP is that of trying to get the two countries to agree that they use different means to achieve the same goal—and to liberalize trade in automobiles.

83. *Alrosa*, [2010] E.C.R. I-05949.

84. *Id.* ¶ 55.

85. *Id.*

Application of the principle of proportionality by the Commission in the context of Article 9 of Regulation No 1/2003 is confined to verifying that the commitments in question address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately. When carrying out that assessment, the Commission must, however, take into consideration the interests of third parties.⁸⁶

The idea that commitments are freely offered by the undertakings and that as a result the interests of the undertakings are safeguarded is, however, a fiction which would be believable only if the incentive of the Commission was purely to solve at the least possible cost a case for which the theory of harm was well established, if the undertakings offering such commitments had other options—as we argued previously—and if there was no possibility that the Commission and the undertakings offering the commitments were not colluding to the detriment of third parties.

In the *Alrosa* case this fiction is particularly difficult to believe since, as we saw, the decision of the European Court of Justice acknowledges the fact that the Commission itself informed the firms of the commitments that it was expecting them to offer and that it knew that the commitments suggested were overbroad. This case shows convincingly that necessity cannot be assumed. What the firms have to offer is what the Commission will accept and not what would be necessary to solve the competition concern it has expressed, particularly in cases where the Commission is unwilling to commit the necessary resources to find out what is the minimal commitment which would meet its concerns.

Fifth, the European Court of Justice states in paragraph 42 that “[j]udicial review for its part relates solely to whether the Commission’s assessment is manifestly incorrect,”⁸⁷ thus rejecting the view of the Court of First Instance that:

[T]he analysis which the Commission is required to carry out in proceedings initiated under Regulation No 1/2003 concerns, whether a decision adopted under Article 7(1) or Article 9(1) of Regulation No 1/2003 is involved, existing practices. Plainly, that fact does not mean that complex

86. *Id.* ¶ 41.

87. *Id.* ¶ 42.

economic assessments may not be necessary, but it cannot mean that, in the absence of such assessments, the review undertaken by the Court of the decisions of the Commission is, on any basis, to be limited to manifest errors of assessment.⁸⁸

In the *Alrosa* judgment, the ECJ departed from its usual position on enforcement decisions that:

Examination by the Community judicature of the complex economic assessments made by the Commission must necessarily be confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers.⁸⁹

Indeed, what that position suggests is that, for enforcement decisions, a more exacting standard of review of decisions can be applied for decisions which do not rely on complex economic assessments.

This departure may mean that the European Court of Justice considers that the definition of “remedy meeting the concern of the Commission” necessarily implies a complex economic analysis and it may mean that only a low standard of review should be applied by the courts to commitment decisions since, on the one hand, the rights of the parties are unlikely to have been breached because of the nature of the process—characterized by a voluntary cooperation between the Commission and the undertakings concerned—and, on the other hand, the ability of the Commission to fulfill its task of enforcing the competition rules effectively in the general interest must be preserved.⁹⁰

Whatever the reason, and as the previous discussion has shown, one can question both whether commitment decisions always involve complex economic or technical analysis and whether the voluntary cooperation process which underlies the model is always realistic.

88. *Alrosa*, [2007] E.C.R. II-02601, ¶ 110.

89. *Cf. Aalborg Portland and Others v. Commission*, Case C-204/00 P, [2004] E.C.R. I-123, ¶ 279.

90. *See* Koen Lenaerts, *Some Thoughts on Evidence and Procedure in European Community Competition Law*, 30 *FORDHAM INT’L L.J.* 1463, 1494 (2006) (providing an example of the importance that the Courts attribute to balancing the rights of the parties with the ability of the Commission to effectively enforce competition law).

V. *THE EFFECT OF THE ALROSA DEBATE ON EU
COMMITMENT DECISIONS*

As Florian Wagner-Von Papp stated: “The CJEU’s judgment in *Alrosa* is rightly interpreted as having completely emasculated the proportionality review of commitment decisions.” As a result, one can only count on the self-restraint of the Commission to ensure that commitment decisions meet the proportionality principle. From that standpoint, as Damien Gerard argues, the *Alrosa* debate has not been completely without results, even if the efforts of the Commission are limited and if the lack of effective substantive judicial review of enforcement decisions and of review of proportionality of commitment decisions distorts the incentives in the application of commitment decisions.⁹¹

The Commission’s Manual of Procedures contains a limited number of provisions which were directly inspired by the *Alrosa* debate. It provides, for example, for the fact that commitment decisions should “explain why the commitments resolve the identified competition concerns in a proportionate manner.”⁹² Furthermore, in its commitment decisions the Commission started discussing the proportionality of the commitments after the Court of First Instance (General Court) *Alrosa* judgment and it has continued to do so even after the Advocate General’s Opinion and the judgment of the European Court of Justice—notably in the imposition of limited duration for the commitments.

However, the major effect of the *Alrosa* EU Court of Justice Judgment appears to have been to encourage a rapid and somewhat uncontrolled increase in the use of commitment decisions by the Commission. The lack of sufficient procedural safeguards in the commitment procedure, and the reluctance of the ECJ both to control the substance of enforcement decisions and the proportionality of commitment decisions, has profoundly changed the nature of competition law enforcement system in the European Union.

One of the major differences between Article 7 (enforcement) decisions and Article 9 (commitment) decisions is that the focus of discussion in Article 7 enforcement decisions is the proof of the (past)

91. See Gerard, *supra* note 10.

92. *European Commission’s Antitrust Manual of Procedures*, §16.2.11, at 178 (March 2012), available at http://ec.europa.eu/competition/antitrust/information_en.html. [hereinafter *Commission Manual of Procedures*].

violation whereas in Article 9 commitment decisions the focus of discussion is the adequacy of the remedy to meet—in the future—the concerns of the Commission. The issue is no longer what the parties did but what the Commission wants. This means not only that the Commission is allowed to take a more regulatory perspective—asking for commitments, including structural commitments, which it could not have imposed through enforcement decisions—but also that reasoned decisions on what is a violation and what is not a violation of the law become less and less numerous and are replaced by decisions which have—or should have—a very limited value as precedents. Thus the EU law enforcement system has moved from a regime of ex-post assessment of competition law violations under the (weak) supervision of the Courts to a regulatory approach whereby the Commission is more concerned by the design of remedies which will improve the competitive situation of a market than by the characterization of a competition law violation and its elimination.

In particular, thanks to commitment decisions the Commission has been able to bypass the constraints on structural remedies attached to Regulation 1/2003. The much-heralded move toward a more economic based approach to competition law has become a crumbling facade since there are fewer reasoned decisions in which there is a clear economic analysis of the competitive impact of investigated practices. The risk of type I errors—*i.e.*, interventions of the Commission to obtain commitments on the basis of concerns not entirely substantiated—has increased, and so has the risk of contradiction between the goal of effectiveness of the Commission enforcement system and the promotion of efficiency.

The legitimacy of decisions has seriously decreased as they are the results of negotiations—between the Commission, the concerned parties and, to a lesser extent, the interested parties—unsupervised by the Courts, rather being than the result of a transparent process leading to appealable decisions.

The legal predictability of competition law has also been impaired as court judgments are being replaced by thinly motivated commitment decisions which, in principle, cannot have precedential value but become a kind of “soft” jurisprudence for lack of a set of formal court decisions. This development is, in particular, a source of concern for abuse of dominance cases in high tech industries where the Commission deals with new issues.

Damien M.B. Gerard makes this point eloquently when he states: “The surge in commitment decisions entailed in various ways a paradigmatic shift from a corrective toward a regulatory approach to the design of remedies in the EU, which also appears to extend beyond negotiated procedures.”⁹³ With a lot of foresight, Heike Schweitzer had expressed concerns before the ECJ *Alrosa* judgment when she stated:

The Commission’s self-interest in expanding the scope of its powers would then come to conflict with the public interest in public censure, deterrence and, most importantly, the development of legal doctrine based on clear precedents that only infringement proceedings can bring. Also, the Commission could be induced to use its bargaining power in commitment procedures to reach beyond the goal to remedy a given infringement and to pursue more ambitious strategies, attempting to restructure markets according to its own vision or to implement noncompetition goals. Commitment decisions could thus become a powerful instrument for regulating markets.⁹⁴

Those concerns were fully justified in the wake of events following the *Alrosa* ECJ judgment.

Finally, it is worth noting that Article 5 of Regulation 1/2003 encourages the development of commitment decisions at the national level by providing that, “[t]he competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions . . . accepting commitments”

As a consequence, nearly all Member States Competition Authorities have now the possibility to accept commitments and some of them—the *Autorité de la concurrence* in France, and the *Autorità* in Italy, at least until 2011, among others—use this possibility quite intensively. The procedural context of commitment decisions varies from one Member State to another, which means that some of the concerns raised at the EU level may be relevant in some countries and

93. *See id.*

94. Schweitzer, Heike, Commitment Decisions under Art. 9 of Regulation 1/2003: The Developing EC Practice and Case Law (October 2008). (EUI Working Papers LAW No. 2008/22). Available at SSRN: <http://ssrn.com/abstract=1306245> or <http://dx.doi.org/10.2139/ssrn.1306245>.

not in others. However, it is clear that the proliferation of commitment decisions at the national level will make it more difficult for plaintiffs to seek damages at a time when the promotion of civil enforcement at national level is one of the priorities of the Commission.

CONCLUSION

The *Alrosa* European Court of Justice decision combined with the lack of procedural safeguards for commitment decisions in Regulation 1/2003, the low standard of review applied by the European Courts for enforcement decisions, and the very limited scope of civil enforcement in the European Union give the EU Commission an enormous amount of discretion and the power to impose solutions to its competition concerns without having to develop robust theories of harm.

This is all the more problematic because until the turn of the Twentieth Century it was clear that the Commission—encouraged by the European Courts—adhered to a legalistic approach of competition law which was criticized as questionable from an economic perspective. In the early 2000s some progress was made culminating in the Commission's claim to follow an interpretation of competition law more in line with economic reasoning with respect to mergers, vertical restraints, and exclusionary abuses of dominance. However, the European Court of Justice has allowed the Commission to escape, practically at will, the constraints of rigorous characterization of anti-competitive practices.

The European Court of Justice has also, with the *Alrosa* Judgment, allowed the Commission to shift its focus, if it wants to, from fighting ex post competition law violations to using (pseudo) voluntary structural commitments to reshape markets or behavioral commitments to regulate them. We have already seen signs of this evolution both in the fact that commitment decisions have become the dominant form of action of the Commission with respect to non-cartel antitrust cases and in the fact that the scope of a number of commitment decisions—such as, for example, in the electricity sector—clearly goes beyond what is strictly necessary to alleviate the competition concern of the Commission. This evolution parallels the one followed by the Commission with respect to the financial sector in the wake of the crisis of 2008. As early as 2009, Philip Lowe, then Director General of Competition of the Commission, explained that

the aim of the Commission was to use European merger control provisions and state aid provisions not only to forbid anticompetitive mergers or competition distorting state aid in the financial markets but also to ensure that financial markets would be stronger than they were before the crisis and less prone to systemic crisis in the future.

This process has a systemic implication: as competition decisions are now “soft” decisions unsupervised by the courts, the development of the case law no longer offers the kind of legal predictability—or legitimacy—which is an essential quality of any legal system. As Damien Gerard states:

Eventually, an effectiveness paradox emerges. The promotion of negotiated procedures as part of a utility-maximizing approach to competition law enforcement was designed to increase the (enforcement) effectiveness thereof. However, insofar as it leads to negotiated procedures becoming the default enforcement mechanism, that approach has the reverse effect of blurring the contours of the law and of leading to a loss in the predictability of antitrust principles, thereby leading to a loss in (substantive) effectiveness.⁹⁵

What then could be—and should be—done to restore the commitment decisions procedure to what could be useful to increase the effectiveness of law enforcement without at the same time encouraging the overuse and misuse of the procedure?

First, it would be necessary to ensure that that Article 7 (enforcement) decisions are subject to a full judicial review. If investigated firms are offered the possibility of arguing their case in front of the European Courts, they may be less tempted to offer commitments when they do not feel that the Commission has a case against them or when they feel that the commitments likely to be accepted by the Commission are disproportionate. From that standpoint, it is interesting to note that Article 13 of Regulation 1/2003 provides that: “The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce, or increase the fine or periodic penalty payment imposed.” This formulation suggests that Regulation 1/2003 intended to give unlimited jurisdiction to the Courts to review the substance of Article 7

95. See Gerard, *supra* note 10.

enforcement decisions. It is only a restrictive reading of Article 13 of Regulation 1/2003 combined with the wording of Article 261 of the Treaty which suggests that the Courts have unlimited jurisdiction only on the fines and not on the substantive part of the decisions imposing them.⁹⁶ Thus Courts themselves could acknowledge the fact that they have full jurisdiction over Article 7 enforcement decisions.

It is to be noted that appellate and even supreme courts in a number of EU Member States have full review powers over the decisions of antitrust authorities⁹⁷ and do not hesitate to examine in detail complex economic arguments. Their level of scrutiny goes beyond the manifest error of appreciation standard used by the European courts, even in complex cases. So national experiences show that the complexity of the economic or technical elements of the Commission's decision is not an un-surmountable obstacle for review courts to exercise their vigilance. As Heike Schweitzer suggests:

Whether there is a need to adapt the procedural framework or practice to the new challenge of ensuring full judicial review in the light of an increased use of complex economic methodologies is a matter of debate. In some cases, courts may want to make broader use of court-appointed experts in the future. Yet, the greatest difficulty may not lie in understanding economic theories typically presented in some clarity by the parties, but in aptly translating them into law. This is a genuinely legal task.⁹⁸

Second, as we have argued, one of the risks of the current situation is that the Article 9 (commitment) decisions procedure can be overused and/or used for questionable purposes. There are three measures which the Commission could take to ensure a better equilibrium among the goals of effectiveness of the Commission's actions, contribution to the goals of EU competition law, legitimacy of Article 9 decisions, and respect for the rights of investigated firms.

96. See Consolidated Version of the Treaty on European Union, art. 261, 2012 O.J. C 326/01 ("Regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of the Treaties, may give the Court of Justice of the European Union unlimited jurisdiction with regard to the penalties provided for in such regulations").

97. This is, for example, the case of the Paris Court of Appeal in France.

98. Heike Schweitzer, *Judicial Review in EU Competition Law*, in HANDBOOK ON EUROPEAN COMPETITION LAW: ENFORCEMENT AND PROCEDURE 491, 538 (Damien Geradin & Ioannis Lianos eds., 2013).

First, the Commission should conform to the letter and the spirit of Recital 13 of Regulation 1/2003 which states, “Commitment decisions are not appropriate in cases where the Commission intends to impose a fine.” In other words, after having sent a preliminary assessment, the Commission should be able, if appropriate commitments to meet its concerns are not offered, to revert back to an infringement decision imposing injunctions but without the possibility to impose a fine—since the preliminary assessment should not have been prepared if the Commission intended to fine the firms. This would force the Commission to be more selective in choosing the cases in which it wants to use commitment procedures; it would also make the investigated firms freer to offer commitments that are not overbroad since the consequences they would incur if they did not offer commitments that were accepted by the Commission would be more limited.

Second, the Commission should also clearly define the types of cases for which, in the name of effectiveness, it might prefer commitment decisions to enforcement decisions. In the EC’s Antitrust Manual of Proceedings, the Commission states:

Another aspect which may militate against the “commitment path”, from a policy point of view, is the different precedent value of commitment decisions compared to final decisions under Article 7. Commitment decisions do not actually find an infringement, and the factual and legal assessment may be shorter than in decisions under Article 7. The more limited risk of an appeal may also reduce the Commission’s chances to have contentious legal issues clarified by the Court. If the Commission therefore wants to establish an important precedent, it may prefer the path of an Article 7 decision.⁹⁹

According to the Commission’s policy brief:

[T]he Commission will prefer article 7 decisions in cases of very serious infringements, such as cartels, as well as when there is no remedy available to solve the competition problem other than a cease-and-desist order.... A commitment under article 9 to comply with the law in the future (e.g. committing not to share markets or not to apply resale price maintenance) would not be accepted...In contrast an article 9 decision is more appropriate when the

99. *Commission Manual of Procedures*, *supra* note 91, at 178.

primary target is not the punishment of past behavior but adjusting future behavior...The Commission retains a wide margin of discretionat the same time this margin has a limit in cartel cases...article 101 or 102 infringements where no effective, clear and precise remedies can be identified will continue to be addressed through article 7 decisions¹⁰⁰

Yet, the practice of the Commission has clearly been to use the commitment decision procedure in fast evolving high tech industries where the antitrust issues are complex and very few precedents exist—see, for example, the *Rambus* case or the *Microsoft* case or the *Google* case. In those cases, the Commission argues that there was a pressing need to intervene. The result is that the Commission reserves the possibility to use Article 9 commitment decisions in nearly all the cases—except in cartel cases—and that reality seems to contradict the initial intention of the Commission. As Botteman and Agapi suggest, “[T]he EC could indicate that cases involving novel legal issues or largely untested theories of harm, where the EC needs to establish a precedent are not to be resolved through commitment decisions.”¹⁰¹

Third, Article 35(16) of the EC’s Antitrust Manual of Proceedings states, “After receiving the Preliminary Assessment, the undertaking under investigation has—in contrast to an Article 7 decision—no right to request a hearing pursuant to Article 12. Neither Regulation 1/2003 nor Regulation 773/2004 expressly provide for access to file in the context of Article 9 proceedings.” Furthermore, EC competition officials do not hide the fact that they consider that one of the advantages of the commitment decision for the Commission is precisely the lack of access to file for the parties.¹⁰² It is submitted that as commitment decisions have become the most frequent form of decisions related to antitrust violations, the lack of access to the file for the investigated firms or for the complainants and the impossibility for the investigated firm to require a hearing—combined with the fact that the Commission does not have to give

100. Competition Policy Brief, *supra* note 12, at 3–4.

101. See Botteman & Patsa, *supra* note 32.

102. See, e.g., Kris Dekeyser, *Alternative Procedures in the European Antitrust Legal Framework: Cartel Settlements and Commitment Decisions*, 7, available at <http://www.euchinacomp.org/index.php/cartels/20-cartels/remedies/161-alternative-procedures-in-the-european-antitrust-legal-framework-cartel-settlements-and-commitment-decisions>.

reasons to refuse a commitment—becomes less and less tolerable. Regulation 1/2003 was written at a time when everybody, including the Commission, thought that the use of commitment decisions would remain quite limited and would be used only in relatively simple cases where the legal principles were clearly established. The situation has now changed due to the extensive use of commitment decisions by the Commission, and it is urgent that the Commission revises the procedural framework of commitment decisions.