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V Praze dne 30. června 2017

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Martin Rott

Declaration

I hereby declare that I have written this master thesis on my own; all the sources and literature have been duly cited and this master thesis has not been used to obtain any other or the same academic degree

In Prague on 30 June 2017

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Martin Rott

Poděkování

Na tomto místě bych rád poděkoval doc. JUDr. Václavu Šmejkalovi, Ph.D., vedoucímu mé diplomové práce za umožnění vypracování této práce, stejně jako za vstřícnou podporu a velmi přínosné poznámky na první návrhy této práce a v celém průběhu jejího zpracování.

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List of abbreviations

AG	Advocate General
CJEU	Court of Justice of the European Union
DG Competition	Directorate General for Competition of the European Commission
EEA	European Economic Area
EU	European Union
NCAs	National competition authorities
Regulation 1/2003	Regulation 1/2003 on the implementation of rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1
Regulation 17/62	Council Regulation No 17 [1962] OJ 13/204
TFEU	Treaty on the Functioning of the European Union

INTRODUCTION

The entry of Regulation 1/2003[1] into force marks the start of an era of EU competition law also known as "modernization". Partly influenced by the regime in the United States, the enforcement of rules protecting undistorted competition across the European Union changed dramatically. Among other changes, Regulation 1/2003 equipped the European Commission with a modified set of enforcement tools, including a power to adopt decisions making commitments offered by companies suspected of breaching Article 101 or Article 102 of the TFEU legally binding. Commitment decisions are an alternative to prohibition decisions and should serve the Commission for a more rapid solution to competition issues identified by the Commission.[2] Although commitment decisions were initially expected to be an instrument of antitrust enforcement which would be used only in exceptional cases[3] they have been used heavily by the Commission over the past 13 years since Regulation 1/2003 came into effect, becoming the number one enforcement tool in Commission´s disposal save from the cases of hardcore cartels.[4] Albeit unanticipated at first, the success of commitment decisions is not surprising, considering the advantages it brings both to the Commission and to the companies.

The objective of this thesis is to evaluate the practice of adopting commitment decisions based on two fundamental criteria – effectiveness and legal certainty.[5][6] The effectiveness of the resolution of anticompetitive concerns lays in the heart of antitrust enforcement

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[1] Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1.
[2] Case C-441/07 P, Commission/Alrosa [2010] ECR I-5949, para. 35.
[3] See, to that end, TEMPLE JANG, J., 'Commitment Decisions and Settlements with Antitrust Authorities and Private Parties under European Antitrust Law' in: Barry Hawk (eds), *International Antitrust Law and Policy: Fordham Corporate Law* 2005, [2006], chap. 13, p. 270.
[4] For an overview of Commission's decisions (excluding hard-core cartel cases) see Chart 1. on page 30 of this thesis.
[5] According to *Italianer*, "Effectiveness, proportionality and legal certainty are the guiding principles in all our remedies cases." see ITALIANER, A., speech at Charles River Associates Annual Conference in Brussels, 5. 12. 2012, "Legal certainty, proportionality, effectiveness: the Commission´s practice on remedies", accessible at http://ec.europa.eu/competition/speeches/text/sp2012_07_en.pdf.
[6] As the author will explain in more detail in chapter 4 of this thesis, the issue of proportionality of commitments will be addressed while assessing effectiveness, as the author deems the principle of proportionality a principle, which serves as a direct limit of Commission while assessing the effectiveness of commitments. The principle of legal certainty, on the other hand, does not serve as a direct corrective – the Commission should consider it while choosing which path it will follow in a particular case: a prohibition decision or a commitment decision.

after the entry into force of Regulation 1/2003.[7] Built on this presumption, the first aim of this thesis is to define and explore features contributing to the effectiveness of commitment decisions and to analyse the limits of the effectiveness. This thesis argues that the effectiveness of commitment decision splits into its two interrelated principal components– the procedure leading to the adoption of the decision and the commitments. The envisaged purpose of the commitment procedure is to adopt a decision which makes the commitments binding while saving time and resources of the enforcer. It follows that in order to be effective, the commitment decisions should be adopted in due time, considerably faster than "standard" prohibition decisions. This thesis analyses the quickness of the adoption of commitment decisions while exploring features, which have a positive impact on the quickness of the procedure as well as identifying the deficiencies, which may slow the procedure down. The purpose of the commitments made binding by the decision is to address Commission´s competition concerns and make a positive impact on the market. The objective is to analyse features, which contribute to the effectiveness of commitments, mainly in comparison with remedies that can be imposed in a prohibition decision.

The second aim is to discover how the use of commitment decisions should be limited by the principle of legal certainty. Based on these two criteria the author´s ambition is to answer the question what should be the appropriate extent of use of commitment decisions in EU competition law.

To answer the research question, the author will analyse relevant decisional practice of the European Commission and the case law of the CJEU, the primary and secondary sources of EU law and soft law documents together with the available scholarly sources and monographies. For accessing the decisions of the Commission, the author will use the EUR-lex database[8], for accessing case law of the CJEU the curia database[9]. Scholarly

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[7] Communication from the Commission to the European Parliament and the Council, Report on the functioning of Regulation 1/2003, COM(2009) 206 final, paras. 13 and 18; see, to that end: GERARD, D., "Negotiated remedies in the modernization era: the limits of effectiveness" in Ph. Lowe and M. Marquis (eds), *European Competition Law Annual 2013: Effective and Legitimate Enforcement,* Hart Publishing, Oxford/Portland.

[8] Available at: http://eur-lex.europa.eu/homepage.html.

[9] Available at: https://curia.europa.eu/.

sources will be obtained from various journals, mainly the *Journal of European Competition Law & Practice, World Competition* and the *European Competition Law Review*, *Common Market Law Review* and *World Competition*. For the research, the author will also use various electronic sources.

This thesis is to be divided into five chapters as follows: the first chapter shall outline the aspects of the modernization of EU competition law brought by Regulation 1/2003 which bear a relevance to the analysis carried out in this thesis. The second chapter will be devoted to a brief retrospective view on the practice of accepting commitments under Regulation 17/62, followed by a definition of commitment decisions by description and analysis of the rules governing their adoption and relevant soft-law documents by the Commission. This chapter should serve as a stepping stone for subsequent parts of this thesis. The fourth chapter will outline how Regulation 1/2003 emphasises the effectiveness as the main ambition of EU antitrust enforcement. The fifth chapter will be devoted to the quickness of the commitment procedure, how it is achieved and how it could be further enhanced. The sixth chapter deals with the effectiveness of the commitments, which the Commission makes binding by its decision. This part aims to analyse features, which contribute to the effectiveness of the commitments and how this enforcement tool can, in practice, suit the Commission to address its competition concerns. The next chapter will explain the impact of commitment decisions on legal certainty of other market participants and how it should limit the effective use of commitment decisions. The final chapter will then conclude the main findings of this thesis.

For the scholarly research, the author will use descriptive and deductive methods. The main method for the actual analysis will be the analytical method together with comparative and inductive methods.

1. RESHAPING THE ENFORCEMENT OF EU COMPETITION LAW

Regulation 1/2003 is commonly known as the cornerstone of the process of modernization of EU competition law. The regulation, which came into force on the 1st of May 2004, replaced first implementing regulation in the field of EU competition law, Regulation 17/62,[10] which had been in force since 1962.[11] The proclaimed purpose of Regulation 1/2003 was to replace Regulation 17/62 with a legislation designed to meet the challenges of an integrated market and a future enlargement of the Community.[12] The characteristic feature of the enforcement regime under Regulation 17/62 was a centralised notification and an *ex-ante* authorisation system for agreements under Article 101(3) TFEU.[13] Regulation 1/2003 brought a radical change to the system of enforcement of competition rules.

First and foremost, Regulation 1/2003 abolished the notification of agreements to the Commission seeking individual exemption and Commission´s exemption monopoly based on the application of Article 101(3) of the TFEU as this provision became directly applicable. Hence, it replaced the former centralised *ex-ante* enforcement with a decentralised[14] *ex-post* enforcement, where not only the Commission but also NCAs and national courts directly enforce Articles 101 and 102 of the TFEU.[15] As a result, the

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[10] Council Regulation No 17 First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204.
[11] See Annex 1. for a brief historical overview of the origins of Regulation 1/2003.
[12] Regulation 1/2003, Recital (1).
[13] For the sake of simplicity and clarity, this thesis will be using the current numbering of Articles, as re-numbered with the entry into force of the Lisbon Treaty on 1. 12. 2009 – Article 101 for agreements, decisions by associations of undertakings or concerned practices and Article 102 for abuses of a dominant position.
[14] Some commentators note in this regard that „decentralization" is not a correct term because Regulation 1/2003 strengthened Commission´s ability to designate and implement the EU competition rules in the European Union. See SCHWEITZER, H., PATEL, K. K., *The Historical Foundations of EU Competition Law*, Oxford: Oxford University Press, 2013, page 216.
[15] Article 11(3) of Regulation 1/2003 obliges NCAs to inform the Commission before or shortly after commencing the first formal investigative measure when acting under Article 101 or 102 TFEU. At the same time, Article 3(2) of the regulation prohibits application of national competition law, which would lead to the prohibition of agreements or concerted practices affecting the trade between the Member States, which are not prohibited under Article 101 TFEU. National competition rules also cannot lead to the prohibition of agreements and concerted practices, which fulfil the conditions of Article 101(3) TFEU or which are covered by regulations for the application of Article 101(3) TFEU. This so-called convergence

modernised enforcement regime depends on market players´ self-assessment of their compliance with the EU competition rules and the ex-post enforcement of these rules by the Commission, NCAs and national courts. With the full applicability of EU competition law by the NCAs, it was vital to ensure consistent application of EU competition law throughout the Union. For this purpose, the European Competition Network was set up, mitigating the risk of different interpretations of similar principles.[16]

Furthermore, Regulation 1/2003 explicitly regulates the burden of proof in antitrust proceedings[17] and grants more powers to the Commission regarding the conduct of the investigation and sanctions. These include the power to interview representatives or members of staff of the inspected undertaking explanations and record the answers,[18] power to inspect private homes of company´s executives,[19] the possibility to use seals[20] or power to impose more severe penalties for obstruction of investigations.[21]

Regarding the decision-making of the Commission, Regulation 1/2003 specified Commission´s powers in "standard" proceedings leading to the adoption of a prohibition decision, based on Article 7 of this Regulation. Firstly, it explicitly empowers the

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rule, extending the primacy rule, which was developed by CJEU in the case 14/68, *Walt Wilhelm v Budeskartellamt*, aims at creating a level playing field for agreements throughout the internal market. However, Art. 3(2) of Regulation 1/2003 allows for the Member States to apply stricter rules on their territory in regard to unilateral conduct engaged in by undertakings. As a result, member states may enforce national rules on "relative" market power below the threshold of dominance. See also SCHWEITZER, Heike, PATEL, Kiran Klaus, op. cit. 11. page 215.

[16] GERARD, D. M. B., "Public enforcement: the ECN – Network antitrust enforcement in the European Union" in LIANOS, I. and GÉRADIN, D. (eds), *Handbook on European Competition Law – Enforcement and Procedure*, Edward Elgar, 2013, p. 182.

[17] Article 2 of Regulation 1/2003 provides that in any national or Community proceedings under Articles 101 and 102, it is the party or the authority alleging the infringement, who must prove the existence thereof. The article also provides that the undertaking claiming the benefit of the legal exemption under Article 101(3) bears the burden of proving it fulfils the conditions of that paragraph. Therefore, the regulation did not shift the burden of proof regarding the application of Article 101(3) in comparison with Regulation No. 17, which requested the undertaking requesting an exemption decision to prove the conditions were fulfilled as well.

[18] Regulation 1/2003, Art. 20(2)(e).

[19] Ibid., Art. 21.

[20] Ibid., Art. 20(2)(d); Commission has showed that it will not hesitate to impose severe penalties for breaking a seal, in judgement in Case *C-89/11 P E.ON Energie v Commission*, [2010] ECLI:EU:C:2012:738, – decision imposing penalty of EUR 38 million was upheld by the CJEU, in case *COMP/39.796 – Suez Environnement* the Commission imposed a penalty of EUR8 million.

[21] Ibid., Art. 23., see case *T-272/12 EPH v Commission* where the General court confirmed the penalty of EUR 2.5 million for obstructing the investigation by not blocking an email address of one of the directors

Commission to impose any proportionate remedy of a behavioural or structural nature, which is necessary in order to effectively put an end to the infringement.[22] The concept of remedies was unknown to the EU courts prior to entry into force of Regulation 1/2003, presumably for the reason that Regulation 17/62 did not use the word remedy, it merely stipulated that in case the Commission finds the existence of an infringement of Articles 101 or 102 TFEU, it may require the undertakings concerned "*to bring such infringement to an end*".[23] However, the regulation empowers the Commission only to impose remedies, which are proportionate to the infringement committed and at the same time, necessary to bring an infringement effectively to an end. Accordingly, structural remedies can only be imposed in case there are no effective behavioural remedies or where equally effective behavioural remedy would be more burdensome for the undertaking concerned than a structural one.[24] This restriction considerably limits Commission´s discretion and makes a significant difference between Commission´s powers to impose remedies under Article 7 of Regulation 1/2003 and to accept commitments from undertakings under Article 9 of this Regulation. The second clarification brought by Regulation 1/2003 is that the Commission may seek to issue an infringement decision about infringements, which have been committed in the past.[25]

Under Regulation 17/62, the notification regime distorted the Commission´s enforcement priorities, forcing it to concentrate and spend its resources on dealing with notifications usually containing only minor infringements, instead of pursuing the most serious infringements of Articles 101 and 102 of the TFEU.[26] The fundamental change of the

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[22] Regulation 1/2003, Art. 7(1).
[23] LIANOS, I., "Competition law remedies in Europe", in LIANOS, I. and GÉRADIN, D., Handbook on European Competition Law – Enforcement and Procedure Edward Elgar, 2013, p. 365.
[24] Regulation 1/2003, Article 7(1).
[25] Nonetheless, the Commission can issue such decision only in cases, where there is a legitimate interest in doing so. This provision was clarified in the judgement of the General Court in case T-486/11, *Orange Polska S.A. v Commission*, where the court held that this provision of Regulation 1/2003 is applicable in cases where the infringement has ceased and the time-limit on the Commission´s power to impose fine has expired. Examples of the legitimate interest may be cases where there is a danger that the undertaking might reiterate the conduct, or where the case raises new issues, which require clarification or where a decision is necessary to ensure consistency in the application of the competition policy. See also: GAUNER, C., DALHEIMER, D., KJOLBYE, L., DE SMIJTER E., *Competition Policy Newsletter*, Directorate-General Competition, unit A-2, 2003, No 1, Spring, p. 6.
[26] WILLS, W., 'Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003', World Competition 29(3), 2006, p. 345.

enforcement under Regulation 1/2003 enabled the Commission to set its priorities and spend more resources on investigating of cases and conducting inquiries into sectors with market distortions, but also to focus on emerging sectors with less ordinary forms of anticompetitive behaviour.[27] These adjustments to the administrative procedure brought by Regulation 1/2003 along with a new type of decision available to the Commission – a commitment decision – ultimately serve as tools for creating more space to prioritisation cases and lets the Commission concentrate and focus its actions and resources on combating the most serious competition infringements, secret cartels and the most flagrant breaches of Article 102 TFEU.

[27] Commission Staff Working Documents '*Ten Years of Antitrust Enforcement under Regulation 1/2003*', SWD (2014) 230, para. 4; see also Annex 1.

2. COMMITMENT DECISIONS

2.1 Commission´s practice of accepting commitments under Regulation 17/62

Regulation 1/2003 laid down the legal framework allowing the Commission to issue a new type of decision while handling competition cases – a commitment decision. However, it is important to point out that in practice the Commission had been accepting commitments from undertakings under investigation prior to Regulation 1/2003, which had formally introduced this new type of enforcement tool.

Although Regulation 17/62 did not provide for a formal termination of antitrust proceedings by accepting commitments offered by undertakings under investigation, the Commission did in practice settle cases by way of accepting commitments without a formal decision. The Commission acknowledged this practice in *XXIVth Report on Competition Policy*, where the proclaimed Commission stipulated its readiness to accept undertakings[28] from dominant companies to ensure efficiently functioning markets, provided that such undertakings are offered early in the proceedings.[29]

Termination of the procedure by accepting commitments was important in cases where interim measures were granted, such as the *Microsoft* case, which ended with the company foreclosing licence agreements concerning MS-DOS and Windows.[30] In the most famous case, which was informally settled, the *IBM* case,[31] the Commission did not close the case but merely suspended the proceedings instead of continuing the proceedings leading to the adoption of the standard infringement decision, after the

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[28] The term undertaking in this sense has a meaning it has in British English – a formal promise or a pledge.
[29] Directorate-General for Competition, European Commission, Secretariat-General, XXIVth Report on Competition Policy, [1994], available at: <http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=CM9095283>, point 211.
[30] Ibid., point 212.
[31] Case *84/233/EEC IBM*, also in Directorate-General for Competition, European Commission, Secretariat-General, XVIth Report on Competition Policy, [1984], accessible at https://publications.europa.eu/en/publication-detail/-/publication/3c93e6fa-934b-4fb9-b927-dc9fed71ccfe, points 94 – 95, The Commission monitored the compliance of IBM with the commitments until July 1995 – see Directorate-General for Competition, European Commission, Secretariat-General, XXIVth Report on Competition Policy, [1994], p. 365.

company had offered to make changes to its marketing practices. By the time the *IBM* case was closed, it was the only case closed by such informal commitments where the Commission made the details publicly available.[32]

Van Bael estimates that approximately ninety-six percent of all antitrust cases were settled in some manner, instead of issuing a formal decision.[33] However, only a fraction of these settlements was similar to commitment decisions. Most of these cases included the so-called "comfort letters" by which the Commission dealt with relatively simple cases involving applications for negative clearance or notifications for an exemption.[34]

Regulation 17/62 was silent on the issue, meaning that the Commission had no explicit legal basis to accept commitments. However, there did not seem to be any legal obstacle for the Commission to informally settle cases in this manner, as the Commission had a broad discretion to choose, which suspected infringements of competition rules to pursue[35], and thus informally extend it empowerments

This practice, nevertheless, had several very important drawbacks. Firstly, the procedure leading to informal settlement of cases was not transparent, because the Commission published only very little information about this practice. Informally settled cases were usually only briefly described in the Commission´s Annual Report on Competition Policy. Another issue was the lack of clear criteria, based on which the Commission decided to close a case after accepting the commitments. Although the Annual Reports state that cases have been settled, because of alteration or termination of an agreement or a behaviour, *Van Bael* points out serious discrepancies in this regard.[36] For example in the *John Deere* case,[37] in which the Commission imposed a (by that time) heavy fine of 2 million ECU on the company for export bans, despite the fact the company had removed these bans from its contract and made steps for compliance with competition rules soon

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[32] VAN BAEL, I., The Antitrust Settlement Practice of the EEC Commission, *Common Law Market Review* 23, 1986, page 75.
[33] Ibid., p. 61.
[34] See, e.g. Case *2001/837/EC DSD*.
[35] WILLS, W., op, cit. 26, p. 347.
[36] VAN BAEL, I., op. cit. 32, page 66.
[37] Case IV/30.809 *John Deere*, Commission Decision of 14 December 1984, O.J. L 35/58.

after it had received the Commission´s statement of objections. However, there are at least 15 other cases involving export bans, which the Commission had chosen to settle.[38]

Additionally, the Commission did not have the power to adequately oversee that the undertaking acts in accordance with the agreed commitments. As the *IBM* case demonstrate, the Commission could only monitor the obedience by itself, because there were no other effective measures, which it could undertake. Moreover, the Commission could only reopen the case and continue with a standard procedure towards issuing an infringement decision in case the undertaking had breached the commitments. Once again, as the *IBM* case shows, the companies made sure that the commitments did not provide for an admission of guilt and that they were not enforceable.[39]

2.2 Commitment decisions under Regulation 1/2003

In the White paper on modernization of the rules implementing Articles 85 and 86 of the EC Treaty, the Commission proposed adding a new type of a decision in Regulation 1/2003 to address the above-mentioned drawbacks of accepting commitments informally under Regulation 17/62.[40] Regulation 1/2003 did so by empowering the Commission to issue a decision based on its Article 9. This article provides the Commission with a fundamental legal basis to resolve cases by accepting commitments offered by parties to the proceedings.

2.2.1 Article 9 – Legal framework for accepting commitments

The Commission is empowered to adopt a commitment decision pursuant to Article 9 (1), which reads as follows:

"*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*

[38] XXIVth Report on Competition Policy, op. cit. 31, page 365.
[39] VAN BAEL, I., op. cit. 32, page 71.
[40] European Commission, White paper on modernization of the rules implementing articles 85 and 86 of the EC treaty, Commission programme no 99/027, [1999], para. 90.

Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission."

Article 9 thus formally empowers the Commission to close the investigation by accepting commitments from the undertakings concerned instead of issuing a standard infringement decision based on Article 7 of Regulation 1/2003. From the wording of Article 9(1), the basic attributes of commitment decisions can be derived.

The first sentence of Article 9 suggests that the Commission may choose to issue a commitment decision only in cases of infringements, which are serious enough that they would otherwise require adoption of a prohibition decision based on Article 7. This precondition also suggests the Commission should only accept commitments whilst being convinced that it would be able to prove the infringement to the extent required in the standard infringement procedure under Article 7. Conversely, Recital 13 of Regulation 1/2003 provides that commitment decisions "*are not appropriate in cases, where the Commission intends to impose a fine*". Typically, these cases include secret cartels, for which, on the other hand, a special settlement procedure is available.[41] Additionally, the most flagrant breaches of both Articles 101 and 102 TFEU should also fall within this group, although there is little guidance as to the necessary severity of such infringements.[42] The first sentence of Article 9 also provides that it is at the discretion of the Commission to accept commitments from the parties to the proceedings.[43] Hence, the Commission may revert the proceedings with a view to adopting a prohibition decision and impose fines.[44] To sum it up, the Commission may choose to accept commitments

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[41] Commitment decisions must be distinguished from the settlement procedure, based on Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases. The settlement procedure is a simplified procedure applicable to cartel cases, the Commission continues the proceedings and establishes an infringement under Art. 7, but the parties to the proceedings acknowledge their participation in a cartel and their liability for it and receive reduction of a fine by 10%.

[42] See, to that conclusion, DUNNE, N., 'Commitment Decisions in EU Competition Law', *Journal of Competition Law & Economics*, Volume 10 (2) [2014], p. 403.

[43] See also European Commission, Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C 308/06, [2011], (Notice on Best Practices), para. 115.

[44] European Competition Network, ECN Recommendation on commitment procedures, accessible at < http://ec.europa.eu/competition/ecn/ecn_recommendation_commitments_09122013_en.pdf> [accessed on 25.5.2017], para. 4.

and adopt a commitment decision in cases where the infringement is serious enough that it is necessary for the Commission to take action and to bring it to an end, but it should abstain from issuing such decisions in cases where it considers that imposing a fine is necessary, which is essentially in cases of secret cartels.[45]

If the case is to be resolved by a commitment decision, an activity on part of the company under investigation is required, as will be explored in more detail in the following chapters. During the initial phases of the investigation undertakings usually communicate with the Commission and express their willingness to negotiate suitable commitments. After the phase of negotiation with the Commission about possible commitments, only the undertaking can voluntarily submit commitments.[46] Commitments must address Commission´s competition concerns, which had been identified and subsequently expressed in a document called preliminary assessment. A statement of objections may be used as a preliminary assessment, as will be explained in the following chapter. If the Commission finds that submitted commitments sufficiently address its competition concerns, it has to submit the text of commitments to a market test.[47] If the market test confirms the appropriateness of the commitments, the Commission may adopt a commitment decision which makes the commitments legally binding.

The commitments made binding by the decision may be limited to a certain period of time as long as they provide that an improvement on the market is secured in a reasonable time.[48] A review clause might be included in the decision[49], or the Commission may also review the decision on its own or on a notice from the undertaking and conclude the commitments are no longer necessary.[50] As is the case with remedies imposed under Article 7, the commitments offered by the undertakings concerned can be either

[45] Ibid., para. 116.
[46] Antitrust Manual of Procedures for the Application of Articles 101 and 102 TFEU [2012] (Manual of Procedures), chapter 16, para. 8.
[47] Regulation 1/2003, Article 29(4).
[48] Manual of procedures, op. cit. 45, para. 51.
[49] Ibid., para. 52.
[50] See, e.g. Case AT.39678/AT.39731–*Deutsche Bahn I / II*, Commission decision about early termination of commitments of 8 May 2011.

behavioural or structural.[51] The possibility to review the commitments will apparently apply only to behavioural commitments.

Most importantly, commitment decisions only conclude "*there are no grounds for action by the Commission without concluding whether there has been or still is an infringement*".[52] The Commission thus does not authoritatively state whether the investigated behaviour was unlawful, it only states that there is no need to take action anymore Accordingly, commitment decisions do not include a fine. The absence of establishing an infringement makes commitment decisions particularly appealing for the undertakings concerned, as they avoid negative outcomes of standard infringement decisions, including negative publicity, court proceedings, which typically follow after prohibition decisions, possibly hefty fine and follow-up actions for damages.

2.2.2 Failure to comply with commitment decision and reopening of the case

Formalisation of the practice of accepting commitments strengthens the position of the Commission by giving it the power to enforce the commitments offered by the undertakings. If a breach of informal commitments occurred under Regulation 17/62, the Commission could only reopen the proceedings and continue with a standard procedure leading to prohibition decision. By contrast, under the formalised procedure of accepting commitments under Article 9 of Regulation 1/2003, the breach of commitments became a legal offence.[53] As a result, the Commission is not obliged to establish that the original conduct of the company, which was addressed by the commitments, infringed Article 101 or 102 TFEU,[54] it merely must prove an infringement of the commitments, which the Commission´s decision made binding.[55] In the event of breach of the commitments, Regulation 1/2003 provides that the Commission may impose either a lump sum penalty

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[51] ECN Recommendation on Commitment Procedures, op. cit. 44, para. 16; Manual of Procedures, op. cit. 45, chapter 16, para. 48.
[52] Regulation 1/2003, Recital 13.
[53] To the same conclusion, see e.g. COOK, CH. J., 'Commitment Decisions: The Law and Practice under Article 9', *World Competition* 29(2), 2006, p. 221.
[54] As confirmed by judgment of the General Court in Case T-342/11 *CEEES and Asociación de Gestores de Estaciones de Servicio v Commission*, para. 56.
[55] See Case AT.39530 *Microsoft*, Commission decision of 6. March 2013 where fine of EUR 504 million was imposed on the company for breaching the commitments.

of up to 10% of the company´s turnover in the preceding business year [56] or a periodic penalty payments not exceeding 5% of the company´s average daily turnover in the preceding business year per day.[57] The penalties imposed by the Commission for non-compliance with the commitments can thus reach the same amounts as sanctions for infringements of Articles 101 and 102 of the TFEU.[58]

In addition to the possibility of imposing fines, Art. 9(2) of Regulation 1/2003 enables the Commission to reopen the proceedings, either following a complaint or on its own initiative, in case one of following three scenarios:

(i) the facts on which the decision was based have changed materially,

(ii) the undertaking concerned acts contrary to the commitments, or

(iii) the information provided by the parties on which the decision was based was incorrect or misleading.

However, the outcome of reopened proceedings does not necessarily entail a prohibition decision together with a fine. In fact, no decision has been opened on the basis of Article 9(2) which would result in the Commission adopting a prohibition decision so far. On the other hand, the Commission reopened proceedings based on a material change of facts and adopted a decision, in which it declared the commitments no longer necessary.[59] That shows the Commission is willing to review and prematurely terminate the commitments based on a notice by the undertaking concerned.

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[56] Regulation 1/2003, Art. 23(2)(c).
[57] Regulation 1/2003, Art. 24(1)(c).
[58] According to Art. 23(2)(a) of Regulation 1/2003 the Commission may impose a lump sum penalty of up to 10% of company's annual turnover for the preceding year for infringement of Art. 101 or 102 TFEU. Pursuant to Art. 24(1)(a) of Regulation 1/2003 the Commission may impose periodic penalty payments of up to 5% of the average daily turnover in the preceding business year per day in order to compel the company to put an end to an infringement of Art. 101 or 102 TFEU, imposed in a prohibition decision based on Art. 7 of the regulation.
[59] Case AT.39317, *E.ON Gas*, Commission decision of 26 July 2016, where the Commission adopted a decision in which it concluded the market conditions had changed to the extent that justifies termination of the commitments.

3. IN PURSUIT OF EFFECTIVENESS

According to *Gerrard*, the modernization of EU competition law encompasses three interrelated dimensions: substantive, institutional and procedural.[60] Substantive modernization entails the transformation from a form-based approach towards a more effects-based approach. The effects-based approach means that the assessment of a particular conduct is not based on its form, but on its anticompetitive effect. The Commission thus needs to establish a theory of harm and assess the degree to which the negative effect might be outweighed by efficiency gains.[61] That entails a shift in regards how economic principles and economic evidence are used while assessing competition cases, particularly while establishing a theory of harm.[62] Accordingly, the effects-based approach demands a comprehensive understanding of the functioning of each particular market. Institutional modernization is represented by the abovementioned decentralisation of the EU competition law enforcement between the Commission and the NCAs and the associated establishment of the European Competition Network. The last dimension of the modernization is procedural, portrayed by the departure from the adjudicative EU competition law towards negotiated procedures – commitments, settlements and leniency. This rise of negotiated procedures corresponds to the boosted amounts of fines imposed by the Commission, resulting in companies opting for negotiation with the Commission, seeking a reduction or even total avoidance of possibly hefty fines.

From the standpoint of the Commission, the modernization process emphasises that effectiveness of the resolution of the particular antitrust problem is the main objective of the competition law enforcement.[63] The pursuit of effectiveness is projected in all three dimensions of the modernization process as explained above. With regard to substantive modernization, the enforcement focuses on the effects of the conduct rather than on its

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[60] GERRARD, D., op. cit 7, p. 2.
[61] Report by the EAGCP 'An economic approach to Article 82', [2006], accessible at: http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf.
[62] ROELLER, L. H., STEHMANN, O., 'The Year 2005 at DG Competition: The Trend towards a More Effects-Based Approach', Review of Industrial Organization (2006) Volume 29 (4), p. 286.
[63] GERRARD, D., op. cit. 7 above, p. 3.

form, by institutional modernization the NCAs were entrusted with the application of the EU competition rules in order to apply the rules effectively across the union, as the law can be implemented by the enforcer, who is able to do so most effectively.[64] The focus on effectiveness in terms of procedural modernization is self-evident. In its recitals, Regulation 1/2003 stresses out the importance of effectiveness in relation to almost every aspect of the enforcement.[65] Moreover, the effective application of the competition rules laid down under the TFEU as the main objective of Regulation 1/2003 is explicitly stated in recital 35.[66] The principle of effectiveness is thus inseparable from commitment decisions which was clearly confirmed by the CJEU in the *Alrosa* judgement, where the court stated that commitment decisions are "*intended to ensure that the competition rules laid down in the EC Treaty are applied effectively*".[67]

The question this thesis aims to address is, which aspects contribute to the effectivity of commitment decisions, mainly in comparison to the prohibition decision based on Article 7 of Regulation 1/2003 as an alternative thereof.[68] The following two chapters aim to discover and analyse different features contributing to the effectiveness of the resolution of a particular case by a way of a commitment decision. For the purpose of this analysis, the author focuses on two integral parts of commitment decisions: the commitment procedure and the commitments, which are rendered binding by the decision.

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[64] White paper on modernization, op. cit. 40, para. 47; Report on the functioning of Regulation 1/2003, op. cit. 7, para. 18; Regulation 1/2003, Recitals 6 and 8.
[65] See Regulation 1/2003, Recital (1) in relation to effective application of Articles 101 and 102 in general, (2) relates to effective supervision on agreements restricting the competition under Article 101(3) TFEU, (5) regarding the regulation of the burden of proof, (12) relates to effectivity connected to remedies imposed under Article 7 of the regulation, (25) in relation to investigative powers of the Commission and (26) regarding Commission´s inspections.
[66] The second sentence of the Recital (34) states that „this Regulation does not go beyond what is necessary in order to achieve its objective, which is to allow the Community competition rules to be applied effectively".
[67] Judgement of the CJEU in Case C-441/07 P *Commission v Alrosa*, para 35.
[68] Joaquín Almunia in his speech noted "When the EU competition authority decides to pursue an antitrust case, it can follow one of two main paths: a prohibition decision under article 7 of Regulation 1/2003 or a commitment decision under article 9. This is well known", see ALMUNIA, Joaquín, „Remedies, commitments and settlements in antitrust", speech at SV Kartellrecht Brussels, 8 March 2013, accessible at: http://europa.eu/rapid/press-release_SPEECH-13-210_en.htm.

4. EFFECTIVENESS OF THE COMMITMENT PROCEDURE

4.1 Introduction: Rapid solution of Commission´s antitrust concerns

One of the main advantages of commitment decisions is quick resolution of Commission´s competition concerns. The quickness of the commitment procedure is generally appraised as one of the main advantages of commitment decisions. Accordingly, quickness of the adoption of the decision, which makes commitments offered by the undertaking concerned binding, brings a swifter change on the market to the benefit of consumers, while, at the same time, saving Commission´s resources.[6970] According to the CJEU, commitment decisions should provide a more rapid solution to the competition problem identified by the Commission in comparison with proceedings leading to a prohibition decision.[71] The author of this thesis recognises quickness as one of the aspects contributing to the effectiveness of commitments decisions. The idea is based on a presumption that only a decision which is adopted within a reasonable time may be considered effective as only a decision which is adopted in due time brings the desired change to the market affected by the anticompetitive conduct.[72] Conversely, decisions accepted after lengthy discussions on commitments between the Commission and companies may no longer reflect the reality of the market. There are several aspects which contribute to the quickness of commitment decisions, which will be explored and analysed on the following pages.

4.2 The commitment procedure and its stages

The quickness of the commitment procedure is achieved through a relatively streamlined process with less procedural steps, which should enable the Commission to adopt the final decision sooner than in more formalised procedure leading to an infringement decision. Unlike infringement decisions, commitment decisions are not based on a full

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[69] ITALIANER, A., The ECN, convergence and enforcement of EU competition law: achievements and challenges, speech on European Competition Day, Vilnius, 3 October 2013, accessible at http://ec.europa.eu/competition/speeches/text/sp2013_08_en.pdf.
[70] Notice on Best Practices, op. cit. 43. para. 103.
[71] Judgement of the CJEU in case C-441/07 P, *Commission v Alrosa* [2010] ECR I-5949, para. 35.
[72] See also, to that conclusion, MARSDEN, P., 'Toward an Approach to Commitments that is "Just Right', *Competition Law International*, Volume 11, [2015], p. 71.

investigation and the Commission is not obliged to precisely conclude on the facts of the case or on the application of the law.[73]

The procedural rules on accepting commitments are only partially developed in Regulation 1/2003. Additional guidance is thus given by Commission´s soft law documents and decisional practice. According to Commission´s Best Practices undertakings are encouraged to express their willingness to discuss commitments at the earliest stage possible, but may contact the Commission at any point in time to see, whether the Commission is open to close the case by means of adopting a commitment decision.[74] The parties will be offered a State of Play meeting, during which the DG Competition will present the initial assessment of its competition concerns, the underlying factual evidence and theory of harm.[75] The Commission will also indicate a timeframe, within which the discussions on commitments should be concluded.[76]

i. *Initiation of the commitment procedure*

Recital 13 of Regulation 1/2003 states that commitments may be accepted during proceedings. A formal initiation of proceedings by the Commission is thus required. As in the infringement proceedings under Article 7, the investigation into suspected breach of antitrust rules may be opened following a complaint or an *ex offo* investigation. If the Commission intends to adopt a decision under Articles 7-10 of Regulation 1/2003 it may decide to open proceedings at any point in time,[77] when the Commission concludes the case merits further investigation, provided the scope thereof has been defined sufficiently.[78] The Commission usually publicly informs about opening the proceedings via a press release on Commission´s web page.[79] In cartel cases, the Commission regularly opens the proceedings by issuing a statement of objections, while in the rest of

[73] Antitrust Manual of Procedures, op. cit. 46, chapter 16, para. 7.
[74] Notice on Best Practices, op. cit. 43, para. 104.
[75] Manual of Procedures, op. cit. 46, chapter 16, para. 20.
[76] Notice on Best Practices, op. cit. 43, para. 105.
[77] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Article 2(1).
[78] Notice on Best Practices, op. cit. 43, para. 17.
[79] Regulation No. 773/2004, op. cit. 78, Article 2.

the cases there is a considerable time lag between the opening of the proceedings and the adoption of a statement of objections or a preliminary assessment.

ii. *Preliminary assessment and statement of objections*

Article 9(1) of Regulation 1/2003 stipulates that commitments may be offered after Commission expresses its competition concerns in its preliminary assessment. The preliminary assessment should summarise the facts of the case and expresses Commission´s competition concerns that would warrant adopting a prohibition decision.[80] Although the preliminary assessment should include the main facts of the case and identify Commission´s competition concerns, it does not need to have the same standard of reasoning and evidence as a statement of objections. In cases where the party to the proceedings declined the State of Play meeting, the preliminary assessment should serve as a basis for formulating adequate commitments to address competition concerns of the Commission.[81] According to the Commission, the length of the preliminary assessment varies from 10 to 70 pages, depending on the complexity of the case or the "*Commission´s interest to set a precedent case in the later commitment decision*".[82]

Statement of objections has in some cases substituted for a preliminary assessment, which demonstrates that the Commission is free to accept commitments even in cases, where it supposedly intended to issue an infringement decision.[83] Statement of objections must be adopted in cases where the Commission intends to adopt a prohibition decision. Its purpose is to inform the parties to the proceedings of the objections which the Commission raises against them, in order to allow them to exercise their rights of defence.[84] Similarly to statements of objections, preliminary assessments are not published nor made available to third parties and are only sent to the company under investigation. The final commitment decision contains a mere summary of the preliminary assessment or the statement of objections, in cases where this document was adopted. Normally the undertakings will have a period of one month to formally submit

[80] Antitrust Manual of Procedures, op. cit. 46, chapter 16, para. 24.
[81] Notice on Best Practices, op. cit. 43, para. 108.
[82] Antitrust Manual of Procedures, op. cit. 46, chapter 16, para. 26.
[83] Notice on Best Practices provide for this eventuality in para. 109.
[84] Antitrust Manual of Procedures, op. cit. 46, chapter 11, para. 2.

their commitments.[85] In case the negotiation on commitments fails for some reason, the Commission will continue the proceedings pursuant to Article 7 of Regulation 1/2003.[86]

iii. *Market Testing*

If the Commission is convinced that the proposed commitments are adequate to address its competition concerns it must publish a "*Market Test Notice*" (or "*Notice for public comment*"), which is a "*concise summary of the case and the main content of the commitments or of the proposed course of action*".[87] The publication of the Market Test Notice triggers a phase of so-called market testing, in which interested third parties are invited to submit their observations, normally within no less than one month from the publication of the notice. The summary is also published in the Official Journal, in all EU official languages, together with a document containing offered commitments by the company under investigation in its authentic language. To promote transparency of the process, the Commission also issues a press release, asking interested third parties to submit their comments on the proposed commitments.[88] In addition, the Commission may also proactively contact third parties seeking their feedback on proposed commitments.

The description of the summary of the case, Commission´s competition concerns and the proposed commitments in the Market Test Notice must be sufficient for the third parties to be able to submit their observations and comments. The market testing phase is a special feature of the commitment procedure, which is not present under the standard infringement procedure under Article 7 of Regulation 1/2003. This phase enables the Commission to put the proposed commitments under the scrutiny of other market participants, which supposedly have deeper market knowledge than the Commission. The decisional practice of the Commission up to date shows that market testing is an important procedural step since it often results in modification of the proposed commitments. Market testing helps the Commission to better assess the possible insufficiency and

[85] Ibid., para 111.
[86] See, e.g., Case COMP/39.525 *Telekomunikacja Polska*, Commission Decision of 22 June 2011, para. 12.
[87] Regulation 1/2003, Art. 27 (4).
[88] Notice on Best Practices, op. cit. 43, para. 114.

appropriateness of the commitments.[89] If, based on the market test, the Commission finds that the commitments do not adequately address its competition concerns, it will allow the undertaking to submit an amended version of the commitments or to offer new/additional commitments to fix the insufficiency. If the market test reveals additional competition concerns, not previously considered in Commission´s preliminary assessment, the Commission is obliged to issue a new preliminary assessment.[90] However, if the market test indicated the commitments are inadequate or if the undertaking fails to submit amended commitments, the Commission might revert to the procedure under Article 7.[91] Another alternative outcome of the market test is that the Commission may find that the concerns expressed in the preliminary assessment were unfounded and the commitments are not necessary.[92]

iv. *Final draft of the commitment decision*

Before formally adopting a decision and making the commitments binding, the Commission consults the draft of the final decision with the Member State Advisory Committee, which is composed of representatives of NCAs of the Member States.[93] Pursuant to Art. 14 of Regulation 1/2003, the Commission must consult with the Advisory Committee prior taking any decision based on Regulation 1/2003, including commitment decisions.[94] Based on the consultation, Opinion of the Committee is issued, which must state whether the Committee agrees with the Commission on the conclusion of the proceedings by means of a commitment decision, whether the commitments offered by the undertaking are sufficient and proportionate to address Commissions concerns expressed in the preliminary assessment (or, in some cases, the statement of objections),

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[89] RAB, S., MONNOYEUR, D., SUKHTANKAR, A., "Commitments in EU Competition Cases: Article 9 of Regulation 1/2003, its application and the challenges ahead", *Journal of European Competition Law & Practice,* 2010, Vol. 1, No. 3., p. 174.
[90] See, e. g., Case COMP/D2/39.654 *Reuters Instrument Codes (RICs)*, Commission Decision of 20 December 2012.
[91] Notice on Best Practices, op. cit. 43, para. 118.
[92] RAB, S., MONNOYEUR, D., SUKHTANKAR, A., op. ci. 90, p. 175.
[93] Regulation 1/2003, Art. 14 (1).
[94] Regulation 1/2003, Art. 14 (1) states that the committee must be consulted prior to the taking of any decision under Articles 7, 8, 9, 10, 23, Article 24(2) and Article 29(1).

and finally, whether there are no longer grounds for action by the Commission.[95] In the Final Report, the Hearing Officer summarises the procedural steps taken by the Commission, particularly focusing on market testing of the proposed commitments. The Final Report also states whether the particular case raised any concerns as to the exercise of procedural rights between the parties and DG competition. Undertakings, which offer commitments to the Commission, may at any time during the proceedings call upon the Hearing Officer to ensure that procedural rights of the parties are exercised in an effective manner.[96]

Soon after the Opinion of the Advisory Committee and the Final Report of the Hearing Officer are published, the Commission adopts the final commitment decision, which is subsequently published (decisions used to be also published in French and German versions, but this practice seems to have been abandoned) together with the final version of the commitments in its original version (as submitted by the undertakings concerned) and a summary of the decision in all EU languages is published in the Official Journal.

4.3 Shortcomings of the commitment procedure

The commitment procedure should be designed to ensure fast resolution of Commission´s antitrust concerns. However, the procedure contains certain deficiencies in undermining the rapid adoption of a commitment decision.

4.3.1 Offering commitments in advanced stage of investigation

Firstly, although being encouraged to contact the Commission to discover its readiness to discuss possible commitments at the earliest stage, the undertakings can do so at any point in time. Even in advanced stages of investigation the Commission might still be tempted to accept commitments. That inevitably leads to the postponement of the adoption of a

[95] By contrast, prior to issuing an infringement decision, the Opinion states, whether the committee agrees with the Commission on (i) whether there was an abuse of a dominant position / the behaviour constitutes an agreement within a meaning of Art. 101 with an object/effect of restriction of competition (ii) final amount of fine, (iii) definition of relevant product and geographic market, (iv) that there are no mitigating or aggravating circumstances to be taken into account, etc.
[96] Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, 2011/695/EU, Art. 15(1).

final decision which should bring a positive impact on the market. Moreover, the Commission may also accept commitments even after the statement of objections has been issued.

4.3.2 Offering commitments after the statement of objections has been issued

Even though a statement of objections had been issued, the Commission accepted commitments in 15 out of 36 cases, which represents 42% of all commitment decision between years 2005 - 2016.[97] The statement of objections contains all objections raised against the parties to the proceedings and should be "*prepared in view of the nature and structure of the final decision that might be adopted*".[98] Although not public, the statement of objections can be generally regarded as a document, based on which the Commission intends to build its final decision, putting forward all the facts and evidence gathered during the investigation with considerably higher standard of reasoning in comparison to a preliminary assessment. As such, it reveals the strength of Commission´s case to the party, to whom it is addressed, including information on whether the Commission intends to impose fines and remedies.[99] In such cases, undertakings might presumably offer more onerous far-reaching commitments for the Commission to be satisfied and to resort to adoption of commitment decision after all. On the one hand, when the Commission accepts commitments after it had issued a statement of objections, it indicates that the potentially unlawful behaviour of specific company has been properly investigated and the Commission has established a solid theory of harm backed up by sufficient evidence, which would hold up in court, as "*questions of fact and law must conform to standards of evidence set by the European Courts*"[100]. That implies that the Commission does not only have a competition concern about a potential infringement as is the case with a preliminary assessment but that the Commission considers that Article 101 or 102 have in fact been infringed and the enforcer is convinced that the prohibition decision would be upheld in court. On the other hand, all the time and cost savings

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[97] See Annex n. 2, Table of commission´s decisions.
[98] Manual of Procedures, op. cit. 46, chapter 11, para. 7.
[99] Judgement of the General Court in Case T-395/94, Atlantic Container Line AB and Others v Commission of the European Communities, ECR II-875, para. 418.
[100] European Commission, 'To commit or not to commit? Deciding between prohibition and commitments', *Competition policy brief*, Issue 3, March 2014, p. 1.

associated with the less thorough investigation and drafting of preliminary assessment with lower demands on the standard of reasoning and evidence are absent. If the commitments are offered after the statement of objection has been issued, the Commission is still obliged to market test them. That further delays the adoption of a final decision which should bring positive impact on the market, even in comparison with prohibition decisions. Based on these considerations, as far as the quickness of the procedure goes, limitation of accepting commitments only to cases, where a statement of objections has not yet been issued is preferable.[101]

4.3.3 Start of negotiations with the Commission

As mentioned above, the Commission normally expresses its views on the case to the parties to the proceedings during a State of Play meeting. The description of the case in the State of Play meeting thus bears a significant importance, as it represents the main basis for the company under investigation to conclude, whether to submit commitments or not.[102] That indicates that undertakings concerned express their willingness to submit commitments and subsequently negotiate with the Commission before the Preliminary Assessment is issued. An example of this practice is the *Coca-Cola* case,[103] where the negotiations between the Commission and the company had already been going on for several months and had also been consulted with interested third parties, even before the preliminary assessment had been issued.[104][105] This practice raises questions about its legitimacy as it suggests the commitments, in fact, do not address Commission´s concerns expressed in its preliminary assessment,[106] as this document was issued after a successful negotiation on commitments. Despite these legitimacy issues, such approach positively contributes to the quickness of the procedure as it considerably minimalizes the time lag

[101] Such is the case of France, where commitments may no longer be proposed once a statement of objection has been issued, see Autorité de la Concurrence, Notice on Competition Commitments Issued on 2 March 2009, p. 4, para. 13.
[102] Manual of Procedures, op. cit. 46, chapter 16, para. 20.
[103] Case COMP/A.39.116/B2 *Coca-Cola*, Commission Decision of 29. September 2005.
[104] COOK, CH. J., op. cit. 53, p. 216.
[105] See also Final report of the Hearing Officer in case COMP/A.39.116/B2 — Coca-Cola, 2005/C 239/09, which states that the preliminary assessment was issued on 15 October 2004 and the parties submitted commitments on 19 October 2004.
[106] As provided for in Article 9(1) of Regulation 1/2003.

between the adoption of a preliminary assessment and the submission of commitments. Additionally, if the Commission adopts a preliminary assessment prior to any discussions on commitments, it sends a clear message that the Commission aims to settle the case rather than adopt an infringement decision. The Commission itself acknowledges that it firstly explores the readiness of the parties to settle the case by a way of commitments before engaging into commitment procedure, prior to submitting the preliminary assessment.[107]

4.3.4 Substantial amendments to the commitments after the market test, offering more sets of commitments

Another shortcoming of the procedure is related to the phase of market testing of proposed commitments and its outcome. Market testing has proven to be a valuable step in the procedure, both by improving transparency and by identifying issues not previously foreseen by the Commission. Although the outcome of market testing puts a substantial pressure on the Commission to adequately evaluate the validity of third parties´ comments (especially those of competitors) it should still be regarded as a vital part of the procedure. If the market testing reveals insufficiencies of commitments formerly offered, the Commission allows the undertakings to submit amended version of the commitments. However, if these new commitments are substantially different[108] in comparison with the former, the Commission must repeat the phase of market testing, which inevitably results into postponement of the final decision.
If the commitments require substantial amendments it indicates that the first set of commitments had such deficiencies that even their mere adjustment cannot secure their capability to address Commission´s concerns. For the sake of quickness of the procedure, the possibility to offer revised commitments should be limited only to unsubstantial revisions which do not require additional market testing. As a result, if the first set of commitments fails to pass the market testing phase, the Commission should revert to infringement procedure.

[107] Manual of Procedures, op. cit. 46, chapter 16, para. 10.
[108] Manual of Procedures, op. cit. 46, chapter 16, para. 67.

Lastly, the CJEU in the *Alrosa* judgement confirmed the possibility for companies to offer multiple sets of commitments, from which the Commission must make binding only the least onerous set, which is still capable of addressing the concerns expressed in the preliminary assessment.[109] Putting aside the high amount of risk it presents for the companies,[110] such practice forces the Commission to assess all the proposed sets of commitments, thereby slowing the progress leading towards the adoption of a final decision.

4.4 Analysis of the length of commitment procedure

The previous chapters described the rules on commitment procedures, which should enable the Commission to adopt a final decision by rendering the commitments offered by the undertakings concerned binding and certain shortcomings which can prolong the proceedings. This chapter focuses on the actual decisional practice of the Commission with the aim to analyse, whether the assumption of faster proceedings has been confirmed in practice.[111] This chapter also aims to explore whether the identified shortcomings have proven to have a negative effect on the duration of the procedure.

It is important to note at this point that commitment decisions are rarely challenged in the General Court. A commitment decision has never been challenged by the company which offered commitments which can be contributed to the consensual nature of this type of decision. There have been cases of third parties challenging commitment decision but as the next chapter will explain, the scope of judicial review is limited. The *de-facto* absence of judicial review saves a substantial amount of resources for both the Commission and parties and enables the Commission to investigate other potential infringements of EU competition rules.

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[109] Judgement in the Case C-441/07 P *Commission v Alrosa* [2010] ECR I-5949, para. 41.

[110] Such as the possibility for the Commission to continue in proceedings leading to a prohibition decision or the inability to appeal the decision based on incorrectly selected set of commitments by the Commission, See on this so-called „salami tactics": WAGENER-VON PAPP, F., 'Best and even Better Practices in Commitment Procedures after *Alrosa*: the Dangers of Abandoning the „Struggle for Competition Law"', *Common Market Law Review*, Volume 49 (3), [2012], page 937.

[111] The analysis is based on author´s own research based on the information in Commission´s publicly available documents, mainly commitment and prohibition decision, but also press releases, memos, and other sources.

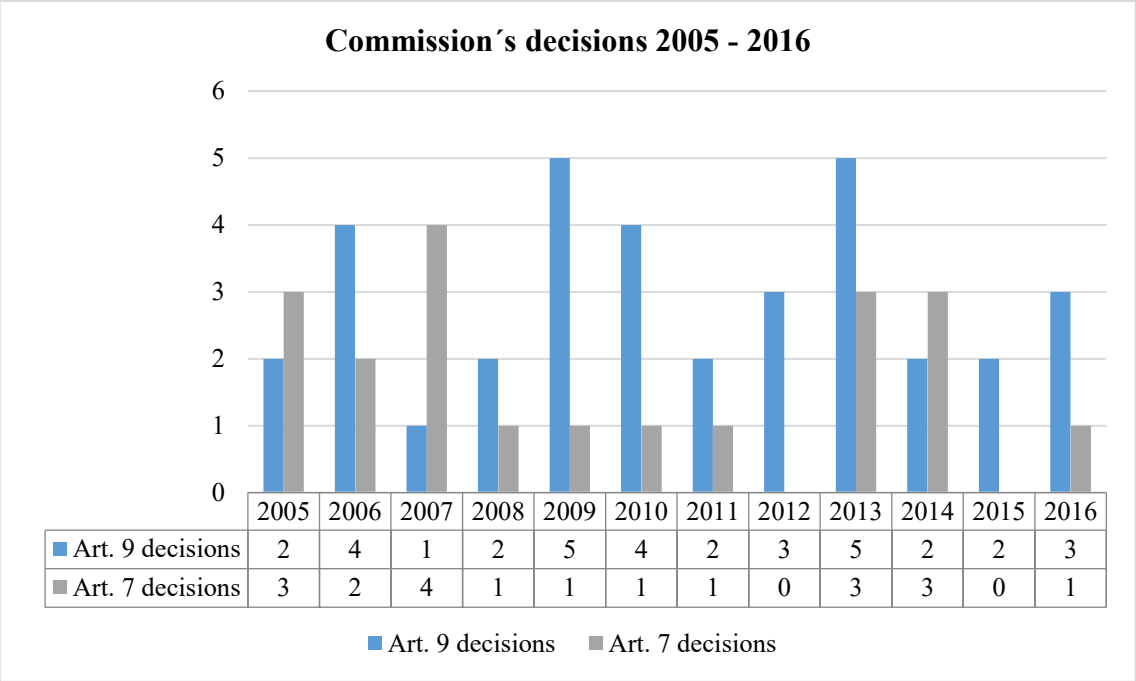
In total, the Commission adopted 55 decisions under Regulation 1/2003 between the years 2005 – 2016, out of these 19 being prohibition decisions and 35 commitment decisions, excluding decisions in cases of secret cartels. Out of 35 commitment decisions, 15 concerned application of Article 101 TFEU on agreements, 21 related to the application of Article 102 TFEU on abuse of dominance. Out of 19 prohibition decision the ratio was 10 decisions concerning Article 101 TFEU and 9 concerning Article 102 TFEU.

Table 1. Overview of decisions (excluding secret cartels):

<table>
<tr><td rowspan="4">55 decisions under Regulation 1/2003 in total</td><td rowspan="2">35 commitment decisions</td><td>15 decisions concerning Article 101 TFEU</td></tr>
<tr><td>21 decisions concerning Article 102 TFEU</td></tr>
<tr><td rowspan="2">19 prohibition decisions</td><td>10 decisions concerning Article 101 TFEU</td></tr>
<tr><td>9 decisions concerning Article 102 TFEU</td></tr>
</table>

Chart 1. Overview of Commission´s decisions[112]

[112] Based on own research of publicly available information, Commission´s web case search, accessible at: http://ec.europa.eu/competition/elojade/isef/index.cfm.



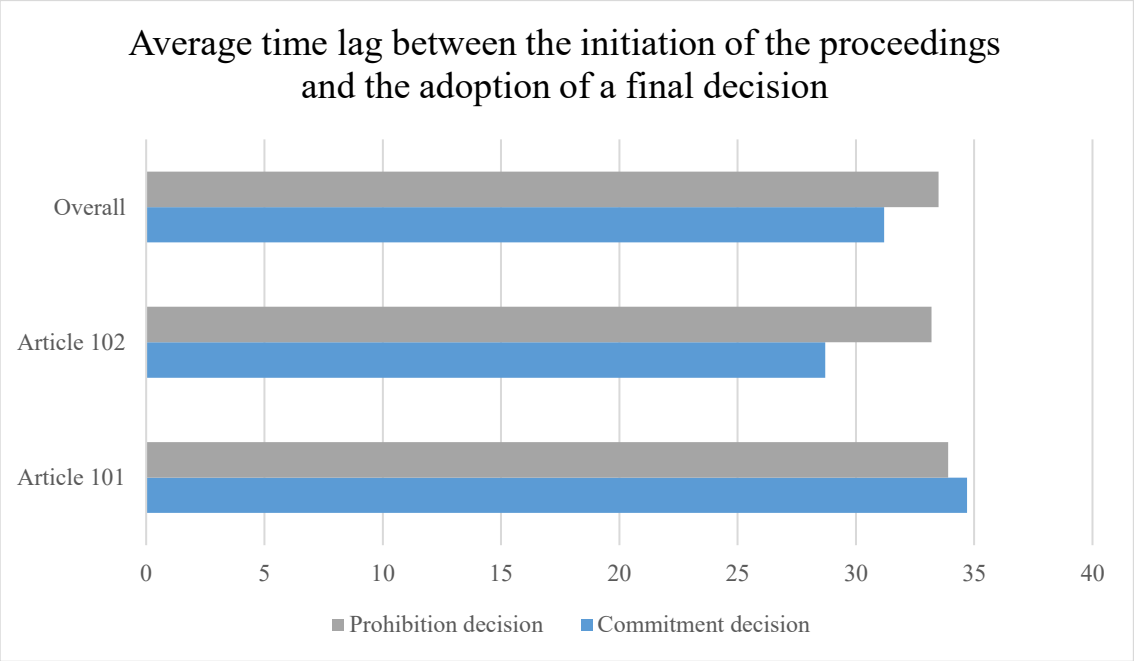
	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Art. 9 decisions	2	4	1	2	5	4	2	3	5	2	2	3
Art. 7 decisions	3	2	4	1	1	1	1	0	3	3	0	1

An analysis of the length of prohibition decisions in the period between 2005 – 2016 shows that the average time lag between the opening of the proceedings and the adoption of a prohibition decision was 33,5 months with no significant difference between cases concerning Article 101 TFEU and Article 102 TFEU.[113] On the other hand, according to an analysis of commitment decisions in the same period, the average time lag between the opening of the proceedings and the adoption of commitment decision was 31,2 months, while the time lag in decisions concerning Article 101 TFEU is 34,7 months compared to 28,7 in cases concerning Article 102 TFEU.[114] That can be contributed to the fact that in cases related to agreements there are more parties to the proceedings, which makes it more difficult for the Commission to negotiate on commitments.[115]

The average time lag in the proceedings stated above suggests a marginal difference in the length of the two procedures.

[113] In average, the time lag in proceeding concerning Article 101 TFEU was 33,9 months compared to 33,2 months in cases concerning Article 102 TFEU.
[114] See Annex n. 2, Table of commission´s decisions.
[115] See, e.g. Case AT.39850 *Container Shipping*, Commission Decision of 7 July 2016, where there were 14 companies each submitting commitments and the it took the Commission 56 months to adopt a final commitment decision.

Chart 1. Overview of the average time lag in the proceedings.



An important remark must be made at this point. In 10 cases, which ended with adoption of a prohibition decision, the Commission initiated the proceedings by sending a statement of objections to the parties. That means that prior to that date a hardly measurable amount of time has passed, in which the Commission had investigated the particular matter, carried out dawn raids, requested information from the investigated companies and other players on the market, built up the case and prepared the statement of objections. In comparison, in cases, which ended by the adoption of a commitment decision, the Commission had started the proceedings in average nearly 17 months before it adopted a preliminary assessment or a statement of objections. Therefore, for more relevance of the statistics, the length of the procedure in commitment cases should be compared to the time lag in 9 prohibition cases, in which the Commission had started the proceedings before it sent a statement of objections to the parties.[116] In these proceedings, it took the Commission in average 45 months from the initiation of the proceedings to the

[116] Those being: Case COMP/D1/38606 *Groupement des Cartes Bancaries*; Case COMP/34.579 *MasterCard*; Case COMP/39.525 *Telekomunikacja Polska*; Case AT.39226 *Lundbeck*; Case AT.39685 *Fentanyl*; Case AT.39984 *OPCOM*; Case AT.39985 *Motorola*; Case AT.39612 Peridopril (Servier); Case AT.39523 *Slovak Telekom*

adoption of a prohibition decision. This finding demonstrates that, in general, commitment decisions provide for earlier resolution of a case and thus restoring the correct functioning of the market.

4.5 Impact of the shortcomings on the quickness of the commitment procedure

In the previous chapter of this thesis the author identified certain shortcomings, which may lengthen the procedure leading to the adoption of commitment decisions. This section aims to analyse their actual impact on the length of the commitment procedure in Commission´s decisional practice.

The possibility to negotiate commitments with the Commission at any point during the proceedings will be scrutinised first. In general, it is without a doubt that the sooner the negotiations on possible commitments begin and the undertaking concerned submits its commitments, the earlier the Commission can assess, whether they sufficiently address its competition concerns stemming from company´s conduct and trigger the market testing phase. The quickness of the phase in which the Commission assesses the conduct of the undertaking concerned and negotiates on possible commitments will inevitably depend on numerous factors, such as the complexity of the antitrust issue, the success of the initial commitment proposals and the overall rapidness of the discussions. However, as these factors are not measurable and will depend to a great extent on the specifics of each case, the analysis will focus on the difference between cases where the Commission adopted a preliminary assessment and where it adopted a statement of objections. As mentioned above, in the period between the years 2005 - 2016 the Commission accepted commitments after issuing a statement of objections in 15 cases, which is nearly 42% of all cases. The analysis of Commission´s commitment decisions confirms that in comparison with cases, where only a preliminary assessment was issued, the adoption of a statement of objections had a negative impact on the quickness of the procedure. It took the Commission on average 56% longer to adopt a commitment decision from the initiation of the proceedings in cases where a statement of objections has been issued than in cases where a preliminary assessment has been adopted: 39 months against 25,5 months, which diminishes the time savings gained by the commitment procedure

identified in the previous section of this thesis. Largest time lag, on average of 15 months, is unsurprisingly created between the moment the Commission sends a statement of objections to the undertaking(s) until it issues a market test notice. In cases where a preliminary assessment is issued instead of statement of objections, it takes on average only 3,3 months for the Commission to put the submitted commitments to market testing. This time lag proves the presumption that the discussions on the possible commitments take place after the statement of objections is issued, which makes the whole procedure considerably longer and postpones the adoption of the final decision. Based on these findings it can be concluded that allowing companies to offer commitments even after the statement of objections had been sent to them has a negative effect on the quickness of the procedure.

The analysis of Commission´s commitment decisions also proves other two assertions made in the previous chapters. Firstly, cases where the Commission discusses the commitments with the undertakings concerned before it adopts a preliminary assessment are resolved more quickly. In these cases, the Commission issued the market test notice within days after the preliminary assessment, which shows that the main part of the discussions was carried out before. The average length the proceedings in 5 cases, where the market test notice was published within 20 days after the preliminary assessment was only 15 months.[117] Secondly, although it had happened only in the *Reuters Instrumental Codes* case[118], substantial amendments to the proposed commitments after the first market test leading to second market test prolonged the proceedings by 7 months, which demonstrates the negative impact of the possibility to substantially amend the proposed commitments on the overall length of the proceedings.

[117] Those being: Case COMP/39.317 *E.ON Gas*; Case COMP/39.316 *GDF*; Case COMP/39.692 *IBM Maintenance Services*; Case COMP/39.847 *E-BOOKS*; Case AT.39727 *CEZ*.
[118] Case COMP/D2/39.654 Reuters Instrument Codes (RICs).

4.6 Quickness of the commitment procedure in particular sectors

The Commission stresses out the importance of a quick resolution of cases in markets in the process of liberalisation, most notably in the energy sector.[119] The statistics reveal that the Commission was particularly keen to accept commitments in the energy sector - 12 commitment decisions have been adopted in this sector since 2005, which amounts to 33% of all decisions. An analysis of these decisions confirms the proceedings in these cases were quicker, in average it took the Commission 25,5 months to adopt the final decision. However, two notes have to be made at this point. Firstly, in three of the cases[120] it took the Commission more than 3 years to adopt the final decision, which aggravates the average time lag in this sector, as some decisions have been taken particularly quickly.[121] The second point relates to the *Gazprom* case[122], in which the Commission opened the proceedings in 2012, sent a statement of objections in 2015 and only recently, in March 2017 issued a market test notice. After 5 years since the proceedings were opened it is apparent that the Commission will not succeed to quickly resolve the case, despite the commitments were put to market testing recently.[123]

The quickness of the antitrust intervention and its precise timing is of a particular importance in fast moving markets, such as IT and other digital markets to achieve the desired result of the enforcement action.[124] It follows that the Commission may be favoured to opt for commitment decisions instead of a lengthy procedure leading to the

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[119] See, e.g., Organisation for Economic Co-operation and Development, Directorate for Financial and Enterprise Affairs Competition Committee, Commitment Decisions in Antitrust Cases, Note by the European Union, DAF/COMP/WD(2016)22, page 6, (Commitment Decisions in Antitrust Cases, Note by the European Union) available at: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2016)22&doclanguage=en; ALMUNIA, Joaquín, „*Remedies, commitments and settlements in antitrust*“, op. cit. 69.

[120] See Case COMP/B-1/37.966 *Distrigaz*, in which it took 44 months to adopt the final decision, Case COMP/39.315 *ENI*, with 41 months and Case AT.39767 *BEH Electricity* with 37 months. In all these cases, a statement of objections was issued rather than a preliminary analysis.

[121] See Case COMP/39.317 Cases COMP/39.388 *German Electricity Wholesale Market* and COMP/39.389 *German Electricity Balancing Market*, in which the proceedings took only 203 days or Case COMP/39.317 *E.ON Gas,* with 196 days.

[122] Case AT.39816 Upstream gas supplies in Central and Eastern Europe.

[123] see European Commission, *Commission invites comments on Gazprom commitments concerning Central and Eastern European gas markets*, Press release from 13 March 2017, IP/17/555, accessible at http://europa.eu/rapid/press-release_IP-17-555_en.htm.

[124] See ALMUNIA, Joaquín, „Remedies, commitments and settlements in antitrust“, op. cit. 69.

adoption of an infringement decision. Moreover, longer proceedings may lead to an outdated decision, which does not reflect the business reality, as it may develop faster than the investigation.[125] In these cases, commitment decisions should be generally able to remove the possible anticompetitive conduct and restore the market conditions faster.[126] Incorrectly assessing and punishing conduct on these markets could possibly lead to undesirable effects on the market and hamper further innovation. The most striking example of overly lengthy proceedings is the *Google* case[127], concerning alleged abuse of dominant market position by favouring its own vertical services by displaying these in a different way than it did in the case of competitor´s web pages by Google´s web search algorithm. The investigation has been ongoing for nearly 7 years, Google had offered commitments which were market tested by the Commission and subsequently rejected on the basis of negative responses by complainants for their insufficiency[128]. On 27 June 2017 the Commission adopted a prohibition decision fining Google EUR 2.42 billion.[129] As such, adopting a prohibition decision seems desirable – Google failed to provide satisfactory commitments in a due time to effectively address Commission´s concern so a prohibition decision sanctioning Google seems a preferable option. On the other hand, it is remarkable that the company have received by far the largest penalty imposed in a prohibition decision, while it had previously negotiated commitments on commitments with the Commission.

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[125] Organisation for Economic Co-operation and Development, Directorate for Financial and Enterprise Affairs Competition Committee, Commitment Decisions in Antitrust Cases, Background paper by the Secretariat, DAF/COMP(2016)7, para. 30.

[126] See, to that conclusion, DOMANICO, F., ANGELI, M., '*An analysis of the IBM Commitment Decision concerning the aftermarket for IBM mainframe maintenance*', accessible at: http://ec.europa.eu/competition/publications/cpn/2012_1_1_en.pdf.

[127] Cases COMP/C-3/39.740, COMP/C-3/39.775 & COMP/C-3/39.768 – *Google*. According to a *Memo* from 5. 1. 2014, the Commission sent a Statement of Objections to Google on 15. 4. 2015 and opened separate formal investigation on Android. On 14. 7. 2016 the Commission sent Google a supplementary statement of objections regarding results of its search engines.

[128] WEBER, R. H., 'From competition law to sector-specific regulation in internet markets? A critical assessment of a possible structural change' in DREXL, J., DI PORTO, F. (eds), *Competition Law as Regulation*, ASCOLA Competition Law series, Edward Elgar Publishing [2015], p. 257.

[129] European Commission, Commission fines Google EUR 2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service, Press release from 27 July 2017, IP/17/1784, accessible at <http://europa.eu/rapid/press-release_IP-17-1784_en.htm>.

In other cases in the digital sector the resolution of a case came considerably faster; it took the Commission to issue a final decision 17 months in the *IBM* case [130], 24 months in the *Microsoft* case[131] and 28 months in the *Rambus* case[132]. A comparison with Commission´s proceedings in the *Intel* case[133], which took 22 months, is not representative as the Commission had been investigated company´s conduct for 3 years prior to notifying a statement of objections and opening the proceedings.[134]

4.7 Effectiveness of the commitment procedure: Conclusion

This chapter aimed to explore the various features of the commitment procedure, which have both positive and negative impact on its quickness. In general, the analysis showed that the Commission can benefit from the less formal procedure and that it reaches the final decision earlier than in cases where a prohibition decision is adopted. However, the procedure also involves several shortcomings, which have proved to negatively affect the speediness of the resolution of Commission´s competition concerns. The table below summarises the main findings of this chapter:

Positive effect	**Negative effect**
- More streamlined and less formalised procedure	- Parties approach the commission in an advanced stage of the investigation
- Preliminary assessment – lower demands on reasoning, considerably shorter	- Preparation of a statement of objections
- Parties approach the Commission at the earliest stage possible	- Substantial amendments to commitments and second market test
- Preliminary assessment tailored to the commitments	- Offering sets of commitments for the Commission to choose from

[130] Case COMP/39.692 IBM Maintenance Services
[131] Case COMP/39.530 *Microsoft (Tying).*
[132] Case COMP/38.636 *RAMBUS*.
[133] Case COMP/C-3/37.990 *Intel*.
[134] Case COMP/C-3/37.990 *Intel*, Commission Decision of 13 May 2009, para. 7.

5. EFFECTIVENESS OF COMMITMENTS

The essential component of commitment decisions, which makes the final impact on the market, is enshrined in commitments, which are voluntary offered by the undertaking and made legally binding by Commission´s decision. A commitment decision generally contains a description of Commission´s preliminary assessment of its competition concerns in terms of the relevant market affected by the undertaking´s conduct, the procedure which led to the adoption of Commission´s decision and finally Commission´s assessment of proposed commitments, their proportionality and the outcome of the market test. As the commitment decisions aim to ensure that the EU competition rules are applied effectively, the commitments must ensure an effective resolution of the competition problem. The aim of this chapter is to analyse what contributes to the effectiveness of the resolution of a competition problem by commitments. Firstly, this chapter outlines the basic rules, which relate to commitments, followed by an analysis of features contributing to the enhanced effectiveness of commitment decision in comparison to remedies, which can be imposed in prohibition decisions. Last part of this chapter is dedicated to examination of the decisional practice of the Commission with the aim to analyse, how the possibility to accept commitments enhanced the effectiveness of Commission´s antitrust enforcement.

5.1 Commitments and their content

In previous chapters, the author outlined the legal framework for accepting commitments and the procedure leading to the adoption thereof. For the purpose of assessing the effectiveness of the commitments, this chapter will briefly describe the rules applicable to commitments and their content.

Generally, commitments can be either of a behavioural or structural nature. Behavioural commitments involve the conduct of the undertaking and seek to alter the behaviour of the company. Structural commitments entail a change in the structure of an undertaking, usually by divesting a part of its business. Moreover, proposed commitments must be unambiguous and self-executing which means that they cannot depend on actions of a

third party who is not legally bound by the commitments. [135] In some cases, where the commitments are too complicated to be precisely determined, it might be more efficient to adopt a prohibition decision and impose the company a cease and desist order and allow the company to determine its own way how to comply with the order.[136] In case the commitments must inevitably depend on agreement with third parties, the undertaking submitting the commitments must provide evidence that such agreement can be reached when it submits its commitment proposal.[137]

Furthermore, the commitments submitted by the undertakings concerned should be designed to be easily and quickly implemented. Monitoring of compliance with the decision is fundamental to guarantee the effectiveness of these decisions.[138] The tools used for monitoring of compliance vary depending on numerous factors, such as the nature of the commitments and their scope, size of the undertaking or the structure of the relevant market.[139] One of the means of such monitoring is appointment an independent trustee, who is controlling the compliance with the commitments. Independent trustees are mainly appointed in cases involving structural commitments to monitor the implementation of thereof[140], however, there are also cases where an independent trustee has been appointed to supervise the compliance with behavioural commitments.[141] The Commission may also monitor the compliance with the commitments by requiring the company to submit reports on the compliance with the commitments.[142] Interested third parties may also help the Commission in monitoring, especially those, who benefit from companies' compliance with the commitments.[143] Another option for the Commission is

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[135] ECN Recommendation on Commitment Procedures, op. cit. 44, para 18; Manual of Procedures, op. cit. 43, chapter 16, para. 46.
[136] Commitment Decisions in Antitrust Cases, Note by the European Union, op. cit. 121, para 34.
[137] Manual of Procedures, op. cit. 46, chapter 16, para. 48; Notice on Best Practices, op. cit. 43, para. 128.
[138] ECN Recommendation on Commitment Procedures, op. cit. 46, para. 19.
[139] Ibid.
[140] See, e.g. Case AT.39727 *CEZ*, Commission Decision of 10 April 2013.
[141] See, e.g., Case AT.39939 *Samsung*, Commission Decision of 24 April 2014, para. 81.
[142] See, e.g., Case COMP/A.39.116/B2 *Coca-Cola*, Commission Decision of 29. September 2005, Case COMP/ 39.351 *Swedish Interconnectors*, Commission Decision of 14 April 2010.
[143] Interested third parties unsuccessfully complained on failure to comply with the commitments made binding by Commission Decision in COMP/B-1/38.348 — *Repsol CPP*, which was rejected by Commissions Decision C(2011) 2994 and the appeal by the third party dismissed in judgment of the General Court of 6 February 2014 Case T-342/11 *CEEES and Asociación de Gestores de Estaciones de Servicio v Commission*.

to cooperate with sectoral regulators or other public bodies, who might be better suited to monitor the compliance.[144] The Commission acknowledges the fact that behavioural commitments require long-term monitoring, thus necessarily involve more resources to be spent, in contrast with one-off structural commitments.[145] Moreover, commitments may be (and in practice they often are) binding on the undertaking for a specified period of time, after which the Commission re-assesses them and decides, whether they are still necessary. The Commission may also reopen the proceedings and review the commitments on its own initiative or after a request from the parties to the procedure or by a third parties´ complaint, in case of a material change in the facts on which the decision was based pursuant to Article 9(2)a) of Regulation 1/2003.

The fundamental requirement of any commitment submitted by a party to the proceedings is that it must address the competition concern identified by the Commission. Commitments not fulfilling this precondition will be rejected by the Commission at the outset.[146]

5.2 The proportionality of commitments

While assessing whether the commitments sufficiently address identified competition concerns, the Commission must determine, whether the commitments are proportional and whether they do not go beyond what is necessary to remedy the competition concern.[147] Regulation 1/2003 addresses the issue of proportionality only in regard to remedies, which may be imposed in a prohibition decision.[148] As already mentioned in chapter 2 of this thesis, the Commission may impose proportionate behavioural or structural remedies, which are necessary to effectively put an end to the infringement.[149] Structural remedies can be imposed only when there is no space for an effective behavioural remedy. Prior to judgement of the CJEU in the *Alrosa* case it was rather dubious, to which extent does the principle of proportionality apply on commitment

[144] ECN Recommendation on Commitment Procedures, op. cit. 46, para. 21.
[145] Manual of Procedures, op. cit. 46, chapter 16, para. 45.
[146] Notice on Best Practices, op. cit. 643, para. 127; Manual of Procedures, op. cit. 45, chapter 16, para. 45.
[147] Manual of Procedures, op. cit. 45, chapter 16, para. 46.
[148] Regulation 1/2003, Article 7(1).
[149] Ibid., see also chapter 2 of this thesis.

decisions. Proportionality, being a general principle of EU law, is a criterion for the lawfulness of any act of the institutions of the Union.[150]

5.2.1 The Alrosa case: Question of proportionality resolved

The question of its scope in commitment decisions was central to the first challenge of a commitment decision brought to European Courts. To put the judgements of the courts into context, it is first necessary to briefly summarise the facts of the case.

i. *Facts of the case*

Alrosa Company Ltd. ("Alrosa") was the second largest producer and supplier of rough diamonds in the world. The De Beers group ("De Beers"), a group of companies established in Luxemburg, was the largest producer and supplier of rough diamonds in the world. In March 2002, these two companies notified an agreement for the supply of rough diamonds in which they had entered in December 2001, seeking negative clearance or an exemption from the Commission under Regulation 17/62. The agreement provided that during a 5-year period Alrosa undertakes to sell rough diamonds produced in Russia to De Beers, limited to the value of USD 800 million a year, amounting to half of Alrosa´s production exported outside the Community of Independent States, while De Beers agrees to purchase these diamonds from Alrosa. Under the agreement, Alrosa could reduce the value of sales to USD 700 million in the last 2 years of the 5-year period.

However, the Commission had not cleared the agreement, neither had it exempted. Conversely, the Commission sent a statement of objections to both companies, expressing its view that the agreement could constitute an anticompetitive agreement prohibited by Article 101 of the TFEU. Moreover, the Commission issued a separate statement of objections addressed to De Beers, stating that the agreement could constitute an abuse of dominant position. After an oral hearing with both parties, the companies jointly submitted commitments, which provided for a reduction of the value of sales from Alrosa to De Beers from USD 700 million in 2005 to USD 275 million in 2010 and following years and afterwards to be capped at that level. Subsequently, the Commission put these

[150] Judgement of the CJEU in Case C-441/07 P, *Commission v Alrosa* [2010] ECR I-5949, para. 36.

commitments to market testing. Based on the outcome of the market test the Commission sought to amend the commitments from the reduction of the value of sales to a complete cessation of the business relationship between Alrosa and De Beers from 2009 onwards. Following the results of the market test and Commission´s demand to amend the commitments De Beers submitted individual commitments, which provided for a reduction of purchases from Alrosa by De Beers from USD 600 million in 2006 to USD 400 million in 2008 and subsequently its complete cessation. In February 2006, the Commission adopted a decision, which made the individual commitments by De Beers binding.

ii. *Decision of the General Court*

Alrosa brought an action seeking annulment of the decision before the General Court, claiming the decision is contrary to Article 9 of Regulation 1/2003, contractual freedom and the principle of proportionality because of the excessive nature of the commitments.[151] The court held that the principle of proportionality applies to commitment decisions in the same manner as it applies to prohibition decisions as both of these decisions has the same objective, even though Regulation 1/2003 does not explicitly refer to this principle in connection with commitment decisions.[152] The obligation to comply with this principle further stems from the Recital 34 of the Regulation, which states that "*this Regulation does not go beyond what is necessary in order to achieve its objective, which is to allow the Community competition rules to be applied effectively*."[153] Hence, the Commission, while deciding between several possible measures, has to apply the least onerous one, which must not be disproportionate to the aim pursued. Despite the voluntary nature of the commitments, it is the decision of the Commission, which makes them binding. Therefore, the Commission is not relieved to comply with the principle of proportionality.[154] According to the court, the purpose of commitment decisions is to address the concerns of the Commission, expressed in its preliminary assessment. The decision sought to provide third parties with an alternative

[151] Judgement of the General Court in Case T-170/06, *Alrosa v Commission* [2007] ECR II-2601, para. 42.
[152] Ibid., para. 92 and 95.
[153] Ibid., para. 93.
[154] Ibid., para. 105.

source of supply by discontinuing trading between De Beers and Alrosa, which did not allow the latter to become an effective competitor on the market.[155] The Commission thus failed to carry out a complex economic assessment, which is necessary in order to enable an effective judicial review of the proportionality of the measure adopted.[156] As a result, the decision was vitiated by a manifest error of assessment because the Commission was obliged to accept less onerous commitments than those leading to a complete prohibition of purchases from Alrosa by De Beers. The court concluded that such less onerous commitments were also those jointly offered by De Beers and Alrosa. Accordingly, the court held that the Commission cannot lawfully accept commitments, which are more onerous than it could accept under Article 7 of Regulation 1/2003.

The judgement of the General Court, which enabled the courts to review the adequacy and proportionality of commitments, was deemed as a desirable approach by some commentators.[157] In commitment decisions adopted after General Court´s ruling the Commission started to assess the proportionality of the final commitments in its decisions, aware of the risk its decisions might be challenged on grounds of non-proportionality of the commitments. The most evident example is the first decision issued after the judgement in the *Distrigaz* case, which contains a comprehensive section on the proportionality of the commitments.[158] Some commentators suggested that the *CISAC* case[159] represents an example of the reduction of the attractiveness of commitment decisions for the Commission after General court´s ruling.[160] Shortly before the General Court handed down its judgement in *Alrosa* case the Commission had market tested commitments in the *CISAC* case. After the market test, the Commission rejected the commitments and later decided to adopt an infringement decision instead. Arguably, the Commission could have rejected the commitments based on the outcomes of the market test, but in such scenarios, the Commission usually lets the undertaking offer amended

[155] Ibid., para. 119.
[156] Ibid., para. 125.
[157] WAGENER-VON PAPP, F., op. cit. 11, p. 930.
[158] Case COMP/B-1/37.966 *Distrigaz*, Commission Decision of 15. January 2008, para. 34 – 41; See also Case COMP/39.402 *RWE Gas Foreclosure*, Commission Decision of of 18 March 2009, paras. 46 – 53.
[159] Case COMP/C2/38.698 – *CISAC*.
[160] WAGENER-VON PAPP, F., op. cit. 11, p. 942.

commitments, which better address the results of the market test, rather than resorting to adoption of an infringement decision.

iii. *Decision of the CJEU*

The Commission appealed the General Court´s decision claiming misinterpretation of the principle of proportionality. The CJEU first noted that "*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 Commission´s obligation to guarantee that the principle of proportionality is observed differs as to the content and extent.[161] On the one hand, prohibition decisions identify an infringement so the remedies imposed by the Commission must be proportionate and necessary to be able to bring the infringement to an end. In commitment decisions, on the other hand, the principle of proportionality is limited to verifying whether the commitments address the competition concerns expressed by the Commission and whether undertaking concerned has not offered less onerous commitments, which are also able to address Commission´s concerns. When assessing the appropriateness of the commitments, the Commission must consider interests of third parties.[162] On these grounds, the CJEU concluded that judicial review of commitment decisions should be confined to the determination whether the Commission´s assessment is manifestly incorrect.[163] It follows that undertakings consciously accept that the commitments they voluntarily offered may be more onerous than what the Commission could impose in prohibition decision after a detailed assessment, but at the same time, it safeguards termination of the proceedings without finding an infringement and imposing a fine.[164]

The CJEU then considered an argument raised by the Commission claiming the General Court incorrectly limited Commission´s discretion to choose which commitments to accept. In its judgement, the General Court held that the Commission was obliged to accept the joint commitments proposed by Alrosa and De Beers, as they were sufficient

[161] Judgement of the CJEU in Case C-441/07 P, *Commission v Alrosa* [2010] ECR I-5949, para. 38.
[162] Ibid., para. 41.
[163] Ibid., para. 42.
[164] Ibid., para 48.

to address its competition concerns. CJEU first stated that the Commission was only obliged to assess if these commitments address the competition concerns. In this regard, the Commission had, based on the market test, concluded that the commitments were not appropriate.[165] Based on these considerations the CJEU held that the General Court incorrectly held that the Commission´s decision was vitiated by a manifest error in assessment. Such conclusion could only have been reached after finding the Commission´s conclusion was apparently groundless, with a view to the facts established by it.[166] The General Court, however, substituted Commission´s assessment of complex economic circumstances for its own, thus was usurping the discretion of the Commission, instead of reviewing the lawfulness of the assessment.[167] This error of the General Court was substantial enough in itself for the CJEU to set aside the judgement.[168]

5.2.2 *Alrosa* decision´s contribution to the effectiveness of commitments

The ruling of the General Court ordered the Commission to fully assess the proportionality of the commitments, which could not go beyond what it could itself impose in an infringement decision. As a result, the Commission would have to consider what remedies it could lawfully impose in an infringement decision while, at the same time, negotiating appropriate commitments with the undertaking concerned. *Cavicchi* points out in this regard the Commission would, in fact, carry on two distinct enforcement actions in parallel, which would have an adverse impact on the quickness and cost saving.[169] Moreover, such obligation would confine the effectiveness of the commitments the Commission may impose.

In the context of the effectiveness of commitments, it is essential for the Commission not to be constrained by what remedies it could impose in a prohibition decisions. The underlying rationale is that commitments differ from remedies, which the Commission

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[165] Ibid., para. 61.
[166] Ibid., para. 63.
[167] Ibid., para. 67.
[168] Ibid., para. 68.
[169] CAVICCHI, P., "The European Commission´s discretion as to the adoption of Article 9 commitment decisions: Lessons from *Alrosa*, Discussion Paper, Europa-Kolleg Hamburg, Institute for European Integration No. 3/11, available at: https://www.econstor.eu/handle/10419/45859

may impose in prohibition decisions, as commitments are not intended to put an infringement established by the Commission, to an end. Logically, commitment decision cannot put an infringement to an end since no infringement was established; they merely react to identified competition concerns. As noted by AG Kokkot in the *Alrosa* case, Article 9 of Regulation 1/2003 "*is not an instrument for establishing infringements of competition law, but merely gives the Commission the possibility of effectively addressing concerns over competition for the future"*.[170] Indeed, commitments under Article 9 are forward-looking, they aim to adjust undertaking's future behaviour beyond merely ordering to put an infringement to an end. Commitments may also aim to adjust the structure of the company, which has a long-lasting effect and prevent from the re-occurrence of the anticompetitive behaviour indicated by the Commission in the future.[171] To that extent, the Commission must assess the commitments in terms of their expected effect on the market. Despite the fact that the proceedings are initiated on the basis of an existing conduct of the undertaking, such assessment must include "*future oriented prospective economic analysis*".[172]

Commission´s decisional practice shows that some decisions indeed involved future oriented commitments, which can be viewed as the Commission trying to *de-facto* micromanage the markets. Examples of this practice include the *Visa* case[173], in which the company committed to cut its interchange fees to a certain level, or the *Standard & Poor´s* case[174], in which the decision rendered legally binding company´s commitment to provide its International Securities Identification Number to non-banking customers for a capped fee of USD15.000 a per year. Another example of Commission adjusting market conduct of the companies for the future is the *Air France/KLM/Alitalia/Delta* case and the *Continental/United/Lufthansa/Air Canada* case, in which it accepted semi-structural commitments. These cases concerned cooperation of airlines under a revenue-sharing joint venture. The companies undertook to make landing and take-off slots at particular

[170] Opinion of Advocate General Kokott in Case C-441/07 P, *Commission v Alrosa*, para. 50.
[171] See, to that end, *Competition policy brief*, op. cit. 101, p. 2.
[172] Opinion of Advocate General Kokott in Case C-441/07 P, *Commission v Alrosa*, para. 71.
[173] Case COMP/39.398 *VISA MIF*.
[174] Case COMP/39.592 *Standard & Poor's*.

airports on transatlantic routes available for potential competitors, thus effectively lowering the barriers to entry on the market.

Conversely, remedies which are imposed in prohibition decisions aim to re-establish the situation that existed before the infringement occurred.[175] In some cases, the basic remedy, cease and desist order, is sufficient because requiring the undertaking to comply with the order is straightforward enough. When the Commission believes that it needs to specify the required measures so the undertaking complies with competition rules, it may impose specific measures the undertaking needs to adopt.[176] However, these remedies cannot go beyond their purpose of restoration of effective competition on the market, so they cannot aim to avoid the risk of repetition of the anticompetitive conduct in the future.[177] It follows that commitment decisions are especially suitable when there is more to gain from fixing the market to function properly in the future, rather than punishing undertakings for their behaviour in the past.[178]

5.3 Better tailored commitments

Having a wide margin of discretion and not being constrained by what remedies it could impose by virtue of a prohibition decision the commitment procedure enables the Commission to accept commitments which can effectively address identified competition concerns.[179] Market testing of the commitments is an important tool helping to further fine-tune the commitments. Moreover, as commitments are offered by the undertaking itself they are presumably implemented more easily and quickly than remedies imposed unilaterally by the enforcer. Admittedly, Commitment decisions are particularly suited for cases where the underlying competition problem cannot be solved by a cease and

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[175] Judgement of the CJEU in Case C-62/86 *AKZO Chemie BV v Commission*, ECLI:EU:C:1991:286, para. 155 – 157.
[176] RITTER, C., 'How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements?', *Journal of European Competition Law & Practice*, Volume 7(9), [2016], p. 4.
[177] Judgement of the General Court in Case T-395/94, *Atlantic Container Line AB v Commission*, ECR II-875, para. 389.
[178] Commitment Decisions in Antitrust Cases, Note by the European Union, op. cit. 121, page 7.
[179] See also, to that end, Commitment Decisions in Antitrust Cases, op. cit. 111, para. 28; ALMUNIA, J., „*Remedies, commitments and settlements in antitrust*", op. cit. 63; Commitment Decisions in Antitrust Cases, Background paper by the secretariat, op. cit. 127, para. 32.

desist order. In these cases, the use of commitments to restore competitive market conditions has proven to serve better for this purpose.

It is in the interest of the parties to the proceedings to find a reasonable, easy to implement and well-defined solution. Unilaterally imposed remedies by the Commission in a prohibition decision following adversarial proceedings might easily be lacking the desired result.[180] An example of such ill-defined remedies imposed by the Commission are the remedies imposed in the *Microsoft* case[181]. The Commission found the company had abused its dominant position by bundling Windows Media Player with Windows and by not providing adequate documentation to enable interoperability of Microsoft servers. The Commission, besides charging the company with a hefty fine, imposed two remedies – to put a version of Windows without Windows Media Player (Windows – N) on the market and to publish information enabling interoperability. These remedies, which were also confirmed by the General Court[182], have proven to be a failure, as the sales of the Windows – N were close to zero and there have been only several server entries.[183] It necessarily follows that the market impact of such remedies is limited, if not non-existent.

Against the failure of these remedies, the commitments in the following case with the same company, the *Microsoft (tying)* case[184], should be briefly addressed. In short, in this case, the Commission had concerns that the company abused its dominant position by tying its Internet Explorer web browser to its Windows operating system. The commitments provided for introducing a "Choice Screen", on which the users could select their preferred web browser and disclose information enabling interoperability. The Commission did not disclose any detailed statistics regarding the actual effects of the commitments, it only published information in its press release that 84 million browsers

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[180] MARTÍNEZ LAGE, S., ALLENDESALAZAR, R., „Commitment Decisions ex Regulation 1/2003: Procedure and Effects" in ELHERMANN, C. D., MARQUIS, M. (eds), *European Competition Law Annual 2008*, Antitrust Settlements under EC Competition Law, Hart Publishing, [2010], p. 586.
[181] Case COMP/C-3/37.792 *Microsoft*, Commission Decision of 24 March 2004.
[182] Case T-201/04 *Microsoft v Commission*, 17 September 2007 ECR II – 3619.
[183] ECONOMIDES, N., IOANNIS L., A Critical Appraisal of Remedies in the EU Microsoft Cases, 2010 Columbia Bussiness Law Review, 346 201, [2010], p. 348, accessible at < http://www.stern.nyu.edu/networks/Economides_Lianos_Critical_Appraisal_Microsoft_Remedies.pdf>.
[184] Case COMP/39.530 *Microsoft (Tying)*, Commission Decision of 16 December 2009

were downloaded via the "Choice Screen".[185] Based on this information it can be concluded that the "Choice Screen" enabled the consumers to make an option regarding the installation of a web browser, although more detailed statistics about the impact on downloads of competing browsers would be needed to fully assess the effectiveness of the commitment. It should be noted that Microsoft was fined for not pre-installing the Choice screen in one of his software, thus for failing to comply with the commitment.[186]

5.4 Commission´s decisional practice under Article 9

As mentioned above, the Commission has accepted commitments in 35 cases since the entry into force of Regulation 1/2003. This section aims to explore how the Commission enforced EU competition rules by accepting commitments by examining its decisional practice with a view to evaluate how commitment decisions enabled the Commission to effectively deal with its competition concerns. Moreover, the analysis of the decisional practice enables to identify weak points, which may have a detrimental impact on the effectiveness of commitments.[187]

5.4.1 Commitment decisions as a continuation of the notification procedure

The initial cases, in which the Commission made use of commitment decisions mirrored the notification procedure under Regulation 17/62. As it was described in the second chapter of this thesis, under Regulation 17/62 companies could seek an exemption of an agreement under Article 101(3) TFEU. In these cases, commitment decisions enabled the Commission to provide amendments to partially pro-competitive agreements to meet the requirements for granting the exemption under Article 101(3).[188]

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[185] See European Commission, 'Commission sends Statement of Objections to Microsoft on non-compliance with browser choice commitments' Press Release from 24. October 2012, accessible at http://europa.eu/rapid/press-release_IP-12-1149_en.htmhttp://europa.eu/rapid/press-release_IP-12-1149_en.htm.

[186] Case COMP/39.530 *Microsoft (Tying),* Commission Decision of 6 March 2013 for failure to comply with a commitment made binding by a Commission decision pursuant to Article 9 of Council Regulation (EC) No 1/2003.

[187] For the purpose of the analysis, the author does not aim to scrutinise every commitment decision which has been adopted since 2005, but based on examples from various sectors or under various circumstances evaluate the effectivity of use of commitment decisions in different scenarios.

[188] RAB, S., MONNOYEUR, D., SUKHTANKAR, A., op. cit. 90, p. 175.

The first two decision falling within this group concern football media rights. In both *Bundesliga*[189] and *Premier League*[190] the Commission was concerned that the joint sale of media rights between the clubs participating in the respective league would restrict competition between the clubs and raise prices, while at the same time, providers of new media services could not broadcast matches. The commitments provided that media rights will be offered for a maximum of 3 years in several packages in a transparent manner. The Commission has also accepted commitments to amend two anticompetitive clauses in the *Cannes Agreement* case[191], the agreement between 13 European collecting societies and 5 major music studios. One of the clauses concerned rebate payment schemes to record producers, the second one a non-compete obligation. In the *Repsol* case[192], the Commission adopted a decision which made binding commitments regarding company's vertical agreements on fuel distribution through service stations in Spain. Repsol undertook, inter alia, to refrain from restricting purchaser´s ability to set the selling price and in the case of agency agreements to from limiting agents from lowering their price by cutting down their commission.

Although not being meant to be a substitute for the formal notification procedure under Regulation 17/62, commitment decisions have proved to be an effective tool to amend notified agreements to be in line with EU competition rules. However, it is important to point out that as a remnant of the pre-modernization system, such use of commitment decisions is now obsolete.

5.4.2 Commitment decisions as a specification of block exemptions

A commitment decision also served as a tool to *de-facto* specify the requirement of block exemption. A set of cases concerned Commission´s preliminary view that four car manufactures[193] did not abide by the rules set down in the motor vehicle block exemption

[189] Case COMP/C-2/37.214 Joint selling of the media rights to the German Bundesliga.
[190] Case COMP/38.173 Joint selling of the media rights to the FA Premier League.
[191] Case COMP/C2/38.681 — The Cannes Extension Agreement.
[192] Case COMP/B-1/38.348 *Repsol CPP*.
[193] Those being Toyota, Fiat, General Motors, DaimlerChrysler.

regulation 1400/2002[194], which provides that the manufactures are obliged to provide full access to technical information must be disclosed to independent repairers. Such information has to be accessible in manner proportionate to the needs of the independent retailers. The commitments specified the scope of the necessary access to be given to the repairers, as well as the scope of technical information and provided a non-exhaustive list of examples thereof and the circumstances, under which the manufacturer may withhold the information. The decision in the cases with car manufacturers shows the possibility of effectively specifying the conditions, under which a block exemption on vertical agreements related to motor vehicles applies. Hence, by its decision, the Commission gave an important guidance to other car manufacturers, which helped them to better assess whether their commercial conduct is in compliance with competition rules.

5.4.3 Commitments going beyond the scope of the investigation

Based on the ruling of the CJEU in the *Alrosa* case, the Commission may accept far-reaching commitments which go beyond what it could impose in an infringement decision. That is "consciously accepted" by the undertaking proposing commitments and acknowledged by the court as a favourable trade-off, compared to the finding of an infringement and imposition of a fine.[195] Undeniably, the Commission will seek to extract more concessions from a company hoping to avoid a possible prohibition decision.[196] The most striking example of such far-reaching commitments is the *Coca-Cola* case.[197] The substance of the case related to practices of the company and its three major bottlers in supply of carbonated soft drinks, namely exclusivity requirements, growth and target rebates, tying and exclusivity in connection with the installation of technical sales equipment. The commitments offered and subsequently made binding by Commission´s decision provided that Coca-Cola will remove all exclusivity arrangements, rebates and

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[194] Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ L 203, 1.8.2002.
[195] Judgement of the CJEU in Case C-441/07 P, *Commission v Alrosa* [2010] ECR I-5949, para. 48.
[196] CAVICCHI, P., op. cit. 172, p. 14.
[197] Admittedly, in the sense that go beyond what the Commission could impose in an Article 7 decision, all structural commitments might be regarded as far reaching as well. This section considers far-reaching in a sense that the commitments went beyond the initial investigation of the Commission. Structural commitments were accepted almost exclusively in the energy sector, subject to the following chapter.

stop tying the most popular drinks it produces with less popular ones. Additionally, the company committed to leave at least 20% of space for soft drinks produced by its competitors in the coolers it had supplied free of charge with the soft drinks. These commitments became binding on the company while covering the whole area of EEA. However, although the practices were investigated by the Commission and the Spanish Competition Office[198] in a number of member states, they did not cover the whole area of EEA. Moreover, the Commission reached a conclusion about the dominance of the company only in relation to relevant markets, which were identified as national.[199] Some commentators have noted that the decision went also beyond the scope of the relevant product market.[200]

Commitments going beyond the product and geographical scope of the relevant market which was investigated would most certainly be considered as disproportionate if this principle would apply to the commitment decisions in the same manner as it does to remedies in prohibition decisions. Based on the CJEU´s ruling in *Alrosa*, the Commission may legally extract commitments going beyond the initially investigated product and geographical markets, provided that the undertaking offers such concessions. That, in turn, enhances the effectiveness of commitment decisions in terms of time-saving, as the Commission does not need to investigate the practices of the company in every single market, but also of the commitments made binding, because they secure that company´s conduct will not contravene competition rules in other markets, despite not being formally investigated.

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[198] The Spanish procedure ran parallel to the Commission´s investigation in number of member states, Spanish Competition Office then decided to hold proceedings until the Commission makes a decision and subsequently closed the proceedings without making any decision; • ARMENGOL, O., PASCUAL, Á., 'Some Reflections on Article 9 Commitment Decisions in the Light of the Coca-Cola Case', European Competition Law Review, Volume 27 (3), [2006], p. 124.

[199] See, Case COMP/A.39.116/B2 Coca-Cola, Commission Decision of 29. September 2005, para. (23) states „In its preliminary assessment, the Commission took the view that TCCC and its respective bottlers are jointly dominant within the meaning of Articles 82 of the EC Treaty and 54 of the EEA Agreement on the CSD market in a number of countries and channels.", in para. 24 the Commission concludes that the company´s market share exceeds 40% in 16 Member States, in some of these only in relation to the distribution channel for consumption at home.

[200] RAB, S., MONNOYEUR, D., SUKHTANKAR, A., op. cit. 90, p. 183.

5.4.4 Commitment decisions in the energy sector

The energy sector represents the area in which the Commission made an extensive use of commitment decisions since Regulation 1/2003. In this period, the Commission has adopted a total of 18 decisions in this sector, 12 of which were commitment decisions. That means that 1/3 of all commitment decisions were adopted in this particular sector. Being a preferable way of dealing with antitrust cases, this section will explore the reasons for the popularity of commitment decisions in this sector.

i. *Characteristics of the energy sector*

Energy markets in the EU were characteristic for their substantial degree of vertical integration with a single state-owned entity being active on every level of the market. Although some of these levels, like distribution, encompass natural monopolies, some activities are potentially competitive, as long as the undertakings have an access to the incumbent's infrastructure.[201] The Commission launched a sector inquiry pursuant to Article 17 of Regulation 1/2003 in June 2005 in response to sudden increases in gas and electricity wholesale prices and high barriers to entry, which suggested that the market, in fact, stays closed to competition, even after measures leading to liberalisation of the sectors were made on the EU-wide level.[202] The inquiry revealed that the gas and electricity markets remain highly concentrated, the networks are insufficiently unbundled and the competition at the retail level is often limited due to the long term contracts with the customers. Moreover, the incumbents exceptionally enter markets in the other Member States. Based on the inquiry, the Commission proposed addressing these issues by a regulation.[203] The subsequent political outcry resulted in a compromise and two corresponding Directives[204]. The Commission thus failed to address the unsatisfactory competition on the market by regulatory means. In turn, the Commission chose to resolve

[201] DUNNE, N., *Competition Law and Economic Regulation*, Cambridge University Press, [2015], p. 112.
[202] Communication from the Commission - Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report), COM(2006) 851 final.
[203] DUNNE, N., op. cit. 45, p. 431.
[204] Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, O.J. L 176; Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, O. J. L 211.

these issues through competition enforcement and initiated an antitrust investigation into practices of energy incumbents in the several Member States with the aim of supplementing the regulatory approach in the liberalisation of energy markets. Commitment decisions in these cases served as an effective way to achieve the desired effects by reaching deals with energy incumbents.[205]

ii. *Long- term contracts – the Distrigaz case*

Some of the cases in the energy sector involved long-term supply contracts in the upstream natural gas sector.[206] According to the Commission, these contracts have an effect of locking in the customers to a particular producer for over the defined period of time. The Commission considers that such contracts amount to infringements of Article 102 TFEU as they involve significant efficiency losses, harm consumers and foreclose the market.[207] In the *Distrigaz* case, the Commission raised concerns about long-term supply contracts of the Belgian incumbent with customers, which required them to purchase certain volumes of gas over a specified period of time exclusively from this company. It follows that these contracts made it very difficult for alternative suppliers to compete on the market. To address these concerns Distrigaz offered behavioural commitments, which provided that the company will put 35% of its volumes sold to large industrial purchasers on the market and to limit the duration of supply contracts with large industrial customers to a maximum of 5 years, granted unilateral termination rights to other customers and removed tacit renewal clauses. The Commission further sought to provide guidance on factors it will consider illegal in long-term contracts[208], rather than stating a fixed maximum length of these contracts.[209] The second case addressing

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[205] SADOWSKA, M., 'Energy Liberalization in an Antitrust Straitjacket: A Plant Too Far?', *World Competition,* Volume 34 (3), [2011], p. 450.
[206] See, in general, TALUS, K., ´Long-term natural gas contracts and antitrust law in the European Union and the United States´, Journal of World Energy Law and Business, Volume 4 (3), [2011].
[207] See, e.g., Case COMP/B-1/37.966 *Distrigaz*, Commission Decision of 15. January 2008, paras. 24 – 25.
[208] SCHOLZ, U., PURPS, S., ´The Application of EC Competition Law in the Energy Sector´, *Journal of European Competition Law & Practice*, Volume 1 (1), [2010], p. 40.
[209] These are the market position of the supplier, the overall share of the market covered by contracts containing such ties, the share of the customer's demand tied under the contracts, the duration of the contracts, efficiencies, see European Commission, 'Commission increases competition in the Belgian market – frequently asked questions', MEMO/07/407, accessible at: http://europa.eu/rapid/press-release_MEMO-07-407_en.htm.

foreclosure of the market by long-term contracts was the *Long term electricity contracts in France* case[210] where the Commission applied the above-mentioned test from the *Distrigaz* case in order to assess the legality of contracts between EDF and large industrial customers. As a result, EDF undertook to let its customers to opt-out of contracts and remove the resell restrictions.

iii. *Access to transportation network: RWE, CEZ and ENI cases*

Another focus of Commitment enforcement activities aimed at market foreclosures stemming from restrictions on access to transportation networks. In the *RWE*[211], *CEZ*[212] and *ENI*[213] cases, the Commission took the view that these companies had abused their dominant positions by *inter-alia* refusing access to their gas and electricity networks. This so-called capacity hoarding, involves dominant company reserving transport capacities on the network for itself, thus constituting a special type of refusal to supply.[214] Moreover, according to Commission's preliminary assessment, RWE had set its transmission tariffs too high, so the competitors were not able to gain profits, thus amounting to the practice of margin squeeze. To address these concerns RWE, ENI and ČEZ offered structural commitments. Structural commitments aimed to ensure that these companies will not engage in anti-competitive practices relating to access to their networks.[215] These commitments involved RWE´s divestiture of its gas transmission network to a suitable purchaser, commitment of ENI to divest its shareholdings in companies related to international gas transmission pipelines and transmission operators and gas transmission systems in the other Member States.[216] CEZ undertook to divest one power plant, which secures entry of a new competitor on the market.

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[210] Case COMP/39.386 Long Term Electricity Contracts France.
[211] Case COMP/39.402 *RWE Gas Foreclosure.*
[212] Case AT.39727 *CEZ.*
[213] Case COMP/39.315 *ENI*
[214] KOCH, O., GAUNER, C., 'Current developments in European and international competition law', 17th St. Gallen International Competition Law Forum ICF 2010 / 2010, v. 12, p. 85.
[215] See, e.g., Case COMP/39.402 *RWE Gas Foreclosure*, para. 49, Case COMP/39.315 *ENI*, para. 89.
[216] Case COMP/39.315 *ENI* , paras. 63–69.

iv. *Long-term capacity booking: the GDF and E.ON Gas cases*

The third group of cases relates to practices by which companies reject requests from competitors seeking capacity in the network by asserting that there is no gas import capacity left due to their own booking. In contrast with capacity hoarding, in long-term capacity booking the companies actually use the capacities.[217] In the *GDF*[218] and *E.ON Gas*[219] cases the Commission accepted commitments to make 50% of the capacities available for competitors, thus removing bottlenecks at the entry point into gas networks and putting an end to the long-term foreclosure of access to gas import capacities.[220]

According to Commission´s preliminary assessment in the German *Electricity Wholesale Market* case[221] the Commission assessed conduct of E.ON on the wholesale electricity market as an abuse of the company's dominant position. The Article 102 might have been infringed by E.ON increasing its own costs on the upstream market in order to favour its vertically integrated affiliate on the downstream market and thus passing on the costs on consumers and by preventing competitors in entering the market.[222] To address these competition concerns the commitments provided for divestiture of about one-fifth of company´s electricity generation capacity in Germany and the whole electricity transmission network.[223] The Commission concluded that divestitures will safeguard that the alleged abuse will not be repeated.[224]

v. *Commitment decisions in the energy sector: Conclusion*

The energy sector represents an area in which the Commission made an extensive use of commitment decisions, with only three cases concluded by a prohibition decision, two of

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[217] HOFFMAN, M. 'Commitment Decisions in the European Energy Sector – Implementation of Sector-specific Regulation via Competition Law', *European Networks Law and Regulation Quarterly*, Volume 2 (2), [2014], p. 136.
[218] Case COMP/39.316 *GDF*.
[219] Case COMP/39.317 *E.ON Gas*.
[220] Case COMP/39.317 *E.ON Gas*, Commission Decision of 4 May 2010,para. 63; Case COMP/39.316 *GDF,* Commission Decision of 3 December 2009, para. 87.
[221] Cases COMP/39.388 German Electricity Wholesale Market and COMP/39.389 German Electricity Balancing Market, Commission Decision of 13. February 2009..
[222] Ibid., para. 50.
[223] SCHOLZ, U., PURPS, S., op. cit. 211, p. 42.
[224] Cases COMP/39.388 *German Electricity Wholesale Market* and COMP/39.389 *German Electricity Balancing Market,* Commission Decision of 13. February 2009, para. 82.

which concerned market sharing practices[225] and the decision in the *OPCOM* case[226] in which the Commission imposed a fine on Romanian power exchange operator for abusing its dominant position by refusing to accept traders from different Member States. Taking into account the above-mentioned recent developments in the *Gazprom* case, this trend is likely to continue. Commitment decisions in this particular sector all had one thing in common – they were used to supplement the EU-wide objective of liberalisation of energy markets. In this way, the commitment procedure served as a "quasi-regulatory" mechanism to foster the liberalisation.[227] Commitment procedure enabled the Commission to negotiate on possible solutions of (in most of the cases) lack of competition on the market. In cases resolved by adopting behavioural commitments the Commission provided guidance as to what conduct might be regarded as anticompetitive, particularly with regard to long-term contracts and on the wholesale level of the market or capacity bookings by incumbents and restricting access to incumbent's infrastructure, thus targeting novel issues arising in connection with the liberalisation of these markets. On 26 July 2016 adopted decision by which the Commission released E.ON from its commitments to reduce long-term bookings on the German gas transmission grid 5 years prior to the original termination date provided for in the final decision. That has to be viewed as a successful opening of the market to competition.[228]

The most prominent example of the quasi-regulatory use of commitment decisions are the structural commitments, by virtue of which the Commission actively reshaped the markets according to its own competition and regulatory objectives.[229] The Commission has thus achieved market outcomes which are more usually achieved via sector-specific regulation.[230] These commitments served the Commission in effectively opening up

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[225] Case COMP/39.401 *E.ON—GdF collusion* Commission decisions of 16 October 2009; Case COMP/38.662 *ENI/ENEL/GDF* Commission decisions of 26 October 2004.
[226] Case AT.39984 *Romanian Power Exchange/OPCOM*, Commission Decision of 5 March 2014.
[227] DUNNE, N., 'Commitment Decisions in EU Competition Law', op. cit 45, p. 431.
[228] Case COMP/39.317 *E.ON Gas*, Commission Decision of 26 July 2016; also see European Commission, 'Successful opening of German gas markets allow early termination of E.ON commitments', Press release, accessible at <http://europa.eu/rapid/press-release_IP-16-2646_en.htm>.
[229] TEMPLE LANG, J., 'Commitment Decisions and Settlements with Antitrust Authorities and Private Parties under European Antitrust Law' in Hawk (ed.), *International Antitrust Law & Policy: Fordham Corporate Law*, 2005, p. 293.
[230] DUNNE, N., Competition Law and Economic Regulation, op. cit. 204, p. 114.

energy markets to the Competition as they ensured that alleged abuses of dominant position cannot be repeated in the future, thus bringing the antitrust enforcement closer to Commission´s future-oriented assessment in merger cases.[231] Moreover, structural commitments provide for swift implementation and no need for further monitoring, in this sense than being more effective than behavioural commitments requiring monitoring, burdening both the enforcer and the company.

However, the extended use of commitments and mainly of structural commitments in the energy sector raises some important issues. Firstly, the practice of addressing imperfections of the liberalisation by competition enforcement rather than by regulation based on the political decision-making, thus effectively bypassing the usual way of resolving these issues is questionable as to the legitimacy of this approach. Moreover, as Commission´s antitrust concerns are based merely on its preliminary views, some cases might be based on rather controversial merits and un-tested theories of harm.[232] Nevertheless, the Commission´s position in establishing harm in energy cases was facilitated by the clear dominant position of the incumbents and plenty of information gathered from the sector inquiry and from national energy regulators.[233]

The fact remains that the Commission enjoys a wide margin of discretion while accepting commitments. It´s decisions are free from judicial review of the appropriateness and proportionality of the commitments which alleviates the pressure on the Commission to build a solid case. Furthermore, Commission's position in the process of negotiating commitments with companies being investigated is strengthened by the threat of substantial fines, so they may offer far-reaching commitments going beyond merely addressing antitrust concerns. Even though the Commission reasoned it´s use of structural commitments by the inadequacy of any behavioural alternatives, it remains questionable given the fact that structural remedies have never been imposed as a remedy in a

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[231] ITALIANER, A., "Legal certainty, proportionality, effectiveness: the Commission´s practice on remedies", op. cit. 5.
[232] See, to that end, DUNNE, N., 'Commitment Decisions in EU Competition Law', op. cit 45, p. 431; HOFFMAN, M. 'Commitment Decisions in the European Energy Sector – Implementation of Sector-specific Regulation via Competition Law', op. cit. 220, p. 139.
[233] GAUTIER, A., PETIT, N., 'Optimal enforcement of competition policy: the commitments procedure under uncertainty', Discussion paper, Centre for Operations Research and Economics, p. 21 – 22.

prohibition decision. It is thus up to Commission´s self-restraint in the application of commitment decision and devising commitments which are appropriate to address its competition issues.

5.4.5 Commitment decisions in fast-moving sectors

According to the Europe 2020 strategy, information and communication technologies and other sectors of the fast-moving digital economy are "*important drivers of productivity, innovation and growth in all sectors of the economy*"[234]. The sectors of the digital economy are characteristic for their rapid innovations, network effects and "winner takes all" competitive forces creating dominant positions of successful companies, although in some cases only temporarily.[235] The network effects of these industries enable the dominant to lock-in customers and continue strengthening its position.[236] As already mentioned in the previous chapter concerning quickness of the commitment procedure, these markets seem particularly opt for the use of commitment decisions, because of the necessity to quickly address potential competition restrictions. However, the Commission must be cautious because if the assessment of the potentially anticompetitive conduct is incorrect, it may lead to over enforcement and a potential impediment to the competition on the market and future innovation.

Being one of the key drivers of the modern economy, the Commission has been investigating a number of practices concerning digital markets. However, contrary to the presumptions of their usefulness in the fast-moving sectors, commitment decisions have not been used to the extent expected by some.[237] The decisional practice of the

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[234] Council Recommendation (EU) 2015/1184 of 14 July 2015 on broad guidelines for the economic policies of the Member States and of the European Union, OJ L 192/27, annex; Broad guidelines for the economic policies of the Member States and of the European Union, Part I of the Europe 2020 integrated guidelines.
[235] DUNNE, N., Competition Law and Economic Regulation, op. cit. 204, p. 115.
[236] Commission Staff Working Document, 'Ten Years of Antitrust Enforcement under Regulation 1/2003', Accompanying the document, Communication from the Commission to The European Parliament and The Council, SWD(2014) 230/2, 9.7.2014, accessible at < http://ec.europa.eu/competition/antitrust/legislation/swd_2014_230_en.pdf>., p. 28.
[237] See, to that end, MARINELLO, M., 'Commitments or Prohibition? The EU Antitrust Dilemma', *Bruegel policy brief*, Issue 2014/01, accessible at < http://bruegel.org/2014/01/commitments-or-prohibition-the-eu-antitrust-dilemma/>, p. 5.

Commission in this sector includes the above-mentioned cases *IBM*, *Rambus*, *Microsoft* and *Samsung*.

The *eBooks* case[238] also falls within the group of decisions from the digital sector. This case had in fact 2 stages in which commitments were accepted from various parties. The first commitment decision made legally binding commitments from Apple and four international publishers. These companies had suddenly switched from wholesale contracts to agency contracts, which provided for maximum retail prices, restrictions on price setting of retailers and flat 30% commission for Apple. The Commission had a suspicion of coordination between Apple and the publishers, which aimed at raising retail prices for eBooks. The parties committed to terminate existing contracts and amending their behaviour towards retailers. Apple´s commitments include termination of the agreements and not enforcing problematic clauses in the existing agreements. The second decision in this case, adopted 7 months after the first one, included fifth publisher Penguin, by whom the Commission accepted commitments which are substantially the same as those in the former decision, with only minor differences in the behaviour towards retailers. The decision in the *eBooks* case showed two interesting features. Firstly, it demonstrated that in the commitment procedure concerning agreements between undertakings, the Commission is flexible in reaching a settlement with some of the undertakings earlier than with others, thus effectively enabling these commitments to be implemented earlier, if the negotiations with the last undertaking does not go as smoothly as with the others. Secondly, this case shows that the quick impact on the market was of a main importance – the Commission adopted the commitment decision only one year after the initiation of formal proceedings, despite the commitments, in fact, amounting to cease and desist order.

Recently, the Commission issued a final report from a sector inquiry into the e-commerce sector, initiated in 2015. Subsequently, it opened a number of proceedings[239] with undertakings active on that particular market, such was the case with the inquiry into the

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[238] Case COMP/39.847 *E-BOOKS*, Commission Decision of 25 July 2013.

[239] See, e.g., European Commission, Commission opens three investigations into suspected anticompetitive practices in e-commerce, Press release from 2 February 2017, IP/17/201, accessible at http://europa.eu/rapid/press-release_IP-17-201_en.htm.

energy sector. The newly opened investigations target mainly geo-blocking practices, but also more traditional practices such as resale price maintenance.[240] It remains to be seen whether the Commission will make use of commitment decisions to resolve antitrust issues or rather by a standard way of prohibition decisions.

5.5 Effectiveness of commitments: Conclusion

The objective of this chapter was to analyse various features of commitments, which positively contribute to their effectiveness. It was observed that the Commission benefits from the limited application of the principle of proportionality on the commitment decisions. Judgement of the CJEU in the *Alrosa* case enabled the Commission to effectively deal with cases by accepting commitments. Not being constrained by what it could impose in a prohibition decision, the Commission may use commitment decisions to flexibly tackle various forms of possibly anticompetitive conduct.

Commitment decisions also allow for a better tailoring of commitments as they are offered by the company itself and further market tested by third parties. On the contrary, remedies imposed unilaterally by the Commission have proven to entail various deficiencies as to their effectivity. Furthermore, commitments also provide for easier implementation, as the company certainly assesses the difficulty of the implementation of commitments prior to offering them to the Commission.

Analysis of the decisional practice showed that the Commission has accepted commitments in many different sectors while targeting various practices which raised its competition concerns. At the outset, commitment decisions served as a continuation of the notification regime as it allowed the companies to amend their agreements to be in line with Article 101 of the TFEU. In the *Coca-Cola* case, the Commission made use of its discretion while accepting commitments to extend the commitments to markets and products, which were not initially subject to the investigation. It was observed that the Commission made use of commitment decisions in the energy sector to supplement the wider EU objective of liberalisation of these markets. Although the practice raised

[240] See European Commission, Report from the Commission to the Council and the European Parliament, Final report on the E-commerce Sector Inquiry, SWD(2017) 154 final.

concerns as to its legitimacy, the Commission succeeded to obtain structural remedies from some of the companies, which should ensure that the potentially abusive conduct cannot be repeated in the future.

Based on the foregoing considerations, it must be concluded that commitments are in many cases better suited to resolve Commission´s antitrust issues. They can certainly be more flexible than remedies imposed in prohibition decisions and the company is more likely to implement them easily and comply with them. They have proven to be an effective tool in various different circumstances. However, the Commission should carefully assess the proposed commitments in order to ensure they can bring the desired effect on the market.

6. COMMITMENT DECISIONS AND THE PRINCIPLE OF LEGAL CERTAINTY

The objective of previous chapters of this thesis was to explore various features of commitment decisions, which contribute to their effectiveness. As it was explored above in this thesis, based on the to-date practice of the Commission, commitment decisions have proved to be an effective tool in resolving various types of possibly anticompetitive conduct. But the extensive use of this antitrust enforcement tool has raised many important questions among professionals and scholars concerning downsides and risks which commitment decisions encompass. These drawbacks include mainly due process considerations, detrimental effects on private enforcement of competition law and a lack of transparency. Most notably, commitment decisions do not have the same effects as prohibition decisions, in terms of both individual and general deterrence, punishment and discharging gains from the illegal conduct. Perhaps the most criticism is aimed at the limited precedential value of commitment decisions. Given the attractiveness of commitment decisions for the Commission and for the parties to the proceedings, it is necessary for the Commission to carefully evaluate the pros and cons of each type of decision on a case-by-case basis.

One of the most important limitations of the use of commitment decisions should be the principle of legal certainty. This chapter will analyse what impact commitment decisions have on legal certainty of the undertakings active on the market and suggests the optimal balance between the effective use of commitment decisions and the legal certainty.

The principle of legal certainty, being a general principle of EU law, requires *inter alia* that rules, which lead to negative consequences for individuals, to be clear, precise and predictable.[241] It is widely perceived that when the antitrust enforcer is deciding what type of procedure shall be used to intervene in markets, one of the most important

[241] Judgment of the CJEU in Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission,* EU:C:2010:512, para. 100; Judgment of the CJEU in Case C-573/12 *Ålands Vindkraft*, EU:C:2014:2037, para. 127.

considerations is the degree of legal certainty.[242] Legal certainty represents the awareness of the undertakings of how a particular conduct will be perceived by the authorities. In addition, the bodies enforcing competition law have a responsibility to adopt decisions that should not be revoked by the courts to ensure predictable and effective competition law regime.[243]

Prohibition decisions adopted by the Commission authoritatively establish that behaviour of the undertaking constitutes an infringement of EU competition rules. These decisions provide a greater detail of Commission´s assessment of a particular conduct and an exhaustive theory of harm, thus giving valuable guidance to other companies on the market.[244] Prohibition decisions are usually subject to judicial review by the EU courts, which can further contribute to clarifying the law and to its development. Once confirmed by the court, prohibition decisions create a solid legal precedent with a strong deterrent effect.

Conversely, by virtue of a commitment decision the Commission does not establish an infringement of EU competition rules, it merely concludes that there are no longer grounds for its action. As repeatedly noted above, commitment decisions are not based on a full investigation into the facts of the case and as such they do not necessarily have to meet the same standard of evidence as prohibition decisions do. The decision does not represent a definite conclusion on the application of law to the facts of the case. The reasoning of the Commission and the legal and factual assessment of undertaking´s conduct is more concise in comparison to necessarily profound reasoning in prohibition decisions. Finally, commitment decisions are very rarely subject to subsequent judicial review and based on the *Alrosa* judgement the scope of judicial review is limited, so Commissions assessments of novel and untested theories of harm and evidence behind

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[242] KATSOULACOS, Y., ULPH, D., 'Legal uncertainty, competition law enforcement procedures and optimal penalties', *European Journal of Law and Economics*, Volume 41 (2), [2016], p. 256.
[243] See, to that end, United Nations Conference on Trade and Development, Trade and Development Board, Intergovernmental Group of Experts on Competition Law and Policy, 'Enhancing legal certainty in the relationship between competition authorities and judiciaries', Note by the UNCTAD secretariat, TD/B/C.I/CLP/37, accessible at http://unctad.org/meetings/en/SessionalDocuments/ciclpd37_en.pdf, p. 1.
[244] See, to that end, European Commission, Competition Policy Brief, op. cit, 162, p. 2.

them escape the scrutiny of EU courts.[245] The numbers prove this assumption, apart from *Alrosa,* there has been only one direct challenge of commitment decisions, which was unsuccessful.[246]

6.1 Novel theories of harm and unclear legal issues in commitment decisions

The Commission acknowledges the lower precedential value of commitment decisions and proclaims favouring prohibition decisions in cases, which call for establishing an important precedent.[247] Although this may suggest that the Commission will not use commitment procedure in cases where the law is unclear or the theory of harm is untested, the opposite is true.

The Commission has put forward novel theories of harm on several occasions in its commitment decisions. In the *Rambus* case[248], the Commission introduced a novel concept of "*patent ambush*". The Commission alleged that the company abused its dominant position by not disclosing the existence of certain patents and patent applications for its DRAM chips during the standard-setting process and subsequently charged excessively high royalties for the use of these patents. The novelty of the concept of "patent ambush" together with the strict test based on the judgement in the *United Brands* case[249] to establish that prices are excessive with only a few instances where the concept was subject to judicial review and the fact that even the Commission admitted the "*complexness and difficult nature of the case*"[250] beg a question whether the Commission´s assessment of unlawfulness of company´s behaviour would be upheld in court. Moreover, the abuse in form of excessive prices was seen by the Commission in

[245] See, to that end, MARDSEN, P., 'The Emperor´s Clothes Laid Bare: Commitments Creating the Appearance of Law, While Denying Access to Law', *CPI Antitrust Chronicle*, October 2013 (1), accessible at <https://www.biicl.org/files/6791_cpi_marsden_2013.pdf>, p. 4.
[246] In Case T-76/14 *Morningstar v Commission* [2016], the commitment decision in the case *Thomson Reuters* was challenged by a competitor, who claimed, *inter-alia*, a wrong assessment of the commitments by the Commission, but the court dismissed the action.
[247] Manual of Procedures, op. cit. 46, chapter 16, para. 11.
[248] Case COMP/38.636 *RAMBUS*.
[249] Judgement of the CJEU in Case 27/76 United Brands Continental BC v Commission, ECLI:EU:C:1978:22.
[250] Case COMP/38.636 *RAMBUS*, Commission Decision of 9 December 2009, para. 54.

the *Standard & Poor´s* case[251], for company´s prices for the supply of identification numbers of securities.

The Commission´s willingness to tackle novel issues where the law is not so clear is also apparent from the commitment decisions adopted in cases in the energy sector. Most notably, the Commission put forward a theory of harm resulting from strategic underinvestment in the *GDF Suez* case[252], based on which the company limited investments in the development of its gas transmission terminals, which resulted in foreclosure of the market. This concept alters the view that Article 102 TFEU may only oblige the undertaking to grant access to an essential facility it owns, however not to expand or construct new ones in order to facilitate market entry for competitors.[253]

The recently adopted decision in the *Container shipping* case[254] serves as another illustration of closing a case by commitments in an area where the law is rather unclear. The case concerned a practice of 14 container shipping companies and their announcements of future price increases. The Commission had concerns that this practice of announcing price changes allowed for coordination of shippers´ behaviour. However, as some commentators noted[255], the Commission did not put forward evidence of concerted practices between the companies and did not consider whether the price signalling was capable of harming competition in line with CJEU´s judgements in the *Wood Pulp*[256] and *T-Mobile Netherlands*[257] cases.

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[251] Case COMP/39.592 *Standard & Poor's*, Commission Decision of 15 November 2011.
[252] Case COMP/39.316 *GDF*.
[253] SCHOLZ, U., PURPS, S., 'The Application of EC Competition Law in the Energy Sector', op. cit. 211, p. 47.
[254] Case AT.39850 Container Shipping.
[255] BLANCO, L. O., 'A reasonable solution, for no problem? Advance rate increase announcements under EU competition law', accessible at https://chillingcompetition.com/2016/07/28/a-reasonable-solution-for-no-problem-advance-rate-increases-announcements-under-eu-competition-law-by-luis-ortiz-blanco/.
[256] Judgement of the CJEU in Case 89/85 *Woodpulp.*
[257] Judgement of the CJEU in Case C-8/08 *T/Mobile Netherlands*, ECR:2009 I-04529

6.2 Guidance for future cases

Some commitment decisions should serve as a "*model for addressing similar situation*" according to the Commission.[258] The above-mentioned decisions from energy sector concerning long-term contracts are one illustration of such approach. Mainly the *Distrigaz* decision is regarded as a guidance on the compliance of these agreements with EU competition rules.[259] Another case serving as a guidance in the Commission´s opinion is the *Ship Classification* case[260], which concerned assessment of standardisation agreements.[261] The Commission subsequently included some information gathered during the investigation and its assessment of standardisation agreements in its Horizontal Guidelines.[262]

The last example, which the Commission deems to provide guidance to companies,[263] is the *Siemens/Areva* case[264], in which the Commission assessed the scope and duration of a non-compete obligation related to a joint venture of the companies. According to the shareholder agreement, the non-compete should continue for a period of 8 – 11 years after Siemens loses control over the joint venture. The Commission reached a preliminary conclusion that these closes were only "*partially ancillary*" to the acquisition of sole control over the joint venture.[265] The Commission thus concluded that the non-compete obligation can be regarded as ancillary to the concentration only in relation to specified number of products and limited to the duration of 3 years.[266]

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[258] Commission Staff Working Document, 'Ten Years of Antitrust Enforcement under Regulation 1/2003', op. cit. 239, para. 109
[259] Ibid, see also, to that end, TALUS, K., ´Long-term natural gas contracts and antitrust law in the European Union and the United States´, op. cit. 209, p. 270.
[260] Case COMP/39.416 *Ship classification*.
[261] See 10 years of Regulation 1/2003, Staff document, para. 31., see also Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01, para. 257.
[262] Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.1.2011, para. 295.
[263] European Commission, Competition Policy Brief, op. cit. 101, p. 3
[264] Case COMP/39.736 *Siemens/Areva*, Commission Decision of 18 June 2012.
[265] Ibid., para. 32.
[266] Ibid., para. 92.

However, the reliance on previous commitment decisions raises an issue of their precedential value. The decision itself does not amount to an authoritative statement of whether the investigated behaviour is unlawful under EU competition law, it is questionable to which extent should the other undertakings rely on it. Moreover, the Commission´s decision is not subject to a full investigation into the facts and evidence and does not provide for a full assessment of the allegedly anticompetitive conduct. Even the Commission itself admits that commitment decisions may merely "*may also provide guidance to companies*"[267], recognising their lower precedential value. The guidance provided by commitment decisions should thus not be taken for granted. Although other companies can learn from the decision "*what was considered by the Commission sufficient to remove the competition concern*"[268], the decision usually does not provide a sufficient assessment of the anticompetitive conduct. Commitment decisions should let the companies active on the market know how to comply with EU competition law, rather than what commitments will be sufficient to remedy the conduct.

Hence, if the Commission seeks to provide guidance in a commitment decision, it should provide a more throughout assessment of the particular conduct, so that other market players may accurately assess whether their own behaviour is in line with EU competition law. The final decision in the *Siemens/Areva* case provided a greater level of detail on Commission´s assessment of the no-compete clause, which enabled to get more insight into Commissions thinking, thus representing a good example to follow when aiming to provide guidance.

6.3 Enhancing legal certainty by adopting both types of decisions – *Samsung* and *Motorola* cases

In 2012 the Commission initiated two proceedings against manufacturers of mobile phones Samsung and Motorola concerning very similar conduct. Both companies undertook to licence their standard essential patents on mobile technologies on fair, reasonable and non-discriminatory (FRAND) terms and conditions in the standard-setting

[267] European Commission, Competition Policy Brief, op. cit. 101, p. 3.
[268] Manual of procedures, op. cit. 46, chapter. 16 para 6.

process. However, companies failed to reach a licencing agreement with a competitor and sought injunctions from a court. The Commission assessed whether seeking injunctions can amount to an abuse of a dominant position.

In the *Motorola* case,[269] the Commission adopted a prohibition decision in which it concluded that company which undertakes to license its patents on FRAND terms abuses its dominant position if it seeks injunctions against a possible licensee, who is willing enter into an agreement on FRAND terms. The decision includes Commission´s detailed legal assessment of the case and conditions, which would justify Motorola´s actions.

In the *Samsung* case,[270] the Commission adopted a commitment decision on the same day as the prohibition decision in the *Motorola* case. In the commitments, Samsung introduced a mechanism, by which disputes related to standard-essential patents could be resolved.[271] While concluding a licencing contract, the company allowed for a negotiation period of 12 months only after which either party can choose to go to court.

Although the Commission did not impose a fine in the prohibition decision against Motorola because of the novelty of the issue[272] and the company did not appeal the decision to the General Court, the combination of both types of the decision to deal with a novel issue is welcomed. The Commission has carried the necessary in-depth assessment of the practice in the *Motorola* decision while applying the same reasoning in the *Samsung* decision. As a result, the Commission saved time and commitments made binding on Samsung (although not binding for other companies) showed a compliant way of dealing with licencing disputes in the future.

6.4 Commitments and the principle of legal certainty: Conclusion

It is undeniable that while commitment decisions can grant legal certainty to the undertakings concerned at the point the commitment decision is adopted. However, in

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[269] Case AT.39985 Motorola - Enforcement of GPRS Standard Essential Patents.
[270] Case AT.39939 Samsung — Enforcement of UMTS standard essential patents.
[271] WHISH, R., 'Motorola and Samsung: An Effective Use of Article 7 and Article 9 of Regulation 1/2003', *Journal of European Competition Law & Practice*, Volume 5 (9), [2014], p. 603.
[272] Case AT.39985 *Motorola - Enforcement of GPRS Standard Essential Patents*, Commission Decision of 24. April 2014, para. 561.

terms of the principle of legal certainty in a meaning of a legal "road map" for other market participants, as defined at the beginning of this chapter, the commitment decisions provide considerably less guidance for the companies to assess their behaviour.

Some commentators have suggested that commitment decisions should be used only in cases of clear-cut infringements. In such cases, the Commission could benefit from the streamlined commitment procedure and save time and resources. However, in the author´s opinion, if the infringement is clear-cut then the Commission should be able to issue an infringement decision with more ease. Also punishing the company for infringing rules which are clear enough and thus motivate the other market participants to act in compliance with EU competition law might be more desirable than accepting commitments to alter its behaviour in the future. Moreover, the company might have to offer more onerous commitments in order to satisfy the Commission when the law is clear.

Schweitzer notes that the Commission might incline to use commitments to address potential infringements of Article 101 or 102 of the TFEU where the law is unclear. In such cases, commitment decisions facilitate the position of the Commission as they merely react to competition concerns, so the Commission does not have to prove the conduct was illegal to the required legal standard. The practice of the Commission shows that in some cases the Commission did opt for commitments where the law was unclear. Wagner-von Papp warns that this practice might lead to a "vicious circle", where the use of commitment decisions in cases where the law is unclear will to even greater demand for commitment decisions and accordingly the legal certainty will decrease.

Based on the foregoing consideration it must be concluded that striking the right balance between the effective use of commitment decisions and the principle of legal certainty presents a difficult task. In cases of clear-cut infringements, the Commission can certainly benefit from the faster procedure and easily resolve the case, but it should consider whether the punishment of behaviour which clearly infringes the law is not more appropriate. If the Commission adopts a commitment decision but wants to set a guidance for the other market participants, it should include a more throughout assessment of the potentially unlawful conduct in its decisions. This is especially true in cases where the

Commission adopted a statement of objections instead of a preliminary assessment. In cases of novel theories of harm or where the law is not so clear, the approach in the Motorola and Samsung cases discussed above seems preferable. Prohibition decision with more precedential value contains a detailed assessment while the commitments might provide for an effective example of compliant measures. In other cases, the Commission should carefully weigh the potential outcomes of both types of decisions. Having a wide margin of discretion in dealing with cases it is up to the Commission´s self-restraint to conclude cases appropriately as practices concerning novel and complex theories may result in either result in clear breaches, but others may require more explanation and proof. In these cases, the Commission risks over-enforcement by accepting commitments to address a potentially unlawful conduct, which may prove to be harmless while assessed thoroughly and thus potentially impede future development of the market.

It should also be borne in mind that in cases of novel theories of harm or where it is unclear how the law applies to a particular practice, the use of commitment decisions does not mean that Commission´s theories are shielded from the judicial scrutiny of the EU courts. That might be provided by the reference for a preliminary ruling, such was the case of *Huawei Technologies*[273], where the CJEU had the chance to consider Commission´s arguments from the above-mentioned *Samsung* and *Motorola* cases. Although it will certainly not happen in every case, this example shows how the courts can *de-facto* review Commission´s decision, albeit not in course of challenge of a commitment decision. It is however quite probable that the CJEU will be approached in other cases which dealt with novel issues, which will present a chance clarify the law for the future.

[273] Case C-170/13 *Huawei Technologies Co. Ltd. V ZTE Corp,* [2015], request for a preliminary ruling under Article 267 TFEU from the Landgericht Düsseldorf (Germany)

7. CONCLUSION

The objective of this thesis was to evaluate the practice of adopting commitment decisions. The evaluation was based on two aspects, which are deemed as the most important by the author – the effectiveness and the principle of legal certainty. The effectiveness of commitment decisions was split into two interrelated dimensions - the commitment procedure and the commitments, which the Commission´s decision makes binding on the undertaking. The principle of legal certainty was put forward as a principle which should limit the Commission while choosing the optimal way to deal with competition issues.

The first chapter explained the most fundamental changes to the enforcement of competition law brought by Regulation 1/2003 which are relevant to the topic of this thesis. The second chapter provided an introduction to commitment decisions and outlined the legal framework under which these decisions may be adopted. The fundamental features of this type of decisions were explored in order to lay down the necessary background for the subsequent analysis in the following chapters. In chapter three, the author explained how the modernisation of the EU competition law turned the focus of antitrust enforcement in the EU towards effectiveness. It was observed that the effectiveness permeates through all dimensions of the modernisation.

In the fourth chapter, the author focused on the effectiveness of the commitment procedure. It was firstly explained that the effectiveness of the procedure is inherently associated with its swiftness. The analysis concentrated on the rules on the commitment procedure. It was observed that these rules should enable the Commission to resolve cases rapidly. There are several aspects of the procedure which contribute to its quickness, mainly less formalised process without an adversarial part, which is inherent to the infringement procedure. However, several shortcomings of the procedure, which have a negative impact on its quickness, were identified. The author argued that the possibility to adopt a decision even after a statement of objection has been issued diminishes the time savings of the whole procedure. The analysis of the decisional practice of the Commission has shown that the commitment procedure is in general quicker, although there have been occasions where the Commission sought to accept commitments and the procedure took

considerably longer. On the other hand, in cases where the parties approached the Commission at an early stage of the proceedings the commitment procedure provides for a swift adoption of a decision. The analysis also confirmed the argument that issuing a statement of objections prolongs the procedure by showing that in these cases the procedure is considerably longer. In terms of quickness, the author therefore suggests abolishing this practice. Commission enjoys a wide discretion in terms of whether it will accept commitments from the parties to the proceedings and it may choose to terminate negotiations on the possible commitments and continue towards a prohibition decision at any point. Hence, the Commission should switch to the prohibition path when the negotiations take too long, which also signals that it is difficult to formulate the commitments.

The fifth chapter focused on the effectiveness of commitments. It was argued that commitments must be effective to make the desired impact on the market. The author regarded the limited application of the principle of proportionality as the main aspect contributing to the effectiveness of commitments. The fact that the Commission is not obliged to compare commitments to remedies it could impose in a prohibition decision enables the Commission to freely accept commitments, which can be far more flexible in addressing its competition concerns. Furthermore, commitments are offered by the parties to the proceedings themselves and which allows for a better tailoring of their design and easier implementation after the decision is issued. Market testing then allows for a fine tuning of the commitments and help the Commission while assessing their appropriateness. Conversely, remedies imposed unilaterally by the Commission, which are not discussed with neither the parties to the proceedings nor other market participants, more easily lack the desired effect on the market.

Analysis of Commission´s decisional practice showed that commitments have been used to deal with various competition issues identified by the Commission. The most remarkable in this regard is the extensive use of commitment decisions in the energy sector. Commitments effectively supplemented a sector-specific regulation in the process of liberalisation of these markets by enabling the Commission to obtain commitments directly from the companies. Hence, the Commission has by-passed lack of political will to regulate the markets. Only in the energy sector, the Commission has been successful

in obtaining structural commitments which secured that the identified conduct, which could amount to an infringement of Article 102 of the TFEU will not be repeated in the future.

The aim of the last chapter was to explore the relation between an effective use of commitment decisions and the principle of legal certainty. It was argued that this principle should serve as a main limitation for the Commission when it commitment decisions undoubtedly have lower precedential value than prohibition decision. It was argued that the Commission should abstain from issuing a decision while the case presents a novel theory of harm or an issue on which the law is not so unambiguous. On the other hand, a proposition that commitment decision should only be used in clear-cut infringements is not so optimal. In cases of clear-cut infringements, the law is clear enough for the undertakings to self-assess that their behaviour is not in compliance with EU competition law. The Commission should thus aim to punish the unlawful behaviour because adopting a commitment decision in such cases might send a wrong message that companies can act with impunity.

Striking the balance between the effective use of commitment decisions and legal certainty thus presents a demanding task. Free from the scrutiny of the courts with blurry boundaries laid down in EU legislation, it is now for the Commission to show its self-restraint when adopting commitment decisions. Excessive use of commitment decisions may lead to even great demand for this alternative procedure and the law might slowly evaporate in favour of consensual resolutions.

The prohibition decision adopted in the *Google* case reminds us that the Commission is still courageous to put forward rather bald theories of harm against the biggest corporations in the world, although it initially seemed that commitments are the only way the case will be resolved. It remains to be seen, how the courts will respond. Moreover, although the lack of judicial review of commitment decision is one of the main downsides of this type of a decision, it does not necessarily mean that novel theory of harm will

never be scrutinised by the EU courts. The *Huawei Technologies* case[274] proves that assumption and shows that even though only by means of a preliminary ruling, novel theories of harm in commitment decisions are not shielded from the scrutiny of the courts.

[274] Ibid.

TEZE V ČESKÉM JAZYCE

Úvod

Nařízení 1/2003 znamenalo začátek éry modernizace soutěžního práva v EU a dramaticky změnilo způsob, kterým jsou prosazována pravidla chránící hospodářskou soutěž. Jednou z nových pravomocí Komise je také možnost přijímat rozhodnutí, kterým učiní právně závaznými závazky navržené ze strany podniků vyšetřovaných pro porušení článku 101 nebo 102 Smlouvy o fungování Evropské Unie (dále jen „SFEU“). Účelem rozhodnutí o závazcích je rychle a flexibilně reagovat na podezření Komise z porušení pravidel na ochranu hospodářské soutěže. Toto rozhodnutí tedy představuje alternativu pro standardní rozhodnutí podle článku 7 Nařízení 1/2003, kterým Komise autoritativně rozhoduje o tom, aby dotyčné podniky takové jednání ukončili.

Práce se zaměřuje na zhodnocení praxe přijímání rozhodnutí o závazcích na základě dvou základních kritérií – efektivity a právní jistoty. Prvním cílem práce je definovat a zjistit limity efektivity rozhodnutí o závazcích, neboť právě efektivita je považovaná za hlavní přínos tohoto nástroje. Efektivita se v souvislosti s tímto typem rozhodnutí dle autora vztahuje ke dvěma jeho vzájemně propojeným součástem – procesu přijímání rozhodnutí a samotným závazkům, které jsou v rámci řízení nabízeny podniky podezřelými z protisoutěžního jednání. Cílem procesu přijímání rozhodnutí o závazcích je co nejrychlejší náprava dopadů jednání, které mohlo narušující soutěž trhu a tím i úspora prostředků Komise, které mohou být soustředěny na jiné případy. Z toho plyne, že pokud má být tento institut efektivní, musí být rozhodnutí o závazcích přijato v dostatečně krátkém čase, ideálně dříve, než by došlo k vydání standartního rozhodnutí. Tato práce proto analyzuje rychlost přijímání rozhodnutí o závazcích a upozorňuje na nedostatky, které mohou přijetí finálního rozhodnutí zpomalit. Dále je efektivita závazků analyzována v souvislosti s jejími dopady na trh, jsou proto zkoumány důvody, pro které může být pro Komisi v určitém případě efektivnější přijmout závazky nežli pouze konstatovat porušení soutěžních pravidel a zakázat takové jednání do budoucna. Dalším cílem práce je zjistit, jak by mělo přijímání rozhodnutí o závazcích omezováno principem právní jistoty.

Práce je rozdělena do 6 kapitol. První kapitola představuje hlavní změny, které přineslo Nařízení 1/2003. Druhá kapitola nejprve nastiňuje praxi neformálního přijímání závazků

za účinnosti Nařízení 17/62, následuje vysvětlením základních pravidel, na základě kterých Komise vydává rozhodnutí o závazcích. Kapitola třetí se zabývá otázkou efektivity a prosazování soutěžního práva v EU pomocí rozhodnutí o závazcích. V kapitole čtvrté autor zkoumá proces přijímání rozhodnutí a jeho efektivita. Kapitola pátá je zaměřena na analýzu efektivity závazků přijímaných Komisí. Kapitola šestá diskutuje dopady přijímání rozhodnutí o závazcích na právní jistotu. Závěr práce je věnován shrnutí zjištěných poznatků a jejich zhodnocení.

Nařízení 1/2003

Úkolem Nařízení 1/2003 bylo reformovat provádění pravidel na ochranu hospodářské soutěže nahrazením prvního prováděcího Nařízení 17/62, aby mohla být tato pravidla efektivně prosazována i po rozšíření Unie o nové členské státy. Jednou z největších změnou, kterou Nařízení přineslo, je nahrazení notifikace dohod mezi podniky a pravomoci Komise udělovat výjimky podle článku 101(3) SFEU přímou aplikací této výjimky. Navíc došlo k decentralizaci aplikace článků 101 a 102 SFEU, kdy začaly tyto články nově aplikovat i členské státy, resp. Jejich soutěžní úřady a soudy. Za účelem konsistentní aplikace byl vytvořen European Competition Network.

Nařízení také zesílilo vyšetřovací pravomoci Komise a explicitně reguluje důkazní břemeno. Dále Nařízení specifikovalo oprávnění Komise ukládat v rámci rozhodnutí podle článku 7 nápravná opatření, která jsou přiměřená k protiprávnímu jednání a nezbytná k jeho efektivnímu ukončení. Tato nápravná opatření mohou se mohou týkat tržního jednání podniku, nebo mohou být strukturální. Strukturální opatření lze ale ukládat jen pokud je to přiměřené vzhledem k protiprávnímu jednání. Tím je značně omezena možnost Komise ukládat strukturální nápravná opatření, což je prokázáno i tím, že doposud Komise v rámci rozhodnutí podle článku 7 takové opatření neuložila.

Centralizovaný notifikační režim článku 101(3) SFEU měl za následek zahlcení Komise dohodami, které většinou obsahovaly pouze méně závažné porušení soutěžních pravidel. Nařízení 1/2003 tedy umožnilo Komisi soustředit více času a prostředků k potírání nejzávažnějších porušení článků 101 a 102 SFEU.

Rozhodnutí o závazcích

Nařízení 1/2003 stanovilo právní rámec pro přijímání závazků od podniků ze strany Komise. Nicméně i za účinnosti Nařízení 17/62 Komise neformálně přijímala závazky ze strany podniků výměnou za uzavření daného případu. Tato praxe měla ale závažné nedostatky. Procedura tohoto neformálního postupu byla netransparentní, chyběla jasná kritéria, podle kterých se Komise rozhodovala, zda závazky příjme, navíc Komise neměla možnost efektivně dohlížet na dodržování takových závazků a v případě jejich porušení jí nezbývalo než případ znovu otevřít a pokračovat v řízení.

Tyto nedostatky byly odstraněny Nařízením 1/2003, které na základě článku 9 umožňuje Komisi přijmout v průběhu řízení závazky nabídnuté ze strany podniků, proti kterým zamýšlela přijmout rozhodnutí podle článku 7. Podmínkou pro přijetí závazků je, že musí reagovat na výhrady Komise, ke kterým dospěla v rámci předběžného posouzení případu. Komise má možnost tyto závazky přijmout a rozhodnutím je učinit právně závaznými, aniž by bylo z její strany konstatováno, že došlo k porušení článku 101 nebo 102 SFEU. Komise nemůže přijmout závazky v případech, kde povaha protiprávního jednání vyžaduje uložení pokuty, tedy v případech tzv. tvrdých kartelů. V ostatních případech je ale v plné diskreci Komise, zda se rozhodne závazky přijme. Závazky mohou být časově omezeny, zároveň je může Komise kdykoliv přezkoumat a rozhodnout, že již nejsou třeba. Porušení závazků může Komise sankcionovat uložením pokuty ve stejné výši, jako v rozhodnutí podle článku 7 Nařízení 1/2003, tedy do výše 10% celkového obratu podniku za předcházející hospodářský rok. V případě porušení závazků, stejně jako v případě změny okolností, na základě kterých Komise přijala rozhodnutí, nebo pokud podniky poskytly Komisi nesprávně informace, může Komise znovu zahájit řízení.

Nařízení 1/2003 a efektivita

Modernizace soutěžního práva EU se promítla do všech jeho oblastí. Zahrnuje změnu orientace z formy určitého jednání směrem k jeho efektu, ale také institucionální modernizaci, která je reprezentována decentralizací aplikace soutěžních pravidel a zřízení sítě soutěžních úřadů ECN. Procedurální modernizace se promítá v postupnému odklonu od standardních forem vymáhání pravidel soutěžního práva k alternativním procedurám, zahrnujících vyjednávání s Komisí, jako jsou procedura přijímání závazků, narovnání a leniency program. Popularitu těchto alternativ podporují vysoké pokuty ukládané Komisí,

kterým se chtějí společnosti vyhnout. Z pohledu Komise znamenala modernizace prioritizaci efektivity v řešení soutěžních problémů na trhu. V praxi by proto vždy měla zvolit takové řešení, které je vzhledem k situaci nejefektivnější.

Efektivita procedury přijímání rozhodnutí o závazcích

Jednou z největších výhod rozhodnutí o závazcích je, že rychle reagují na obavy z protisoutěžního jednání vyjádřené Komisí. Rozhodnutí, které je přijaté dostatečně rychle, přináší požadovanou změnu na trh a zároveň šetří prostředky Komise. Rozhodnutí o závazcích mělo přinášet rychlejší řešení obav Komise z narušení soutěžních norem, nežli v případě rozhodnutí podle článku 7 Nařízení 1/2003 což bylo zdůrazněno i Soudním Dvorem Evropské Unie (dále jen „SDEU“) v rozhodnutí *Alrosa*. Autor této práce považuje rychlost přijetí rozhodnutí jakožto hlavní aspekt, díky kterému může být takové rozhodnutí efektivní.

Přijetí rozhodnutí o závazcích ve kratším časovém úseku je umožněno díky méně formálnímu řízení, které zahrnuje méně procesních kroků. Obavy Komise jsou obvykle vyjádřeny ve formě předběžného posouzení, které by mělo sloužit jako základ pro formulaci závazků ze strany podniků. Nicméně v praxi diskuze o závazcích předchází vydání předběžného posouzení. Prohlášení o námitkách může pro účely přijetí závazků sloužit jako předběžné posouzení. Pokud dle Komise navržené závazky odpovídají na její obavy z porušení soutěžních pravidel, následuje fáze tzv. tržního testu, v kterém jsou přizvány zainteresované strany, aby posoudili adekvátnost závazků. Pokud na základě tržního testu Komise dospěje k závěru, že jsou závazky dostačující, vydá rozhodnutí, kterým je účinní právně závaznými.

Ačkoliv by řízení o přijetí závazků mělo sloužit k co nejrychlejšímu přijetí finálního rozhodnutí, obsahuje úprava určité nedostatky, které mohou řízení prodloužit. Zejména se jedná o možnost Komise přijímat závazky i poté, co je podniku zasláno sdělení výhrad. Sdělení výhrad obsahuje detailnější posouzení daného jednání podniku nežli pouhé předběžné posouzení. Sdělení výhrad, které musí být vydáno vždy, když Komise zamýšlí vydat rozhodnutí podle článku 7 Nařízení 1/2003, musí také obsahovat informace o tom, zdali Komise uloží podniku pokutu, případně i nápravná opatření. Časové úspory Komise jsou tudíž minimalizovány, protože do doby vydání sdělení výhrad Komise postupuje

v řízení s cílem vydat rozhodnutí podle článku 7. Další identifikovaný nedostatek je v možnosti podniků zásadně upravit navržené závazky po tržním testu.

Analýza rozhodnutí Komise přijatých mezi lety 2005 – 2016 potvrzuje, že je řízení o přijetí závazků podstatně kratší, nežli v případě řízení vedoucímu k rozhodnutí podle článku 7 Nařízení 1/2003. Průměrná délka řízení od jeho zahájení po vydání finálního rozhodnutí trvala v případě rozhodnutí o závazcích v průměru 31,2 měsíců, v případě rozhodnutí podle článku 7 to bylo 33,5 měsíců. V případě těchto rozhodnutí je třeba brát v potaz, že bylo řízení zahájeno až po vydání sdělení výhrad, čemuž předcházela v mnoha případech poměrně dlouhá doba, kdy Komise prošetřovala dané jednání bez toho, aniž by zahajovala řízení. Pokud tedy pro účely srovnání délky řízení použijeme jenom řízení, která začala dříve, nežli Komise vydala sdělení výhrad, vychází průměrná délka těchto řízení na 45 měsíců. Z těchto údajů lze dovozovat, že jsou rozhodnutí o závazcích přijímána rychleji, nežli rozhodnutí podle článku 7.

Analýza rozhodnutí také prokázala, že výše popsané nedostatky řízení mají v praxi negativní efekt na rychlost přijetí finálního rozhodnutí. To platí zejména o rozhodnutí o závazcích, která byla vydána poté, co Komise odeslala podniku sdělení výhrad. V těchto případech bylo řízení o 56% delší.

Efektivita přijatých závazků

Základní součástí rozhodnutí o závazcích jsou závazky, které jsou nabídnuty podniky a rozhodnutím Komise nabývají právní závaznosti. Jelikož je cílem rozhodnutí o závazcích zajištění, aby byla pravidla hospodářské soutěže efektivně aplikována, je nezbytné, aby samotné závazky zajišťovaly efektivní řešení daného soutěžního problému. Tato kapitola proto analyzuje důvody, pro které je v určitých případech efektivnější využít k řešení výhrad Komise k určitému potenciálně protisoutěžnímu jednání právě rozhodnutí o závazcích, nežli rozhodnutí podle článku 7.

Obecně mohou být závazky buďto strukturálního charakteru, nebo se mohou týkat tržního chování podniku. Závazky nesmí záviset na vůli třetí strany a musí být lehce implementovatelné. Dohled nad dodržováním závazků může Komise vykonávat sama, nebo může jmenovat pro tyto účely nezávislého správce. Komise má také možnost

spolupracovat se sektorovými regulátory a jinými správními orgány. Na základě článku 9 Nařízení 1/2003 mohou být závazky omezeny na dobu určitou a mohou být v průběhu času přezkoumány, zdali jsou nadále potřebné. Hlavním pravidlem je, že závazky musí odpovídat na výhrady Komise, jinak budou zamítnuty.

Hlavní otázkou před přijetím rozhodnutí CJEU ve věci *Alrosa* bylo, do jaké míry se u závazků uplatní princip proporcionality. Nařízení 1/2003 totiž upravuje tento princip pouze v souvislosti s nápravnými opatřeními, které může Komise uložit spolu s rozhodnutím podle článku 7. Tribunál ve svém rozsudku dovodil, že princip proporcionality musí být aplikován na závazky podle článku 9 stejně jako na nápravná opatření podle článku 7, jelikož obě tato ustanovení sledují stejný cíl, kterým je efektivní aplikace soutěžních pravidel podle SFEU. Na základě rozsudku Tribunálu by Komise byla povinna v každém jednotlivém případě nabídnuté závazky poměřovat s nápravnými opatřeními, které by mohla uložit v rozhodnutí podle článku 7. Rozsudek Tribunálu byl ale zrušen na základě kasační stížnosti Komise ze strany SDEU, který dovodil, že se princip proporcionality v rozhodnutí závazcích neuplatní do stejné míry jako u zakazujících rozhodnutí a nápravných opatření. Hlavním důvodem je, že v rozhodnutí podle článku 7 Komise konstatuje porušení článku 101 nebo 102 SFEU, naproti tomu v případě rozhodnutí o závazcích pouze deklaruje, že již pominuly důvody pro její zásah. Princip proporcionality se tudíž v případě rozhodnutí o závazcích uplatní pouze do té míry, že nabídnuté závazky musí adekvátně reagovat na výhrady Komise. Z tohoto důvodu také soud stanovil, že přezkum rozhodnutí o závazcích je omezen pouze na zjištění, zdali bylo posouzení Komise zjevně nesprávné.

Rozsudek SDEU ve věci *Alrosa* zajistil Komisi volnost v přijímání závazků, což ji umožňuje pružněji reagovat na různé typy možných protisoutěžních jednání. Efektivita rozhodnutí o závazcích by byla bezesporu nižší, pokud by musel být princip proporcionality aplikován na tento typ rozhodnutí stejně jako na nápravná opatření uložená v rozhodnutí, kterým Komise zakazuje určité jednání. Jak také uvedla AG Kokkot ve svém stanovisku ve věci *Alrosa*, rozhodnutí o závazcích neslouží k tomu, aby bylo stanoveno porušení pravidel na ochranu hospodářské soutěže, ale k tomu, aby závazky mohly pružně reagovat do budoucna na výhrady Komise z narušení soutěže. Z toho plyne, že posouzení v případě přijímání závazků musí Komise dopady závazků

podrobit perspektivní analýze. Rozhodovací praxe ukazuje, že Komise využila v mnoha případech závazků k tomu, aby zajistila lepší budoucí soutěžní podmínky, jako tomu bylo v případě *Visa,* kde byl přijat závazek omezení účtovaných mezibankovních poplatků, nebo případy *Air France/KLM/Alitalia/Delta* a *Continental/United/Lufthansa/Air Canada,* ve kterém se společnosti zavázaly, že uvolní kombinace letištních časů, aby umožnili dalšímu podniku vstoupit na relevantní trhy určitých transatlantických letových tras.

Komise má širokou diskreci v přijímání závazků, což jí umožňuje přijímat flexibilní řešení jejích obav z narušení soutěže, aniž by byla povinna posuzovat, jaké nápravné opatření může uložit. Jelikož jsou závazky nabídnuty přímo určitým podnikem a následně posuzovány také ze strany dalších zainteresovaných společností, jsou lépe uzpůsobené, tedy i efektivní. Navíc podniky si sami vyhodnocují dopady závazků před jejich přijetím, což dále usnadňuje jejich implementaci. Naproti tomu nápravná opatření uložená Komisí často postrádají výsledného efektu na trh, jako tomu bylo v případě *Microsoft*.

Analýza rozhodovací praxe Komise prokazuje, že rozhodnutí o závazcích bylo od roku 2004 užito v mnoha různých případech k efektivnímu odstranění obav z narušení hospodářské soutěže. Nejprve tento typ rozhodnutí posloužil Komisi k úpravě dohod, které ji byly notifikovány podle Nařízení 17/62 nebo ke specifikaci podmínek pro uplatnění blokové výjimky. Závazky také umožňují Komisi upravit jednání podniku i na trzích a v souvislosti s produkty, které nebyly přímo vyšetřovány, jako tomu bylo v případě *Coca-Cola*. Nejvíce rozhodnutí o závazcích bylo přijato v energetickém sektoru, kde Komisi posloužily jako doplnění její snahy o liberalizaci těchto síťových sektorů. V tomto sektoru také Komise přijala strukturální závazky ze strany společností, které zajišťují, že se protisoutěžní jednání nebude opakovat v budoucnu. Tímto přístupem se přijímání rozhodnutí o závazcích blíží spíše regulaci, nežli ex-post vymáhání dodržování soutěžních pravidel. Oproti původním předpokladům nebylo v sektoru digitální ekonomiky přijato větší množství rozhodnutí o závazcích.

Komise při přijímání rozhodnutí o závazcích těží zejména z toho, že má širokou diskreci v rozhodování, jaké závazky přijmout, a to zejména z důvodu omezeného uplatnění principu proporcionality. Navíc jsou závazky lépe uzpůsobené jak danému podniku, tak

i specifikacím daného trhu, což ještě více podporuje jejich efektivitu. Díky rozhodnutí o závazcích má Komise možnost flexibilně reagovat na různé případy jednání, které by mohlo narušovat hospodářskou soutěž.

Rozhodnutí o závazcích a princip právní jistoty

Předchozí kapitoly analyzovaly aspekty rozhodnutí o závazcích, které pozitivně působí na jejich efektivitu. Komise by ale měla při rozhodování, kterým typem rozhodnutí bude řešit určitý případ, brát v potaz nedostatky, které rozhodnutí o závazcích přináší. Mezi ně patří zejména absence preventivního účinku rozhodnutí a potrestání podniku za protiprávní jednání, ale také negativní dopad na postavení třetích osob. Patrně největším nedostatkem rozhodnutí o závazcích je jejich negativní dopad na právní jistotu pro ostatní účastníky hospodářské soutěže.

Právní jistota zajišťuje, že jsou podniky schopny samy posoudit soulad svého jednání s pravidly na ochranu hospodářské soutěže. Komise by měla přijímat jen taková rozhodnutí, která nebudou zrušena soudy, aby bylo zajištěno efektivní a předvídatelný režim ochrany hospodářské soutěže. Zakazující rozhodnutí podle článku 7 stanovují, že určité jednání podniku bylo v rozporu se soutěžním právem EU. Odůvodnění rozhodnutí a zejména posouzení daného jednání je velmi podrobné a dává tak ostatním podnikům vodítko, na základě kterého lze posoudit zákonnost svého vlastního jednání na trhu. Naproti tomu rozhodnutí o závazcích pouze konstatují, že již není prostor pro akci Komise, aniž by určité jednání bylo prohlášeno za nezákonné. Jejich odůvodnění je proto stručnější, rozhodnutí popisují teorii újmy pouze v nedostatečném rozsahu a Komise nemusí dosáhnout stejného důkazního standardu. Navíc jsou rozhodnutí o závazcích pouze výjimečně předmětem soudního přezkumu, proto nemá soud šanci posoudit adekvátnost rozhodnutí Komise.

To je spatřováno jako problematické zejména v souvislosti s případy, kde Komise předkládá neotestovanou teorii újmy, nebo kde není aplikace soutěžních pravidel dostatečně jasná. Analýza rozhodovací praxe komise ukazuje, že Komise v některých případech operovala s novými teoriemi újmy a přijímala závazky od podniků za praktiky, které postrádají konzistentní judikaturu. V jiných případech se zase Komise snažila případem ukázat, jak bude podobné případy posuzovat v budoucnu, což ale naráží na

absenci deklarace soutěžního práva. Jako ideální se jeví způsob, kterým Komise řešila případy *Motorola* a *Samsung*, které se oba týkaly totožné formy zneužití dominantního postavení. Komise v případě Motorola vydala rozhodnutí podle článku 7, ve kterém detailně posoudila nezákonnost jednání a popsala teorii újmy. V případě *Samsung* Komise vydala rozhodnutí o závazcích, na základě kterého společnost navrhla způsob, kterým lze efektivně předcházet budoucím porušením soutěžních pravidel EU.

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ABSTRACT

Regulation 1/2003 empowers the European Commission to issue a decision, by which it makes commitments offered by the parties to the proceedings legally binding. Although being an alternative to the prohibition decision, it has become a predominant type of decision the Commission uses to tackle various antitrust issues, save from the area of secret cartels. This thesis primarily focuses on the effectiveness of commitment decisions, exploring various features contributing thereof. The first chapter outlines the main changes to the enforcement of EU competition law brought by Regulation 1/2003. The second chapter provides a necessary background for the subsequent analysis by introducing the legal framework for the adoption of commitment decision, followed by an explanation of the importance of effectiveness in public enforcement of EU competition law. The fourth chapter analyses effectiveness of the commitment procedure, which is narrowed down to the quickness of the procedure leading to the adoption of the final decision. The author observes that the procedure provides for more rapid resolution of cases, but it contains various drawback negatively affecting the quickness of the procedure. The fifth chapter is devoted to the enhanced effectiveness of commitments, mainly in comparison to remedies which may be imposed in a prohibition decision. The decisional practice of the Commission is examined in order to explore how commitment decisions were adopted in various circumstances. The sixth chapter analyses the impact of commitment decisions on the legal certainty of other market participants with the aim to strike the optimal balance between the effective use of these decisions and the principle of legal certainty. The last chapter concludes the main findings in this thesis.

ABSTRAKT

Nařízení 1/2003 umožňuje Evropské Komisi vydávat rozhodnutí, kterým může učinit právně závaznými závazky nabídnuté od podniků vyšetřovaných pro protisoutěžní jednání. Přestože měla být rozhodnutí o závazcích alternativou ke standardním rozhodnutím zakazujícím protisoutěžní jednání, stala se dominantním typem rozhodnutí, které Komise využívá k řešení různých druhů potenciálních protisoutěžních jednání, mimo oblast tvrdých kartelů. Tato práce se zaměřuje zejména na efektivitu těchto rozhodnutí, zkoumá přitom různé aspekty, které jeho efektivitu zvyšují. První kapitola nastíní nejdůležitější změny v podobě vymáhání soutěžního práva EU, které přineslo Nařízení 1/2003. Druhá kapitola poskytuje nezbytný základ pro další analýzu tím, že představuje základní pravidla pro přijímání rozhodnutí o závazcích. Následující kapitola se věnuje vysvětlení důležitosti efektivity ve veřejnoprávním vymáhání soutěžního práva. Čtvrtá kapitola analyzuje efektivitu procedury přijímání rozhodnutí o závazcích, zejména s ohledem na rychlost přijetí tohoto rozhodnutí. Ačkoliv je zjištěno, že je řízení obecně rychlejší nežli v případě standardních rozhodnutí, jsou popsány nedostatky, které průběh řízení zpomalují. Pátá kapitola se zabývá efektivitou samotných závazků, a to zejména ve srovnání s nápravnými opatřeními, které může Komise uložit v rámci standardního rozhodnutí. Analýza rozhodovací praxe následně ukazuje, že Komise využila závazkových rozhodnutí v mnoha různých oblastech a za různých okolností. Šestá kapitola analyzuje dopad rozhodnutí o závazcích na právní jistotu ostatních hráčů na trhu s cílem najít optimální rovnováhu mezi efektivním užíváním závazkových rozhodnutí a principem právní jistoty. V závěru autor shrnuje poznatky z předchozích kapitol.

NÁZEV PRÁCE A KLÍČOVÁ SLOVA / TITLE AND KEY WORDS

Název diplomové práce v českém jazyce

Název diplomové práce v anglickém jazyce zní „Rozhodnutí o závazcích v soutěžním právu EU“.

Klíčová slova

Rozhodnutí o závazcích

Článek 9 nařízení 1/2003

Ochrana hospodářské soutěže v EU

Název diplomové práce v anglickém jazyce

Název diplomové práce v anglickém jazyce zní „Commitment Decisions in EU Competition Law“.

Key Words:

Commitment decision

Article 9 of Regulation 1/2003

EU competition law

ANNEX NO. I – ORIGINS OF REGULATION 1/2003

Origins of Regulation 1/2003

The origin of Regulation 1/2003 dates back to the year 1997 when a group of Commission´s officials began to meet in the so-called Modernisation Group at the initiative of then Deputy Director-General of Commissions´ DG Competition Gianfranco Rocca.[275] Three main findings were the starting points of groups´ efforts: the enlargement of the EU was swiftly approaching, the notification system was no longer effective for the enforcement of competition rules and that the developed EU competition rules allowed for the companies to assess the compliance of their agreements and practices with EU competition rules themselves.[276] Modernisation group soon realised that a thorough change of the administrative procedure was required, a simple modification of the current procedure would not suffice.[277] This led to publication of the White paper on modernisation of the rules implementing Articles 81 and 82 of the EC Treaty in 1999.[278] The publication of the White paper came as a surprise even to the Commission´s officials, as the works of the Modernisation Group were kept secret. The publication was also surprising because the general view at the time was that the Commission would never propose to replace Regulation 17, as it would lead to Commission´s loss of its substantial powers which had been assigned to it by this regulation.[279]

In the White paper, the Commission acknowledged that the system of centralised enforcement requiring a decision by the Commission on agreements or practices, which fulfil the conditions of Art. 101(3), is not consistent with the effective supervision of the competition any longer.[280] As a consequence of the enforcement regime under Regulation

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[275] WILS, W., 'Ten Years of Regulation 1/2003 – A Retrospective ', *Journal of European Competition Law & Practice,* 2013, Vol. 4, No. 4., p. 1.
[276] ROCCA, G., 'Regulation 1/2003: a modernised application of EC competition rules', *Competition Policy Newsletter*, 2003, No 1, Spring, p. 3.
[277] Ibid.
[278] European Commission, White paper on modernization of the rules implementing articles 85 and 86 of the EC treaty, Commission programme no 99/027, [1999].
[279] EHLERMANN, C., 'The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution' (2000) *37 Common Market Law Review*, Issue 3, p. 540.
[280] European Commission, White paper on modernization of the rules implementing articles 85 and 86 of the EC treaty, Commission programme no 99/027, [1999].

No. 17, the Commission was swamped by over 34 500 notifications, with a constant backlog of more than 1000 notifications every year since 1994.[281] Making the authorisation system work would require substantial resources for the Commission and also impose heavy costs on companies after the enlargement of the Community.[282] As a result of these concerns, the White paper proposed abolition of the notification and exemption system and its replacement with a decentralised self-assessment regime of direct application of the Art. 101(3), without the requirement of a prior decision by the Commission.

The reactions to the proposal were mostly positive,[283] with an exemption of Germany, which was the biggest supporter of the notification system when Regulation 17 was being prepared in the late 1950s and early 1960s.[284] Moreover, already in 1998, the *Budeskartellamt* proposed decentralising the notification and authorisation system between the Commission and the NCAs, without any knowledge of the Modernisation Groups works.[285] This option was rejected for not being capable of decreasing the total number of notifications, the Commission had concluded that it would merely redistribute them.[286] Other concerns were expressed by the European Parliament and the industry, which feared the decentralisation would lead to re-nationalisation of competition policy.[287] These concerns led to the addition of Art. 3 into Commission´s legislative proposal in 2000[288] which excluded the applicability of all national competition rules to any conduct captured by the Art. 101/102 TFEU, which affects trade between the Member States. However, a number of Member States were strongly opposing the wording of Art. 3 of the proposal.[289] This resulted in a compromise and the Commission modified Art. 3

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[281] Ibid., footnote 8.
[282] Ibid., p. 5.
[283] HAWK, B., 'EU "modernisation": a latter-day Reformation', *Global Competition Review 12,* August/September 1999.
[284] WILS, W., 'Ten Years of Regulation 1/2003 – A Retrospective ', *Journal of European Competition Law & Practice,* 2013, Vol. 4, No. 4., p. 1.
[285] WILS, W., 'Ten Years of Regulation 1/2003 – A Retrospective ', *Journal of European Competition Law & Practice,* 2013, Vol. 4, No. 4., p. 1.
[286] Ibid., para. 6.
[287] European Commission, White paper on modernization of the rules implementing articles 85 and 86 of the EC treaty, Commission programme no 99/027, [1999].
[288] Proposal for a Council Regulation implementing Articles 81 and 82 of the Treaty, COM(2000)582.
[289] WILS, W., 'Ten Years of Regulation 1/2003 – A Retrospective ', *Journal of European Competition Law & Practice,* 2013, Vol. 4, No. 4., p. 1.

into its final version, which stipulates a simultaneous application of national and EU law by the NCAs and national courts to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 101(1) TFEU, which may affect trade between the Member States and also to any abuse captured by Article 102.[290] The purpose of this obligation is to ensure the cases are argued on the basis of EU law from the beginning and also that the mechanisms of newly set-up European Competition Network, whose objective is to ensure consistent application of EU competition rules, are effective.[291]

[290] Regulation 1/2003, Article 3(1).
[291] Céline Gauer, Dorothe Dalheimer, Lars Kjolbye, Eddy De Smijter, Directorate-General Competition, unit A-2, Competition Policy Newsletter, 2003, No 1, Spring, p. 6.

ANNEX II. – TABLE OF COMMISSION´S DECISIONS

N.	Case	ART. TFEU	SO/PA	Start	Date of SO/PA	Market test notice	Adoption of CD	Time lag - months
1	DFB	101	PA	22.10.2003	18.06.2004	14.09.2004	19.01.2005	15,1
2	Coca-Cola	102	PA	29.09.2004	15.10.2004	26.11.2004	22.06.2005	8,9
3	Alrosa	102	PA	05.03.2002	14.01.2003	03.06.2005	22.02.2006	48,3
4	Premier league	101	SO	20.12.2002	20.12.2002	30.04.2004	22.03.2006	39,6
5	Repsol	102	PA	20.12.2001	16.06.2004	20.10.2004	12.04.2006	52,5
6	Cannes Extension agr.	101	PA	01.07.2003	23.01.2006	23.05.2006	04.10.2006	39,7
7	Distrigaz	102	SO	24.02.2004	24.02.2004	01.03.2007	11.10.2007	44,2
8	E.ON	102	PA	07.05.2008	27.05.2008	12.06.2008	26.11.2008	6,8
9	RWE	102	PA	20.04.2007	15.10.2008	05.12.2008	18.03.2009	23,2
10	Ships - IACS	101	PA	12.05.2009	12.05.2009	10.06.2009	14.10.2009	5,2
11	GDF Gas	102	PA	16.05.2008	22.06.2009	09.07.2009	03.12.2009	18,9
12	Rambus	102	SO	27.07.2007	27.07.2007	12.06.2009	09.12.2009	28,9
13	Microsoft	102	SO	21.12.2007	14.01.2009	09.10.2009	16.12.2009	24,2
14	EDF French electricity	102	SO	18.07.2007	19.12.2008	04.11.2009	17.03.2010	32,4
15	Swedish interconnectors	102	PA	01.04.2009	25.06.2009	06.10.2009	14.04.2010	12,6
16	E.ON gas	102	PA	22.10.2009	22.10.2009	22.01.2010	04.05.2010	6,5
17	BA/AA/IB	101	SO	09.04.2009	29.09.2009	10.03.2010	14.07.2010	15,4
18	ENI	102	SO	20.04.2007	06.03.2009	05.03.2010	29.09.2010	41,9
19	Visa	101	SO	06.03.2008	03.04.2009	28.05.2010	08.12.2010	33,6
20	Standard and Poor's	102	SO	06.01.2009	13.10.2009	14.05.2011	15.11.2011	34,8

21	IBM	102	PA	23.07.2010	01.09.2011	20.09.2011	13.12.2011	16,9
22	Siemens	101	PA	21.05.2010	16.12.2011	14.03.2012	18.06.2012	25,3
23	E-books	101	PA	01.12.2011	13.09.2012	19.09.2012	12.12.2012	12,6
24	Rio Tinto Alcan	102	SO	20.02.2008	11.07.2012	10.09.2012	20.12.2012	58,8
25	Reuters	102	PA	30.10.2009	19.09.2011	14.12.2011	20.12.2012	38,2
26	CEZ	102	PA	11.07.2011	26.06.2012	10.07.2012	10.04.2013	21,3
27	Continental/Lufthansa	101	PA	08.04.2009	10.10.2012	21.12.2012	23.05.2013	50,2
28	E-books II	101	PA	01.12.2011	01.03.2013	19.04.2013	25.07.2013	20,1
29	Deutsche bahn	102	PA	13.06.2012	06.06.2013	15.08.2013	18.12.2013	18,4
30	Visa II	101	SO	06.03.2008	30.06.2012	14.06.2013	26.02.2014	72,8
31	Samsung	102	SO	30.01.2012	21.12.2012	18.10.2013	29.04.2014	27,0
32	Air France/KLM	101	PA	23.01.2012	26.09.2014	23.10.2014	12.05.2015	7,0
33	BEH Electricity	102	SO	27.11.2012	12.08.2014	19.06.2015	10.12.2015	39,9
34	Container Shipping	101	PA	21.11.2011	26.11.2015	16.02.2016	07.07.2016	56,3
35	CDS - Information market	101	SO	20.04.2011	01.07.2013	29.04.2016	20.07.2016	63,9
36	Paramount	101	SO	13.01.2014	23.07.2015	22.04.2016	26.07.2016	30,8