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COMMITMENT DECISIONS IN ANTITRUST CASES

-- Background paper by the Secretariat --

This document was prepared by the OECD Secretariat to serve as a background note for the roundtable on commitment decisions in antitrust cases taking place at the 125th meeting of the OECD Competition Committee on 15-17 June 2016.

The opinion expressed and arguments employed herein do not necessarily reflect the official views of the Organisation or of the governments of its member countries.

More documentation related to this discussion can be found at www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm

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COMMITMENT DECISIONS IN ANTITRUST CASES

Background paper by the Secretariat¹

Abstract

Over the last decade, an increasing number of competition authorities have obtained powers to adopt commitment decisions or other forms of negotiated/consensual termination of cases. The terminology used varies depending on the jurisdictions: some refer to these tools as commitment decisions; others as consent decrees, consent orders, or (written) undertakings. They all entail legally binding commitments voluntarily submitted to a competition authority by parties in an antitrust investigation with the objective of eliminating the grounds for the enforcement action to continue. Some competition authorities have made extensive use of these tools.

Resolution through commitment decisions or other negotiated remedies can be very attractive for competition authorities, companies and third parties alike, although some authors have raised concerns with an excessive use of commitment decisions as opposed to full-fledged infringement decisions. This paper finds that the majority of competition authorities in OECD member countries (29 plus the EU) have powers to accept commitments in antitrust cases and thereby to terminate the investigation, and that some of them have made extensive use of this possibility. However, there are still different procedural rules and requirements that agencies must meet before they can accept commitments. The paper reviews arguments in favour and against the use of commitment decisions as they are presented in the literature. It also discusses judicial reviews of commitment decisions and touches upon the relationship between commitment decisions and damages actions.

¹ This paper was prepared by Antonio Capobianco and Satoshi Ogawa of the OECD Competition Division with comments from their colleague Despina Pachnou.

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1. Introduction

1. Many competition authorities (both in the OECD and outside) have been granted in recent years powers to accept remedies from the parties to an antitrust proceeding to resolve cases raising anti-competitive concerns. Such remedies are typically relied on in investigations for alleged abuses of a dominant position (or unilateral conduct cases) and investigations of vertical anti-competitive agreements. The terminology used in different countries to refer to these forms of negotiated remedies leading to the termination of an antitrust investigation varies: some refer to them as commitment decisions, others as consent decrees, consent orders, or (written) undertakings. This paper will refer to all such negotiated remedies as “commitment decisions”.

2. This paper (i) takes stock of the legislative status in relation to commitments decisions for antitrust cases in OECD member countries and in other jurisdictions (e.g., requirements for adopting remedies, the number of cases, types of remedies accepted and industries in which they are more common) (Chapter 2); (ii) reviews the main arguments in favour or against the use of commitment decisions (Chapter 3). The final part of the paper (Chapter 4) offers some concluding remarks.

3. The following main points emerge from this paper;

- Many competition authorities have the power to adopt commitment decisions which allow them to terminate investigations in antitrust cases based on structural and/or behavioural remedies offered by the parties. Except for the United States, the adoption of these powers for competition authorities is a relatively recent trend which developed over the last 10 years; the trend is common to OECD and non-OECD countries.
- Reliance on commitment decisions to close non-cartel antitrust investigations has increased significantly in recent years in a number of jurisdictions. This trend can be explained by the fact that commitment decisions do not require extensive and long-lasting investigations but offer a relatively fast and flexible means to address antitrust concerns compared to full-fledged investigations.
- Procedures to adopt commitment decisions in various jurisdictions have common features. These include: i) the competition authority conducts a preliminary assessment of the concerns related to the conduct under investigation; ii) the submission of commitments by the companies is voluntary; iii) the commitments offered are market tested (i.e. the summary of the case and of the proposed commitments are made public to give third parties an opportunity to submit observations); iv) the final commitments are included in a formal decision of the agency, making them binding on the company that offered them; and v) if commitment negotiations fail, the competition authority can always resume the investigation to determine if there has been a competition infringement and, if that is the case, to impose an appropriate level of fines.
- There are, however, important differences in the legislation and practices on commitment decision. They concern the procedural steps, the requirements and conditions that agencies must meet to adopt such decisions. Divergences might hamper effective competition law enforcement in cases involving more than one jurisdiction and requiring co-operation or co-ordination between several competition authorities seeking the resolution of the same case through commitments.
- Procedural economy and efficiency of the enforcement action are the most important reasons for agencies to rely on commitment procedures to close investigations. Efficiencies benefit both the agency, which can resolve cases faster and consequently maximise the use of its scarce resources, as well as the investigated companies who can avoid long investigations and exposure to the risk of large fines and subsequent damages actions.

- However, an extensive use of commitment decisions (especially if this happens to the detriment of traditional infringement decisions) may have downsides. These include reduced legal certainty, limited judicial review and low precedential value of commitment decisions which can affect development of competition law and render private actions more difficult.
- Some of these downsides could be addressed by agencies through guidance on when they will rely on commitments decisions rather than pursue an infringement case, and by including more details about the facts of the case and competition concerns that they have in the commitment decision itself.

2. Commitment decisions – An overview

2.1 *Definition and differences with other enforcement tools*

4. Traditionally, antitrust proceedings could only end in two ways. The agency could either find sufficient evidence of an infringement of the competition law in which case it would issue a cease and desist order and impose appropriate fines to deter future similar behaviour; or it could close the case with a non-infringement decision. Today most competition authorities have a third option: they can accept remedies (or commitments) proposed by the parties to address the initial concerns identified by the agency. If accepted, the commitments are binding on the party who submitted them and no competition infringement is established.

5. There is no uniform terminology for such consensual, early termination procedures in competition regimes. They are called “commitment decisions” in the European Union (EU), where they were introduced by Regulation 1/2003,¹ and in most of the EU member countries. The US Department of Justice (DOJ), the Korea Fair Trade Commission (KFTC) and the Israeli Antitrust Authority for example refer to them as “consent decrees”, while the US Federal Trade Commission (FTC) calls them “consent orders”. Other jurisdictions refer to them as “undertakings” or “written undertakings”; this is especially the case in some non-OECD jurisdictions (e.g. Zambia and Malaysia). This paper will refer to all such negotiated remedies as “commitment decisions”.²

6. In most jurisdictions, parties cannot offer commitments in every case. The European Commission, for example, considers that if the nature of the infringement calls for a fine it would not be appropriate to terminate the investigation accepting a remedy.³ Consequently, the Commission does not apply the commitment procedure to secret cartels that fall under the Leniency Notice.⁴ Many member states of the European Union follow the same approach.⁵ Some countries also exclude the possibility to accept commitments in serious abuse of dominance cases.⁶ Criteria that are often considered when deciding if to accept a remedy/commitment are (i) the nature of the suspected infringement, (ii) the nature of the commitments offered and their ability to quickly and effectively solve the competition concerns, and (iii) the need to ensure sufficient deterrence. Agencies do not only consider the interests of the parties involved in the investigation but also take into consideration the interests of third parties and of the market in general.

7. Despite the fact that commitment decisions are relatively recent for many jurisdictions, consensual or negotiated enforcement of competition law has a long history. The first consent decree was entered by the DOJ in 1906 and has since been a key enforcement tool in the United States.⁷ In the European Union, this tool was introduced much more recently in 2004; Article 9 of Regulation 1/2003 provides the possibility for the European Commission to accept commitments in antitrust cases (with the exception of cartel cases) and formalise them in an administrative decision. This provision was inspired by the US model of consent decree (DOJ) or consent order (FTC).⁸

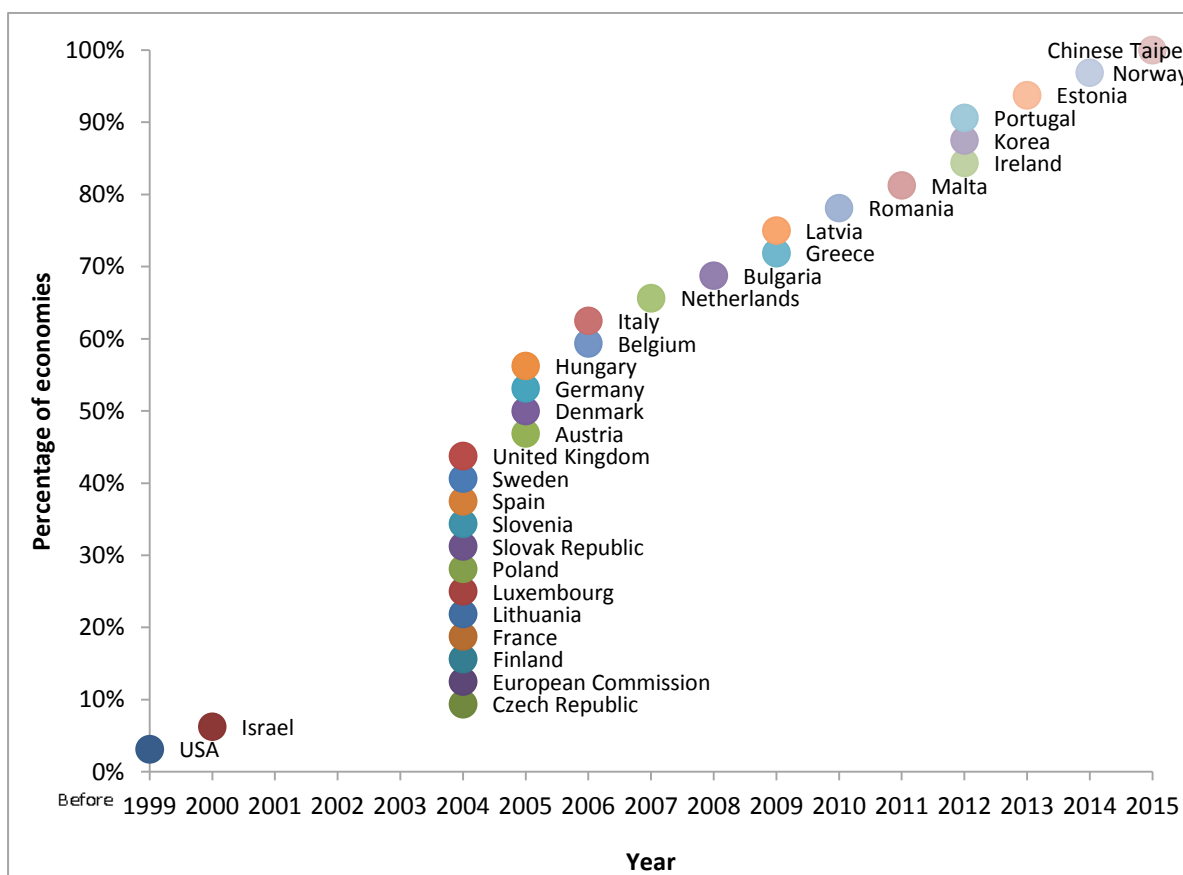
Box 1. Consent decrees/orders and commitments⁹

There are three major differences between consent decrees/orders in the United States and commitment decisions in the EU:

- i) Negotiated remedies in the US are applicable to both merger and non-merger cases, while commitment proceedings in the EU are only available to non-merger cases with the exception of cartel cases;
- ii) A consent decree with the DOJ requires approval by the court to come into effect, whereas commitment decision are not subject to court approval; and
- iii) Commitment decisions do not usually include monetary compensation (such as disgorgement of illicit gains), in contrast to a consent decree.¹⁰

8. In the last decade, many countries (and not only European countries) have introduced commitment decisions as enforcement tools. The graph below shows when powers to adopt commitment decisions were introduced in selected OECD countries and in countries that enjoy Associate/Participant status in the OECD Competition Committee. There are still OECD jurisdictions which do not possess such powers. The most notable examples are Japan,¹¹ Switzerland¹² and Turkey.¹³

Graph 1 – Introduction of powers to adopt commitment decisions (by year)



Source: Prepared by the Secretariat based on publicly available information.¹⁴

Note: Not all countries in which competition authorities have the power to adopt commitment decisions are shown in the graph due to the limited availability of public information on the date of the introduction of such powers into every competition law regime.

9. Commitment proceedings have a number of common features.¹⁵ Typically, these are the common procedural steps that most agencies must follow before they can accept and formalise commitments in a decision:

- i) Commitments can be proposed/accepted if there is an antitrust investigation pending, or if the agency has done an initial/preliminary assessment which has uncovered potential competition concerns. Such concerns must be communicated to the parties involved so that they can make a decision as to whether to initiate commitment negotiations.
- ii) The decision to submit commitments in response to concerns raised by an agency is a voluntary one by the company. Agencies cannot require companies under investigation to engage in commitment discussions.
- iii) Once commitments are submitted, the agency proceeds to a ‘market test’ or to the publication of a summary of the case and of the commitments so that interested third parties can submit observations within a fixed time limit. Based on the results of the market test, further discussions with the parties can take place with a view to amend eventually the commitments initially proposed.
- vi) Once the agency is satisfied that the commitments offered adequately address its competition concerns, it adopts a formal decision which renders the commitment binding and eliminates the grounds for continuing any enforcement action.¹⁶ Most agencies make commitment decisions public.
- v) It is up to the agency to monitor compliance with the commitments. In case of non-compliance the agency can reopen the investigation and/or impose fines; most agencies (but not all)¹⁷ can also impose a separate sanctions on the company for the breach of the binding commitments.

Box 2. Commitments and settlements

Together with the spreading of commitment decisions, there has been an increase in use of other early termination tools. Many jurisdictions especially in the European Union have conferred upon the competition authority the power to settle cases.¹⁸ Like commitments, settlement decisions allow the agency to terminate the investigation early on and to save investigative resources. However, settlements also pursue other policy objectives. Generally they reward cooperation from the investigated parties with a reduction of the fine that would have been otherwise imposed by the agency¹⁹ and they create and sustain momentum in the investigation of other conspirators. In some jurisdictions, settlements also offer “finality” in the sense that they provide certainty as to the outcome of the investigation.

There are important differences between settlement procedures and commitment procedures:²⁰

- i) In many jurisdictions, settlements are applicable only to cartels;
- ii) To enter into a settlement negotiation the agency is typically required to establish an infringement of the competition law (therefore settlement procedures need a full investigation, unlike commitment decisions);
- iii) Settlements require the company to admit liability for the infringement, where commitment usually do not require to do so;²¹
- iv) Settlements still require the imposition of a fine (but with a reduction in recognition of the cooperation with the agency),²²
- v) Settlements constitute legal precedents, in the sense that the establishment of the infringement has a precedential value and that it can be used for establishment of recidivism or for purposes of filing a private action for damages.

2.2 Availability of powers to accept commitments

10. Based on information publicly available, of the 34 OECD jurisdictions plus the EU, 30 jurisdictions (86%) have powers to adopt commitment decisions in antitrust cases. This includes the European Commission and the competition authorities of all the member states of the EU.²³ Other OECD jurisdictions which use commitment decisions are for instance the United States and Korea.

Table 1: Availability of commitment decisions

Status	#	Commitment decisions and other negotiated remedies		
		Yes	No	Unclear
OECD Members, and the EU	35	30 (86%)	3 (9%)	2 (6%)
Associate/Participants	16	6 (38%)	6 (38%)	4 (25%)
TOTAL	51	36 (71%)	9 (18%)	6 (12%)

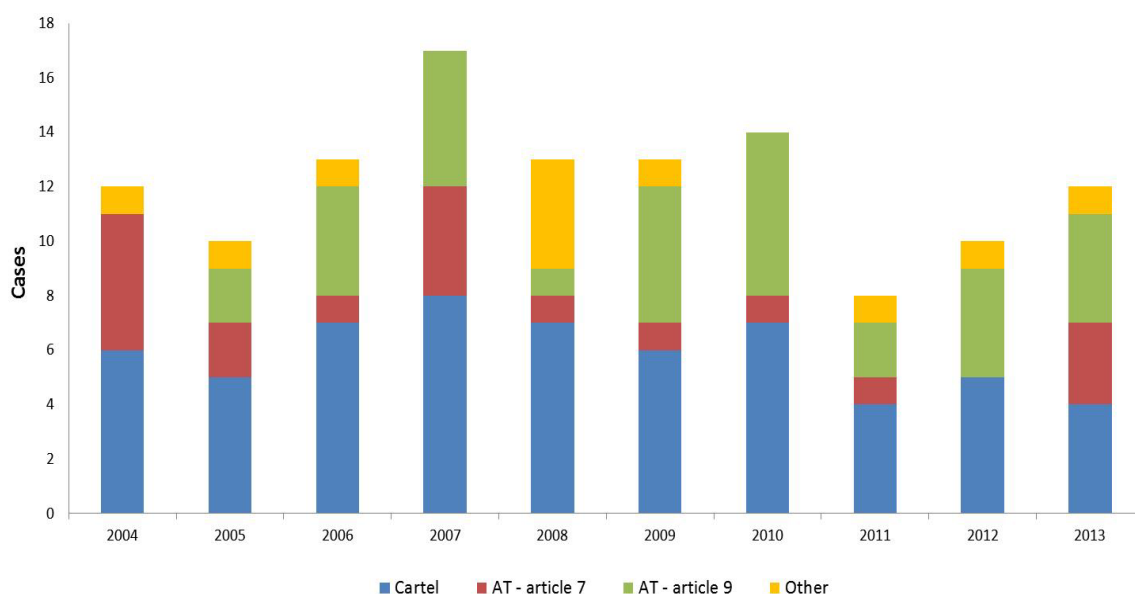
11. Outside the 34 OECD jurisdictions, at least 6 countries out of 16 (1 associate –Romania- and 15 participants in the Competition Committee), can adopt commitment decisions or other similar proceedings (i.e. 38%). There are several additional non-OECD jurisdictions with powers to adopt commitment decisions (for instance, the People’s Republic of China, Croatia, Malaysia and Serbia).

2.3 The use of the powers to issue commitment decisions

12. A review of the practice of competition authorities in OECD and non-OECD countries shows significant use of commitment decisions as a way to close antitrust investigations. This section tries to offer an overview on the importance that commitment decisions have in the enforcement practice of competition agencies. The conclusions however largely depend on the publicly available information about individual jurisdictions which can vary significantly.

13. The United States is the jurisdiction which relies most on negotiated remedies (consent decrees/orders).²⁴ The DOJ entered into its first consent decree in *United States v. Otis Elevator Company* in 1906. By the 1950s, 87% of all civil antitrust cases brought by the DOJ were settled by consent decrees and by the 1980s the percentage had reached 97%. Percentages remained relatively constant at above 90% thereafter. The DOJ resolved nearly its entire antitrust civil enforcement docket by consent decree from 2004 to present. The FTC has experienced a similar increase in the use of consent orders (first adopted in 1974) in its enforcement activity. FTC consent orders more than tripled from 1992 to 1995. Since 1995, the FTC has closed 93% of its competition cases by consent orders.

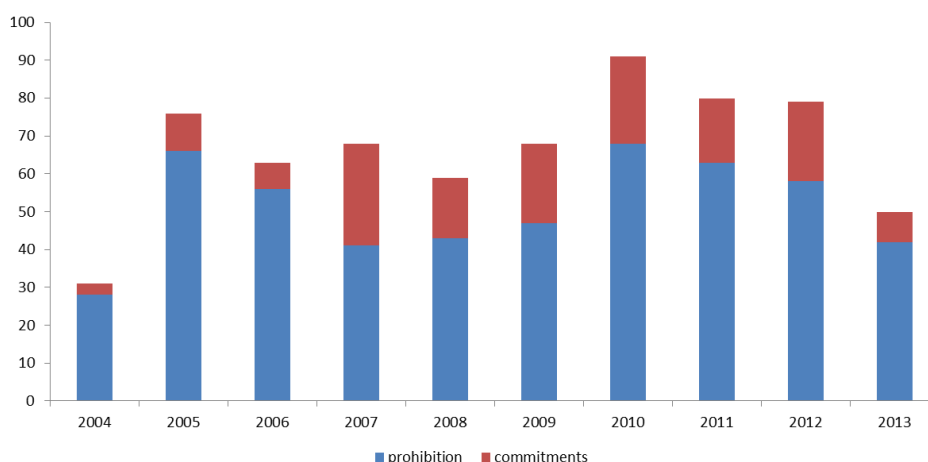
14. According to the European Commission, between May 2004 and February 2014, the Commission adopted 34 commitment decisions and 19 decisions establishing an infringement of the competition provisions in the Treaty on the Functioning of the European Union (TFEU), excluding all cartel decisions.²⁵ This means that over 60% of the cases concerning non-cartel antitrust cases have been closed by way of commitment decisions. Wils (2015) points out that, according to historical statistics within the EU (i.e., comparing case resolutions under Regulation 17/1962 and under Regulation 1/2003), the percentage of cases terminated by commitments (informal commitments under Regulation 17/1962) rather than by infringement decisions appears to be stable.²⁶

Graph 2 – Commitments and infringement decisions of the European Commission

Source: European Commissions (2014b)

15. Within the EU, there were over 150 commitment decisions between May 2004 and December 2013, accounting for 23% of all decisions by national competition authorities (NCAs).²⁷ This percentage is much higher in some EU jurisdictions. In France, after 2010, more than half of abuse of dominance cases were resolved thanks to commitments.²⁸ In Italy there have been over 60 commitment decisions and from 2009 to 2014 nearly half of the cases were closed through commitment decisions.²⁹ In Germany, the Federal Competition Office (Bundeskartellamt), has concluded a considerable number of cases accepting commitments by the parties.³⁰ In Greece, Decision 588/2014 concerning the terms, conditions and the procedure for the acceptance of commitments proposed by companies led to a considerable increase in the number cases resolved through commitment decisions. The Polish Competition Authority is among the national competition authorities within the EU with the highest number of commitments. Following the introduction of powers to accept commitments, over 70 decisions were adopted between 2004 and 2010.³¹ Spain³² and Croatia³³ report similar use of commitment decisions.

**Graph 3 – Infringement and commitment decisions by NCAs in Europe
(May 2004 - December 2013)**



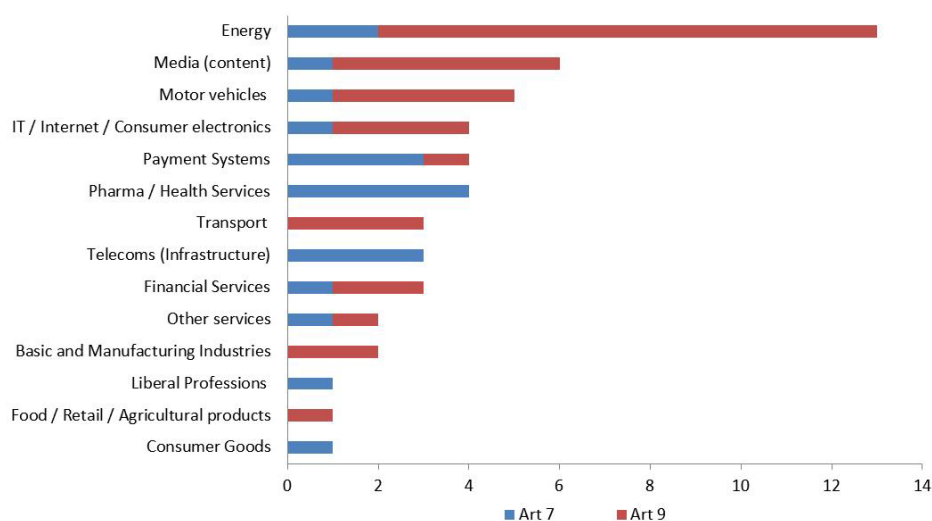
Source: European Union (2014b)

2.4 Sectors and conducts most subject to commitment decisions

16. One of the main advantages of resolving antitrust cases with commitments is procedural economy and quicker restoration of effective competition in markets at stake. These advantages may lead agencies to prefer the use of commitments in fast-moving industries (such as the digital and IT sectors) where traditional enforcement may not be fast enough to reflect quick changes in the industry thus making the final decision obsolete or potentially redundant. Commitment decisions are significantly more flexible than infringement decisions. They can be adopted for a specified period of time at the end of which the agency may re-assess the competitive situation and decide if to renew the commitments, amend them in light of the new market context or terminate them. They may also be reviewed upon request of the parties or on the initiative of the agency when there has been a material change in the facts on which the decision was based.³⁴

17. There seems to be no clear correlation between specific sectors and the use of commitment decisions. In case of the European Commission, for example, during the period from 2004 to 2013, commitment decisions have been adopted most often in the energy sector (11 out of around 30 commitment decisions), followed by media (5 decisions) and motor vehicles sectors (4 decisions).³⁵ Looking at the practice of European NCAs, commitment decisions were frequently used in the energy, media, payment systems and telecommunications sectors.³⁶ More recently, the European Commission and other European NCAs have adopted commitment decisions in the IT and digital sectors, exemplified by the Rambus, Microsoft, E-books, Samsung and Online Hotels Booking cases.³⁷

**Graph 4 – Infringements and commitment decisions by the European Commission
Number of decisions³⁸ by sector (2004 - 2013)**



Source: European Union (2014b)

18. In the European Commission's practice between May 2004 to March 2014 there have been 54 antitrust decisions (excluding cartels) of which 34 were commitment decisions: 25 decisions related to unilateral conduct cases, 18 of which were commitment decisions; 29 decisions related to non-unilateral conduct cases, 16 of which were commitment decisions.³⁹ Based on these limited statistics, unilateral conduct cases seem to lend themselves more to be concluded through remedies or commitments. The complexity of unilateral conduct cases, the difficulties with balancing pro- and anti-competitive effects of most unilateral conduct, and the incentives of large companies to avoid significant fines and the negative reputation associated with an infringement decision can be some of the reasons why commitments decisions are used more frequently in unilateral conduct cases.

2.5 *The types of remedies accepted in commitment decisions*

19. Competition agencies have a great degree of discretion in deciding the types of remedy they are prepared to accept in order to meet the competition concerns that they have identified. In general, the principles that apply to remedies in other enforcement areas (such as merger control) apply also to commitment decisions. In antitrust as in merger cases, agencies aim for commitments that are unambiguous, self-executing and tailored to the nature of the competition problem.

20. Commitments can be *behavioural* if they concern the conduct of the company (e.g. a supply obligation), or *structural* if they lead to changes to the structure of the market (e.g. the divestiture of assets or of part of a company to create a new competitor). In principle, agencies can accept both types of commitments. Experience has shown that structural commitments tend to be more effective than behavioural ones, because they are clearer, usually one-off, more easily enforceable and do not require ongoing monitoring. However, behavioural commitments seem to have been more frequently used in the context of commitment decisions than structural ones. The decision as to which type of remedy to accept is made on a case-by-case basis, and the agency assesses whether the commitments proposed by the company effectively solve the competition problem identified. In some cases, a combination of structural and behavioural remedies will be the most appropriate remedy.

21. Some examples of structural commitments include:

- Divestment (or transfer) of part of business or capacity/assets to suitable third party(ies) – to address competition concerns caused by restricting capacity or preventing access to the market in abuse of dominance cases;⁴⁰
- Divestiture (or transfer) of shares owned by a vertically integrated company in companies that are active in one or more industry levels (ownership unbundling) – to address competition concerns on market foreclosure by refusal to allow access to essential facilities;⁴¹
- Release of certain slots or other entry-facilitating measures in airline cases – to address foreclosure and remove barriers in such markets.⁴²

22. Some examples of behavioural commitments include:

- Prohibition or modification of exclusivity clauses and other terms restricting competition in supply contracts (e.g., non-compete clauses, most-favoured nation clauses, territorial protection clauses), or limiting the duration of such contracts - to address competition concerns on market foreclosure through such terms;⁴³
- Providing information or inputs to new entrants/competitors which are necessary to effectively enter into a market (or into neighbouring markets) – to address competition concerns on market foreclosure through refusing to provide such information/inputs or refusal to deal in general;⁴⁴
- Prohibition of publication of information about future market behaviour or other sensitive information which might lead to market transparency and anti-competitive conduct or collusion – to address competition concerns caused by such publication;⁴⁵
- Reduction in prices, setting price caps and/or taking measures to ensure transparency, predictability or fairness of prices – to address competition concerns on excessive or discriminatory and unreasonable prices, or exclusionary abuses;⁴⁶
- Change in the pricing system to open up the market for third parties – to address competition concerns on foreclosure caused by margin squeeze by a dominant company;⁴⁷
- Untying or unbundling – to address competition concerns on tying or bundling of distinct products or services in abuse of dominance cases;⁴⁸
- Commitment not to file a claim seeking injunctive relief concerning standard essential patents against licensees – to address abuses of dominance through injunctions;⁴⁹
- Change in supply chain or distribution systems to increase flexibility and transparency (e.g., establishment of objective and non-discriminatory selection criteria) or termination of systems that lead to price increase/maintenance – to address competition concerns on price increase or maintenance in distribution.⁵⁰

Box 3. Example of commitment decisions in selected jurisdictions

Belgium – In Belgium, the competition authority has concluded two antitrust cases with commitment decisions, both of which were abuse of dominance cases (2005 and 2006). There has been no commitment decision since then. In August 2006, the Belgian competition authority approved the commitments offered by Banksys in the Belgian electronic payments market for applying excessive and discriminatory fees to small companies. In November 2005, the Belgian competition authority accepted the commitments offered by Coca-Cola Enterprises Belgium for an abuse of dominance in the Belgian market consisting in the application of discriminatory sales conditions. Coca-Cola offered commitments to terminate such discriminatory practices.

Korea – The KFTC obtained in 2012 powers to approve consent decrees submitted by companies as a result of the Korea - US free trade agreement. Since then the KFTC has entered into two consent decrees, both of which involved the IT sectors. In March 2014, the KFTC approved the first decree proposed by Naver and Daum, two domestic Internet portal sites, for alleged abuse of dominance position under the Korean competition law. In November 2014, the KFTC also approved a consent order proposed by SAP Korea, a global software company, involving termination clauses in its license and maintenance policies.

Portugal – The Portuguese competition authority (PCA) obtained powers to issue commitment decisions in 2012 and since then has adopted two such decisions. In June 2015, the PCA accepted commitments to end a case concerning the contract of Controlinveste Group to license broadcasting and multimedia rights for football matches of the First and Second Portuguese Football Leagues. In this case, the PCA considered that the agreement foreclosed the market because of the excessive duration of the contracts and the first refusal rights. Controlinveste committed not to include exclusivity clauses in future agreements for more than three years and a first refusal right for seasons beyond the term of the agreements. In March 2015, the PCA accepted Peugeot Portugal's commitments and terminated its investigation of contracts between Peugeot and its customers where customers lost the right to the manufacturer's guarantee when they took their cars for maintenance or repair to independent repair shops. Peugeot offered to change all the contracts to allow customers to take their cars to independent repair shops for maintenance or repair operations without losing the right to the manufacturer's guarantee.

United States – Recent consent decrees/orders in the US related to intellectual property rights after the two agencies raised concerns about the increase of patent litigation and possible misuse of standard-essential patents (SEPs) rights. For instance, the FTC ended its investigation into Google's subsidiary *Motorola* after Google agreed to a consent order that prohibits it from seeking injunctions against a licensee willing to follow a fair, reasonable, and non-discriminatory (FRAND) determination process.⁵¹ To settle charges that it violated Section 5 of the FTC Act by engaging in unfair methods of competition and unfair acts or practices related to the licensing of SEPs for cellular, video codec, and wireless LAN standards, Google agreed to allow competitors access on FRAND terms to patents on critical standardised technologies needed to produce popular devices such as smart phones, laptop and tablet computers, and gaming consoles.

European Union – Patent related commitments were accepted by the European Commission in the *Samsung* case.⁵² This was a case of commitments offered in the context of a standard setting case where the Commission claimed that it is anti-competitive to seek to exclude competitors from the market by seeking injunctions on the basis of SEPs if the licensee is willing to take a licence on FRAND terms. In these circumstances, the seeking of injunctions can distort licensing negotiations and lead to unfair licensing terms, with a negative impact on consumer choice and prices. According to the commitments offered by Samsung (a SEPs holder) (i) it will license its SEPs; (ii) it will do so on FRAND terms; and (iii) it will not seek injunctions in Europe on the basis of its SEPs for smartphones and tablets against licensees who sign up to a specified licensing framework. Under this framework, any dispute over what are FRAND terms for the SEPs in question will be determined by a court, or if both parties agree, by an arbitrator. The commitments therefore provide a "safe harbour" for all potential licensees of the relevant Samsung SEPs. Indeed, potential licensees that sign up to the licensing framework will be protected against SEP-based injunctions by Samsung.

In 2007, the Commission objected to *Rambus* that the company had abused of its dominant position on the digital random access memory (DRAM) market where Rambus controlled more than 95% of the sales. The Commission complained that Rambus had engaged in a so-called "patent ambush", intentionally concealing that it had patents and patent applications which were relevant to technology used in the JEDEC standard for DRAMs, and subsequently claiming royalties for those patents. According to the Commission, concealing information in order to charge higher prices could amount to an abuse under Article 102 TFEU. To address the Commission's concerns, Rambus offered to put a worldwide cap on its royalty rates for products compliant with the JEDEC standards for five years. These commitments were accepted by the Commission and made legally binding in 2009.⁵³

2.6 Differences in proceeding for commitment decisions

23. There are important differences in the various commitment procedures across jurisdictions.⁵⁴ While this paper does not offer a comprehensive comparative analysis of the legal systems on commitment decisions across OECD and non-OECD countries, it is nevertheless possible to detect some notable differences:

- **Discretion on when to accept commitments.** The degree of discretion which agencies enjoy when deciding whether to accept commitments or to proceed with an infringement decision differs among jurisdictions. For instance, the European Commission has a wide discretion in this regard.⁵⁵ Several competition authorities, like the French Autorité de la Concurrence, the Italian Autorità Garante della Concorrenza e del Mercato (AGCM), the CMA in the United Kingdom, and the Hellenic Competition Commission (HCC) in Greece have limited their discretion by publishing detailed guidelines on commitment procedures and decisions with the purpose of increasing transparency and predictability.

Box 4. Examples of Guidelines on commitment decisions in selected jurisdictions

Some authorities have published guidelines on commitment decisions. Such policy guidance typically elaborates on the procedural steps and requirements for adopting commitment decisions, and clarifies under which circumstances the agency will consider the commitments offered by the parties as appropriate. Below are some examples of commitment decisions.

In **France**, the Notice on Competition Commitments issued by the French competition authority on 2 March 2009 clarifies the procedural aspects related to commitment decisions. The Notice sets out the scope of the commitment procedure, the procedural steps to be implemented and the decision-making process of the authority. Commitment procedures are applicable to competition concerns that can be quickly addressed and that they are not applicable to serious forms of collusion such as cartels and certain types of abuses which might cause significant damage to the economy. The Notice states that commitments must be relevant, credible and verifiable, and proportionate to the competition concerns identified by the agency in its preliminary assessment. The Notice details the procedural steps for the offer of commitments, the market test, the access to the case file, and the commitment negotiations.

In **Italy**, the AGCM published a Notice detailing the procedure and the timing for proposing and accepting commitments in antitrust cases.⁵⁶ The Notice clarified that parties to an antitrust infringement have 45 days from the start of the investigation to propose remedies, although in exceptional circumstances the agency reserves the right to consider late commitments. Remedies will be subject to a market test to seek the views of third parties. The agency has 30 days to accept the remedies and publish a commitment decisions. The Notice confirm that the agency has a wide discretion if to accept remedies or continue with the infringement procedure. If it decides to engage in commitment negotiations, it can accept remedies which are likely to be implemented fully and in a timely fashion; they need to be easily verifiable and must be suitable to effectively eliminate the concerns that led the agency to open the investigation

In the **United Kingdom**, the Guidance on the CMA's investigation procedures states that the CMA must be satisfied that the commitments offered fully address its competition concerns. The Guidance clarifies that the decision to accept commitments is at the CMA's discretion, but also makes it clear that the CMA is likely to consider it appropriate to accept commitments only in cases where the competition concerns are readily identifiable, will be fully addressed by the commitments offered, and the proposed commitments can be implemented effectively and, if necessary, within a short period of time.⁵⁷ The Guidance also states that the CMA is very unlikely to accept commitments in cases involving secret cartels between competitors or a serious abuse of a dominant position. The Guidance further sets out procedural steps and timeframes for commitment negotiations.

In **Greece**,⁵⁸ the Hellenic Competition Commission (HCC) adopted the Decision No. 588/2014 defining the terms, conditions and procedures for the acceptance of commitments offered by companies to cease possible infringements of the competition law. The Decision clarifies that the HCC enjoys wide discretionary powers to decide whether to start a procedure for evaluating and accepting commitments proposed by interested parties. Still, it makes it clear that commitments are appropriate in cases where the competition concerns (a) are readily identifiable (b) are fully addressed by the commitments offered and no new concerns emerge and (c) may be resolved efficiently and within a short period of time. Moreover, commitments are appropriate when they contribute to saving resources of the HCC and to improving the efficiency of the procedure. Companies are encouraged to signal their interest in discussing commitments as early as possible. It is also made clear that the HCC will not accept commitments in cases involving serious restrictions of competition and/or serious abuses of dominance, nor in horizontal agreements falling within the leniency program. The Decision also introduces a procedure of consultation on the proposed commitments and offers guidelines to companies on the procedures to follow, on the relevant timeframes, as well as on the terms and conditions for submitting commitments.

- **Coverage of commitment procedures.** In many countries, for instance in the European Commission and most of the EU member countries, commitment proceedings are not applicable to serious infringement of competition laws such as hard-core cartels; some jurisdictions also exclude the possibility to consider remedies for serious infringements of unilateral conduct/abuse of dominance provisions. However, some competition authorities use commitment decisions in cartel cases⁵⁹.
- **Time limits.** Many competition law regimes do not have a fixed timeline for commitment discussions. Some agencies, however, have deadlines for commitment procedures. Typically the deadline for proposing commitments or for starting commitment negotiations is the issuance by the agency of the Statement of Objections (SO) or of a similar document addressed to the companies stating the case against them. Because some authorities only accept commitments pre-SO and others accept commitments also post-SO, it might be hard for agencies investigating the same conduct to co-ordinate offers for commitments made in several jurisdictions.⁶⁰ This was exemplified in Online Hotel Booking cases in the EU, where the European Commission co-ordinated the investigations of several competition authorities within Europe with the aim of issuing consistent commitment decisions.⁶¹

Box 5. The Online Hotel Booking platform cases within the EU

The parallel investigations on the online hotel booking platforms within the EU offer an interesting example of international co-operation and co-ordination in commitment procedures. This was the first case where several European NCAs coordinated commitment procedures. The investigations were closed with commitments by most NCAs involved except for Germany and Switzerland which decided to adopt an infringement decision.

The investigations concerned price parity clauses in online hotel booking platform contracts with hotels⁶². They were mainly led by France, Italy and Sweden and involved more than 10 European NCAs. These proceedings were co-ordinated within the European Competition Network (ECN) by the European Commission.⁶³ In December 2014, the French, Italian and Swedish NCAs simultaneously announced that Booking.com has offered commitments and that they were launching a markets test. Booking.com's commitments offered in the three NCAs were said to be identical. All three NCAs adopted commitment decisions against Booking.com in April 2015⁶⁴. In June 2015 Booking.com announced that it would apply the commitments offered in the three jurisdictions to hotels throughout Europe. As a consequence, the Danish Competition Authority closed its investigation and the Hellenic Competition Commission announced that it would not open a formal investigation following these recent developments. Booking.com has also agreed on commitments with the Irish Competition and Consumer Protection Commission to address competition concerns raised by parity clauses.

In the **United Kingdom**, the OFT (the predecessor to the CMA) accepted commitments from Booking.com and other companies on 31 January 2014. However, this decision was overturned by the Competition Appeal Tribunal (CAT) in September 2014 following an appeal by Skyscanner, a competing price comparison website.⁶⁵ The case was referred back to the agency (now the CMA) which reopened the investigation. It announced its decision to close the investigation in this case on 16 September 2015.⁶⁶

In **Germany**, on 20 December 2013, the Bundeskartellamt prohibited HRS from continuing its 'best price' clause and ordered to remove the clause from its contracts.⁶⁷ The Düsseldorf Higher Regional Court rejected HRS's appeal against the decision and confirmed the prohibition of HRS's 'best price' clauses.⁶⁸ The other online hotel booking platform, Booking.com, maintained its 'best price' clauses, including not only the so-called "wide best price clauses"⁶⁹ but also the "narrow best price clauses".⁷⁰ The Bundeskartellamt prohibited Booking.com from using its narrow best price clauses, which are not prohibited in commitments with other European NCAs, and ordered to completely delete the clauses from its contracts in Germany.

- **Procedural steps and procedural rights.** Jurisdictions apply procedural rules that may affect the procedural rights of the parties involved in a commitment proceeding. The French and Belgian competition authorities for example have an obligation to inform the complainants and interested third parties of the initiation of the commitment proceeding.⁷¹ The timing when the competition concerns identified by the agency are shared with the parties differs from country to country, affecting the timing of possible commitment negotiations.
- **Monitoring compliance.** Similarly, the experiences with monitoring compliance with commitments can be different across jurisdictions and across types of cases.⁷² Some competition authorities have established a monitoring unit precisely for this purpose. Others prefer to include in the commitment decisions an obligation to submit regular reports to the agency on the status of implementation of the remedies; other rely on independent trustees for monitoring compliance.⁷³

Box 6. Examples of monitoring methods in commitment decisions

Monitoring of commitments can be costly and burdensome and may cancel out the procedural economies in terms of resources and duration of proceedings. This is the reason why agencies have a strong preference for one-off structural over on-going behavioural remedies. The experience in monitoring compliance with merger remedies offers some good lessons of how competition authorities can minimise monitoring costs:⁷⁴ self-monitoring and the appointment of independent trustees are the most used monitoring methods also in commitment decisions but there is a variety of ways in which compliance with the commitments (especially behavioural ones) can be monitored. These are some example of monitoring methods included in binding commitment decisions by competition authorities:

- i) appointment of an independent monitoring trustee/agency⁷⁵ (see, for example, the Samsung case of the European Commission);⁷⁶
- ii) obligation on the company to regularly submit status report describing the status of compliance with the commitments or the measures taken to comply with them (see, for example, the Coca-Cola case of the European Commission);⁷⁷
- iii) status hearings on the compliance with the commitments (in the presence of interested parties) (see, for example, the Booking.com cases in France);⁷⁸
- iv) setting-up a specialised unit within the competition authority to monitor commitments (see, for example, the case of the CMA in the United Kingdom and Spain);
- v) obligation to retain relevant documents showing compliance with the remedies or allowing access to the company's employees and records.

The market can also monitor compliance with the commitments. Interested third parties and complainants in the original proceedings who have knowledge on the behaviour of the companies in the market have an incentive to monitor anti-competitive activities or infringements of the commitment decision. They can play an important role in monitoring compliance with the commitments, by submitting information on possible breaches to the competition authority.

- **Breach of commitments.** In case of breach of commitments, competition authorities can always reopen the infringement and continue the investigation which may lead to an infringement decision and fines. Most (but not all) competition can also impose monetary sanctions for non-compliance with a commitment decision.⁷⁹

Box 7. Examples of non-compliance with binding commitments

In the **European Union**, the Commission launched an investigation against Microsoft in 2008 regarding the illegal tying of Internet Explorer to Windows. The case concluded in 2009 after Microsoft submitted commitments to offer Windows users a choice of various web browsers through a choice screen. In 2013, the Commission imposed a €561 million fine on Microsoft for failing to comply with this commitment (the Commission found that Microsoft failed to roll out the browser choice screen of one of its products during a certain period).⁸⁰

In **Italy**, in January 2015 the Italian competition authority AGCM imposed a €14,156,000 fine on *Organizzazione Servizi Marittimi nel Golfo di Napoli* for non-complying with a commitment decision.⁸¹ The AGCM also opened proceedings against *Automotive Club Italia* for an alleged non-compliance with commitments made binding by the AGCM in May 2011 but ascertained that the companies concerned did not breach their obligations and the case was closed without fines in February 2012.⁸²

In **Romania**, the Romanian Competition Council applied sanctions against three companies (the Professional Football League and others) for failure to comply with commitments (concerning broadcast rights of football matches) for the first time in 2014 imposed fines totalling approximately €156,340 on the three companies.⁸³

3. Benefits and risks associated with the use of commitment decisions – A summary of the debate

24. As the use of commitment decisions by competition authorities has increased throughout the world, commentators have identified and analysed the reasons for such a success. However, they have also emphasised the risks associated with a possible “excessive” use of commitments as a means to terminate antitrust investigations instead of using traditional infringement decisions. This section summarises this debate and reflects upon the possible benefits associated with the use of commitment decisions for competition authorities, the companies involved, as well as for third parties. It will also review some of the criticisms against agencies which have relied extensively on such tools. While commentators underline the benefits of using negotiated remedies in antitrust cases, there is a strong call for a careful design of remedies and for an appropriate use of commitment decisions.

3.1 Benefits from commitment decisions

25. Relying on commitment proceedings to address competition concerns carries a number of benefits not only for the enforcers but also for the firms involved in these proceedings, and for the market at large. While there is not sufficient data to support this empirically, the fact that many agencies are making extensive use of commitment decisions lead us to think that benefits tend to outweigh the costs or risks associated with such proceedings.

26. The Commission’s DG Competition has pointed out a number of benefits of commitment decisions including “*procedural efficiencies*”, “*quick market impact*”, “*swift resolution of concerns*” and the involvement of “*fewer resources*”.⁸⁴ Commitment decisions increase the efficiency and effectiveness of the enforcement action, which represent a powerful driver behind the agencies preference for this tool. This remains true even if the costs associated with these proceedings may be high.⁸⁵

3.1.1 Procedural economy and efficiency

27. Commitment decisions are often driven by procedural economy. If negotiations start early in the process – as most agencies recommend – this will shorten the timing of the investigation and in most cases will render a full investigation ultimately unnecessary.⁸⁶ This is because in order to start discussions on remedies it is not necessary for the agency to reach definitive conclusions on the facts of the case and on

the application of the law to the facts at stake. In abuse of dominance and vertical cases competition authorities often face serious challenges in establishing a competition law infringement. There is often uncertainty as to what behaviours amount to illegal conduct and agencies are required to make a careful balancing of pro- and anti-competitive effects based on extensive fact-finding and investigations.

28. The procedural efficiencies are not limited to saving resources. Commitment decisions require reduced formalities and allow authorities to secure an effective intervention in sometimes complex cases and/or highly dynamic markets based on a “preliminary assessment”. Free from the constraints of establishing an infringement and developing formal objections, agencies can limit the articulation of their theory of harm and rely on a narrower set of evidence. Agencies of course can anyway re-open formal proceedings in cases of material changes to the market in question. The possibility to resolve cases without the need to establish an infringement allows the agency to restore competition without spending a lot of investigative resources, which can then be redirected to other cases. In practice, it is not clear if competition authorities that have adopted numerous commitment decisions have indeed been able to strengthen their overall level of enforcement through the more effective use of resources (e.g. by increasing the number of infringement decisions in other types of anti-competitive conduct). In Europe, for example, where the number of commitment decisions has increased in the last years, the overall number of non-cartel decisions has declined while the number of cartel decisions has remained stable.⁸⁷

29. A shift towards a more administrative and less litigation-oriented antitrust enforcement may have a counter-productive effect on the overall quality and intensity of antitrust enforcement.⁸⁸ The concern is two-fold. On the one hand, negotiated remedies enable the enforcement agency to extract from parties under investigation commitments well beyond what the agency could have obtained in infringement proceedings, exposing the agency to possible biases in the selection of cases in favour of easy cases for commitment purposes.⁸⁹ Agencies may also be tempted to choose cases which might help them pursue other, more regulatory, objectives. On the other hand, an extensive use of negotiated remedies may also have an impact on the development of internal forensic and investigative skills. If at some point in the investigation it becomes apparent that the agency’s case is sufficiently strong and commitment negotiations very likely, resources and skills devoted to that case will be inevitably reduced and diverted to cases that are expected to require a full investigation. In the mid/long term this may have the risk of affecting the quality and intensity of the agency’s enforcement action.

3.1.2 *Quicker resolution of cases*

30. Commitment procedures can facilitate a quicker resolution of cases and allow agencies to obtain a certain and ready result, as compared to long, costly and often uncertain outcomes if the case is run until the final stage of an infringement decision. Quick case resolution results in swifter changes to the market. This may be particularly important in dynamic sectors (such IT and digital markets) where timely intervention is key to achieving results from the enforcement action. In these cases, the length of traditional enforcement through full investigations and infringement decisions risks producing outdated final decisions, as the business reality can evolve more rapidly than the investigation, which can take several years. The market conditions that existed when the alleged anti-competitive conduct took place may change or the conduct itself may be terminated and replaced by new business models. Commitments allow a more timely intervention, thus increasing the chance of successful enforcement through a swifter restoration of effective competition in the market or a speedier elimination of the anti-competitive business behaviour. This is advantageous for competitors of the investigated companies, for other companies (e.g. suppliers and customers) and for consumers who can benefit from effective market competition.

31. But, do commitments really lead to quicker case resolution compared to full-fledged investigations and infringement decisions? In abuse of dominance cases the average duration of commitment decisions is 15% longer than in infringement decisions.⁹⁰ There is no sufficient empirical

evidence on this. However, in infringement decisions “finality” is often only achieved years after the agency’s decision as appeals to courts tend to double if not triple the time to obtain a final decision. Commitment decisions are rarely subject to appeals and therefore become effective much faster.

Box 8. Possible delays in case resolution – The Google case

Unsuccessful commitment proposals or negotiations can delay enforcement and remove the benefits from commitment procedures. This can be the case when proposed commitments are withdrawn before a commitment decision is issued or when the market test shows that the commitments offered are not appropriate. In these cases, competition authorities can revert back to infringement proceedings, but the overall duration of the case will increase significantly.⁹¹

This scenario is exemplified by the Google investigation of the European Commission, which was initiated in November 2010 and after over 5 years has not yet reached the decision stage. At the start of the investigation, the European Commission identified several business practices by Google which might have raised concerns from a competition perspective. Two concerns related to specialised search services, such as product, hotel, restaurant or flight search engines, or so-called “vertical” search. According to the Commission, Google was displaying on its web search results its own specialised search services in a more prominent manner than the services of its competitors. The other concerns related to online advertising, where Google imposed exclusivity agreements on publishers who wanted to use its advertising programmes, and imposed restrictions on advertisers who were using those programmes.

For several years, DG Competition has discussed with Google possible remedies that could remove these concerns. After several proposals made by Google, the Commission decided to pursue the case under a full investigation and in April 2015 sent to Google a Statement of Objections alleging that the company had abused its dominant position in the markets for general internet search services in the European Economic Area (EEA) by systematically favouring its own comparison shopping product in its general search results pages.⁹² In its official statement the Commission “*considers that overall, previous commitment proposals from Google were insufficient to address its competition concerns*”.

The Google case signals that in complex cases some of the benefits from relying on negotiated termination of proceedings might not materialise.⁹³ It could well be that for complex negotiations the cost increases and the whole enforcement action might take longer than a regular investigation.

3.1.3 Improved quality of remedies

32. In the context of a commitment proceeding, competition authorities can obtain remedies that they may not have been able to obtain in a full investigation leading to an infringement decision. This allows the enforcement action to be more effective and to address more precisely the competition problems identified. If in infringement decisions the focus of enforcement is the prohibition of past anti-competitive behaviour, in commitment proceedings agencies can be more pro-active and try to shape market structures or firms’ behaviour towards forward-looking models which are more likely to generate competitive outcomes.⁹⁴

33. The fact that the remedies proposed by the parties are subject to market testing can improve the quality of the remedies themselves and the effectiveness of the commitment decisions. After the agency has formulated its competition concerns and the parties have submitted commitments to address such concerns, the agency consults with the market on the commitments offered. The commitments are published, as well as a summary of the case, and interested third parties are invited to submit observations within a fixed time limit. The results of the market test may require undertakings to amend the commitments before the agency makes them binding, thus leading to improving the quality of commitments.

34. Some commentators have, however, highlighted the risk that market testing may expose the remedies to sub-optimal outcomes.⁹⁵ This is because the design of remedies is highly dependent on the

feedback received in response to the market testing in question. Seeking the views of third-parties is certainly an important step to balance the information asymmetry between firms and the enforcer and, as a result, it can prevent capture in the negotiation process. However, third parties may be motivated by specific business interests and not necessarily by the public interest to effective competition. Such biased interest can affect the design of negotiated remedies especially when the theory of harm is not well defined and the preliminary concerns are not yet fully formed.⁹⁶

3.1.4 Avoidance of fines for firms and mitigated exposure to private damages actions

35. There are several benefits from commitment decisions for the investigated companies. In many jurisdictions companies who successfully submit remedies that are subsequently made binding in a commitment decision can avoid the threat of high, unpredictable fines which would likely be imposed if the case would conclude with an infringement decision.⁹⁷ Also, firms who enter into commitment negotiations with the agency gain firmer control over the remedies implemented. In infringement decisions the parties would be exposed to the unilateral imposition of remedies, typically a cease and desist order and monetary fines, but also structural remedies in some jurisdictions.

36. Moreover, since commitment decisions do not usually require the agency to establish an infringement, this reduces significantly the risk of follow-on damages actions as complainants cannot rely on the decision to prove an infringement of competition law. This makes commitments attractive to companies.

There are other reasons that may make commitments an attractive option for businesses:

- Enforcement by one agency may encourage further enforcement in other jurisdictions, thereby increasing the value of commitments especially for risk-averse firms.
- Infringement decisions also affect the public image of businesses and may have serious consequences on the stock price of listed companies⁹⁸.
- Commitment decisions, conversely, provide positive publicity or media exposure, as the firm is perceived as co-operative and willing to pro-actively solve a possible competition problem.
- Faster commitment procedures enable companies to move on with their business, rather than to invest resources and time on burdensome and lengthy antitrust investigations.
- Commitments offer some sort of certainty regarding the acceptability of future market behaviour through commitment discussions and binding commitment decision.

3.2. Possible downsides and risks associated with commitment proceedings

37. The benefits from the use of commitment decisions for the enforcers, the companies involved in antitrust proceedings, third parties and the market have strongly contributed to the increased use of commitments in antitrust cases.⁹⁹ However, the extensive (and for some also “excessive”) use of commitment decisions has downsides, too. Those stronger critics of the agencies’ preference of negotiated enforcement have emphasised that agencies have used a legitimate enforcement tool to leverage their bargaining power to extract excessive remedies or remedies which are non-proportional to the objective that they were meant to pursue.¹⁰⁰ This bargaining power derives from the possibility to “threaten” the re-opening of the infringement procedure and impose sanctions, should the remedies offered by the parties not satisfy the agency.

3.2.1 *Commitments and the quasi-regulatory function of competition law enforcement*

38. The increased use of commitment decisions in the last decade had triggered a debate on whether competition agencies have switched to a more “regulatory” approach to enforcement and what the consequences of such trend might be. The wide discretion that some agencies have in determining if the remedies offered are appropriate to eliminate their preliminary concerns shifts the agency from a classic *ex post* review of past behaviour, its effects on competition and a corresponding infringement decision to punish the offenders and prevent future violations,¹⁰¹ to a forward looking *ex ante* regulatory approach to change market structures and affect business’ conduct.¹⁰²

39. Proposals by companies involved in an antitrust proceeding often include commitments on future behaviour which go beyond what the competition authority could have obtained in the context of an infringement decision. However, remedies negotiations are based on a mere preliminary assessment of the possible competition concerns by the agency and the future impact of the commitments might not be entirely predicted or even predictable. Agencies thus risk accepting remedies that might turn out to be inappropriate or inadequate to the objectives that they were meant to pursue.¹⁰³

Box 9. The liberalisation of EU energy markets through commitment decisions

Botteman and Patsa (2013) point out that commitment decisions by the European Commission have been adopted not only to modify the contested business conducts but also to secure structural, quasi-regulatory remedies such as unbundling of ownership in the energy sector.¹⁰⁴ Since 2009 the Commission has adopted a number of commitment decisions which has significantly contributed to support and supplement the liberalization of EU energy markets.¹⁰⁵ The Commission was able to negotiate structural and behavioural remedies to address alleged competition violations arising from vertical integration of energy incumbents in a number of European countries.

Several cases involved long-term contracts with large customers, or supply contracts where the incumbent is a monopsony purchaser of balancing energy, which allegedly prevented new entrants from gaining a foothold in the market and therefore foreclosed them from effectively entering the market and competing in it. Other cases alleged a *de facto* refusal to supply access to the incumbent’s natural monopoly infrastructure, despite existing regulatory access obligations. The agreed-upon remedies have typically involved either full ownership divestment of energy infrastructure or commitments to make available additional capacity to competing firms.

3.2.2 *The lack of deterrent effect from commitment decisions*

40. Commitment decisions lead to the closing of an investigation without the need to impose fines on the companies involved. In most jurisdictions commitment decision cannot even include disgorgement of illicit gains. Fines are the main, and sometimes the only, option available to antitrust authorities. According to the economic theory of law enforcement, a fine should in principle be set at such a level as to equal the net harm to other parties. The optimal fine induces firms to comply with competition rules, and deters from future anti-competitive behaviour. The possibility to terminate an antitrust proceeding through commitments creates incentives to engage in dubious practices from a competition perspective, because firms always have the possibility to avoid an infringement decision by offering commitments if the authority investigates them. The ultimate effect of excessive use of commitment decisions is a weakening of the deterrent effect of orthodox enforcement. It is important to ensure the adequacy of commitments in order to deter future anti-competitive conduct.

41. There is no theoretical analysis in the literature regarding the optimal way of administering commitments. Polo and Rey¹⁰⁶ show that commitments should be used only in precise circumstances: (i) when the business practice under investigation is presumably socially harmful, (ii) when it is particularly damaging and (iii) when gathering information and evidence is hard. By offering commitments firms cash

in -in the form of retained extra profits- the saving in administrative costs that the agency can obtain by accepting commitments and closing the case earlier. The efficiency of the enforcement action, in turn, must be traded off with the increased incentives to undertake socially harmful practices and with the fact that commitment decisions may weaken the deterrent effect of fines. Wils suggests that commitment decisions should be adopted only “*in those cases where the benefit in terms of an earlier termination of the infringement and the saving of the cost of longer proceedings outweigh the benefit of the other contributions [that] infringement decisions could make, in terms of clarification of the law, public censure, deterrence, disgorgement of illicit gains and punishment, facilitation of follow-on actions for compensation.*”¹⁰⁷

3.2.3 *The limited judicial review of commitment decisions*

42. Although in most jurisdictions the right to appeal against a commitment decision is not disputed,¹⁰⁸ the procedural rules governing the right to appeal (or *locus standi*) make it difficult for plaintiffs to succeed in court. This explains, for example, why there is almost a complete absence of litigation before the EU courts in relation to commitment decisions despite the high number of such decisions by the European Commission.¹⁰⁹

43. There are three possible plaintiffs that could appeal against a commitment decision. However, standing may be denied depending on who appeals and on what grounds.¹¹⁰

- **Appeals by the companies who have proposed the commitments.** In most jurisdictions, standing would not be granted automatically and some jurisdictions exclude standing. This is because the company who proposed the commitments is considered as having waived its right to appeal. This is the case for example in Germany.¹¹¹ Even when standing is legally granted, it is generally considered that the company who has submitted commitments voluntarily might not necessarily have a legal interest (or an incentive) to lodge an appeal. Remedies are submitted voluntarily to settle a legal dispute. This means that standing will be granted only in rare and extreme circumstances, e.g. when the commitments were extracted with coercion or deception.
- **Appeals by the complainants.** Individuals or companies who have initiated the antitrust proceeding by lodging a complaint with the competition authority normally have legal standing, but in practice they would rarely be granted it.¹¹² Agencies have a broad discretion on whether to investigate a complaint, on how to conclude the investigation and on which remedies to accept, and this would make any successful appeal quite unlikely. It is different if the complainant has been denied due process in the proceeding leading to a commitment decision. In this case the commitment decision might be annulled if the lack of due process has “materially affected” the complainant’s legally protected interests.
- **Appeals by the third parties affected by the commitment decision.** The interest of third parties may be legally or *de facto* affected by a commitment decision. This might be sufficient to have standing in most jurisdictions.¹¹³ However, it can be quite challenging in practice for third parties to show that they have been directly and individually concerned by a commitment decision.
- Appeals by complainant or by the third parties (typically competitors or companies having business relationship with the investigated undertakings or market) are more likely to be accepted by courts. In fact, almost all of the appeals related to commitment decisions of the European Commission have been made either by a complainant or by a competitor, and not by the companies which had proposed the commitments. Some of the very rare cases of litigation concerning commitment decisions are presented in following Box.

Box 10. Examples of judicial review for commitment decisions¹¹⁴

- i) Morningstar, Inc. v European Commission in relation to commitments by Thomson Reuters; Case T-76/14. This case is still pending;
- ii) Hynix, Inc. v European Commission in relation to commitments by Rambus; Cases T-148/10 and T-149/10. The case was dismissed following an out-of-court settlement between the parties.
- iii) CEEES and AGES v European Commission in relation to commitments by Repsol; Case T-342/11. The appeal was made for its non-compliance with commitments, but it was dismissed;
- iv) European Commission v Alrosa in relation to commitments by De Beers; C-441/07 P; the appeal was launched by a third party affected by the commitments offered by De Beers;
- v) in the United Kingdom, in relation to commitments in the online hotel booking platforms, the Competition Appeal Tribunal (CAT) considered in an appeal by Skyscanner, a price comparison website company, that the OFT (the predecessor authority to the CMA) had failed to properly take into consideration objections to the proposed commitments raised by Skyscanner and others, and failed to consider the possible impact on price transparency of a restriction on disclosure of price information. The decision by the OFT was overturned by the CAT on 26 September 2014 (Skyscanner v CMA [2014] CAT 16);
- vi) in Hungary, there has been only one case where a commitment decision was reviewed by a court (Vj-22/2008). The appeal was made by the complainant (who cannot, in principle, lodge an appeal under the Hungarian competition law).¹¹⁵ The court quashed the commitment decision as certain aspects were not proven (e.g., failure to establish a dominant position).

3.2.4 Commitment decisions and the principles of legal certainty and predictability

44. The limited review of commitment decisions may have broader implications which go beyond the technical questions on legal standing.¹¹⁶ Courts play a fundamental role in developing through their case law useful guidance on the application of competition law for enforcers, businesses and the market. The fact that agencies enjoy a large degree of discretion in the context of commitment proceedings and that they can operate largely unchecked by the judiciary has opened the door to the development of a so-called “soft jurisprudence”.¹¹⁷ This is especially troublesome if commitments affect areas of competition law such unilateral conduct/abuse of dominance and vertical agreements where the law is still unsettled and complex economic issues continue to arise. This may lead to “*a parallel competition policy that completely escapes judicial control and the minimum guarantees to which our rule of law remains attached.*”¹¹⁸

45. An extensive reliance on commitment decisions, especially in complex areas of law or in new markets or business contexts where guidance from agencies is fundamental, may weaken the application of the principles of legal certainty and predictability. Commitment decisions by their very nature do not establish a competition law infringement. They do not describe the underlying facts and the theory of harm that the agency has pursued but limit themselves to a superficial description -if at all- of the context which led to the proposal of commitments. Commitment decisions therefore have very little if no precedential value with regard to competition law issues. This is due not only to the lack of a formal finding of infringement but also to the fact that commitment decisions are not usually subject to judicial review.

46. While a commitment decision may offer ‘legal comfort’ to its addressee and rapidly restore competition in a given instance, it provides less clarity and thus legal certainty than infringement decisions.¹¹⁹ For this reason, some commentators have suggested that agencies “*could indicate that cases involving novel legal issues or largely untested theories of harm [...] are not to be resolved through commitment decisions.*”¹²⁰

3.2.5 Commitment decisions and the principle of proportionality

47. One of the questions which has been highly debated in the literature on commitment decisions relates to the scope and limits of the powers that agencies have to accept remedies as a way to terminate an antitrust proceeding. The question fundamentally relates to what extent an agency must define its preliminary concerns and what should be the relationship between these concerns and the remedies proposed by the parties. Should for example the commitment accepted by the agency be proportional to the preliminary concerns or can they go beyond them (e.g. in wider product/geographic markets or for other/different behaviours)? The question becomes very important if negotiated remedies turn into a common substitute for infringement decisions, where the law and courts oblige agencies to abide by precise proportionality standards.

48. Agencies have argued that in order to achieve the procedural economy and effectiveness which drive the use of commitment decisions they should be allowed a wide flexibility and discretion on what remedies to accept and include in binding decisions. Two concerns arise from such position. There is a risk that commitments offered to (or as some argue extracted by)¹²¹ the agency may go further than what would be appropriate and necessary to meet the actual concerns from the case. The second concern relates to the role of the courts which in many jurisdictions defer to the agency's assessment where the agency enjoys a degree of discretion in interpreting and enforcing competition law. In these cases, courts would limit their review to assess if the agency committed a manifest error and would not enter into the merits of the agency's highly technical assessment, and substitute their own economic or technical assessment to that of the agency. This would to some extent shield the development of competition law from the review of courts.

49. These questions were addressed by the European courts in relation to the powers of the European Commission under Article 9 of Regulation 1/2003 in the *Alrosa* judgment,¹²² where the European Court of Justice (ECJ) defined a different scope and extent of the principle of proportionality depending on whether the European Commission is using its powers under Article 7 of Regulation 1/2003 (infringement proceeding) or under Article 9 of Regulation 1/2003 (commitment proceeding) and recognised that the Commission has wide discretionary powers in deciding what remedies to accept and that it does not have to assess if there would be less onerous remedies than those offered by the firms to address its concerns as manifested in its preliminary assessment. As a consequence, the court limited the standard of judicial review solely to a manifest error of appreciation on the part of the Commission. Some have concluded that the ECJ has rendered commitment decisions in practice virtually "*unsupervised by the court*".¹²³

50. Many commentators have strongly criticised the *Alrosa* judgment. They contend that ECJ has narrowly interpreted the principle of proportionality in the judicial review of commitment decisions and in concluding that the European Commission is not required to compare the remedies that it is prepared to accept in the context of a commitment decision with the remedies it would have been able to impose under an infringement decision. The *Alrosa* judgement is criticised for having in practice limited excessively the scope for judicial control in commitment decisions,¹²⁴ and for leaving the Commission free to exercise self-restraint on the remedies it is prepared to accept in a binding commitment decision.¹²⁵

Box 11. The Alrosa judgement of the European Court of Justice¹²⁶

De Beers and Alrosa are the two largest producers and suppliers of rough diamonds in the world. They concluded a 5-year agreement under which Alrosa would supply its entire production of rough diamonds to De Beers. In March 2002, Alrosa and De Beers notified the agreement to the Commission under the old EU notification system for agreements of Regulation 17/1962. Rather than granting an exemption, the Commission sent a Statement of Objections, expressing concerns both under articles 101 and 102 of the EU Treaty. When Regulation 1/2003 entered into force, Alrosa and De Beers offered joint remedies to the Commission under Article 9 of Regulation 1/2003 and committed to a progressive reduction in the sales of rough diamonds from Alrosa to De Beers. By 2010, the value of the sales would have been capped at the level of \$ 275 million. The market test of these commitments revealed persisting concerns and the Commission asked for new commitments which in practice would involve the complete termination of the parties' trading relationship by 2009. De Beers decided to offer such commitments but Alrosa refused. The Commission issued a commitment decision based on the proposal by De Beers and Alrosa filed an appeal for the annulment of the decision. Alrosa argued that the Commission had exceeded its legal powers by ordering the complete cessation of the trading relationship and prohibiting any future contracts for an indefinite period of time. Alrosa pleaded that the remedies accepted by the Commission went beyond what was appropriate and necessary to meet the Commission's concerns under article 102 TFEU.

The General Court (GC) found that the general EU principle of proportionality applies to commitment decisions in the same way that it does to infringement decisions. The Commission would thus be obliged to perform a full proportionality analysis before making commitments binding under Article 9 of Reg. 1/2004. The GC added that the proportionality of commitments should be subject to review by the courts. However, the ECJ set aside the judgment of the GC and dismissed Alrosa's claim. According to the ECJ, due to the differences between commitment decisions and infringement decisions, the proportionality principle applies differently in the two contexts. In the context of Article 9, the application of the principle of proportionality is limited to verifying that the commitments offered address the concerns expressed by the Commission in the preliminary assessment. The Commission is under no obligation to verify that the commitments imposed would also be proportionate in an infringement decision. According to Court the "[a]pplication of the principle of proportionality by the Commission in the context of Article 9 of Regulation No 1/2003 is confined to verifying that the commitments in question address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately."¹²⁷

3.2.6 Commitment decisions and their negative effects on private enforcement

51. Private antitrust damage actions can complement public competition enforcement by strengthening deterrence and empowering victims to tackle anti-competitive behaviour directly and to seek compensation for the damages suffered from the illegal behaviour.¹²⁸ Public and private enforcement are mutually reinforcing and inter-related. However, companies who offer commitments to terminate an antitrust investigation are generally less exposed to private damages actions.

52. There is no doubt that those who are unsatisfied with a commitment decision can still pursue their case before a court and seek damages. But they will need to establish an infringement of the competition law first. This will be challenging as they will not have the investigative tools available to a competition agency.¹²⁹

53. The lack of precedential value of commitment decisions thus affects the chances of success of follow-on damages actions.¹³⁰ In most jurisdictions, damages claims rely on the establishment of the facts and of the infringement by the competition authority, which leaves the plaintiff with the burden to prove the amount of the damage suffered and the causal link between the damage and the anti-competitive behaviour.¹³¹ However, commitment decisions do not establish an infringement of the law, nor does the company have to acknowledge any involvement in the alleged competition infringement. Moreover, commitment decisions tend to be brief on the facts and focus on the remedies rather than on the concerns that led the agency to discuss the commitments in the first place. A wide use of commitment decisions can

therefore negatively affect the development of private enforcement of competition laws especially in those jurisdictions where private actions are a nascent phenomenon.¹³²

54. Of course, the evidentiary value of a commitment decision should be judged on a case-by-case basis. Commitment decisions may still be helpful for plaintiffs to understand the basic factual background and the competition concerns expressed by the competition authority. Competition authorities can alleviate the task of the plaintiff by including in the commitment decision as many factual details of the case as possible and elaborating their competition concerns as clearly as possible.¹³³

Box 12. Examples of damages actions concerning commitment decisions

In **France**, on 27 December 2012 the Paris Commercial Court ruled in *SA NAVX v Google* that, after examining the commitment decision by the French competition authority, it could not be concluded that there was an abuse of dominant position.¹³⁴ The Paris Court of Appeal also ruled on 24 September 2014 that complainants can seek compensation of damages caused by an anti-competitive conduct where the companies have offered commitments.¹³⁵ The Commercial Court of Paris ruled on 30 March 2015 that *Eco-Emballages* and *Valorplast* should pay EUR 400,000 to *DKT International*, following a commitment procedure by the French competition authority.¹³⁶

In **Italy**, courts have looked at the question of the value of the authority's commitment decisions as proof for the unlawful character of the defendant's conduct.¹³⁷ The Milan Tribunal in particular expressed serious doubts about the use of commitment decisions as proof of an infringement in a private action (Milan Tribunal, 3 April 2014). However, in a more recent judgment (*BT v Vodafone* in 2015), the court concluded that commitment decisions are indeed to be considered as having a lesser evidentiary value than infringement decisions but also held that they can provide indications to the court on the existence of the infringement.¹³⁸ In a different case, the Milan Tribunal awarded damages against a company which had offered commitments. The damage case followed a decision of the AGCM against three companies, two of which were fined while the third company offered commitments, and the court established that it is reasonable to assume that the third company which settled the case had also participated in the same infringement, since the infringement had been confirmed in the decision against the other two companies.¹³⁹

3.2.7 Due process and transparency in commitment procedures

55. One important question is whether the parties involved in commitment procedures should enjoy the same degree of due process and procedural safeguards as in the context of infringement decisions. Some commentators have queried whether commitment procedures fully protect the procedural rights of the parties under investigation and those of third parties. There is a tension between the objective of speedier procedures and full due process protection. Access to the file of competition authorities and the right to be heard in an oral hearing¹⁴⁰ are activities that can delay the adoption of commitment decisions as they take time. In the name of ensuring a quick case resolution, for example, the right of access to the file and to an oral hearing are limited¹⁴¹ in the commitment procedure of the European Commission,¹⁴² and are partly granted in other jurisdictions.¹⁴³

56. A particular concern relates to the lack of access to file (in combination with the large degree of discretion of the agency) which may lead to disadvantageous commitments for the company involved.¹⁴⁴ The agency is only under an obligation to make known its preliminary concerns but not to fully disclose the evidence it has in the file. Commitment negotiations therefore take place in an asymmetric context where the company has only a partial view of the agency's case. This may be less problematic in straightforward cases, but might result in overreaching commitments if the facts of the case are complex or disputable.

57. Transparency in commitment procedures is relevant in many stages of the procedure, such as the publication of preliminary assessment, the development of the commitment negotiation, the market testing of the proposed commitments and the publication of the commitment decision.¹⁴⁵ Market test in

commitment procedures itself increases transparency as it enables third parties to submit opinions. This is something that generally does not happen in the context of an infringement decision where the role of third parties is much more marginal. According to Advocate General Wathelet: *“Market tests, which require a concise summary of the case together with the main content of the commitments proposed to be published in order to allow interested third parties to submit observations, undoubtedly increase the transparency and legitimacy of commitment proceedings as they open them up not only to public scrutiny but also to the possibility of public input.”*¹⁴⁶

58. However, some practitioners have been calling for a broader application of the principle of transparency in commitment decisions. For example, it has been suggested that the results of market testing should be made publicly available and that a full application of the transparency principle would require agencies to make a full (as opposed to a “preliminary”) assessment of their competition concerns to allow companies to make a fully aware decision as to whether they wish to enter into commitment negotiations with the agency.¹⁴⁷

4. Conclusions

59. Many OECD and non-OECD jurisdictions have introduced commitment procedures in their competition regimes in the last ten years to resolve antitrust cases. There are a number of common features in the fundamental aspects of commitment procedures, but there still are significant divergences in the procedures followed by different agencies to adopt such negotiated/consensual remedies. Some harmonisation in this area would provide greater clarity to businesses especially when seeking a negotiated resolution of an anti-competitive practice with a cross-border geographic scope.

60. The introduction of the powers to adopt commitment decisions has been followed by a significant increase in the use of commitments accepted by competition agencies. This paper also reveals that with the notable exception of the US where consent decrees must be approved by the courts before coming into effect, the involvement of courts in the review of commitment decisions has been quite limited until now. Similarly, the spreading of commitment decisions has not favoured follow-on private actions. The lack of precedential value of commitment decisions, the fact that they do not need to establish a competition infringement and that companies offering commitments do not need to admit guilt are the main reasons why there have not been so many private damages actions brought after commitment decisions.

61. There are however significant benefits from the use of commitment decisions for both the enforcer, the companies involved in antitrust cases and for the market. The main driving factor behind commitment decisions is procedural economy and efficiencies of the enforcement action. These procedures allow fast resolution of cases and a swifter restoration of effective competition in the market. This arguably leads to the enhancement of overall effectiveness of competition enforcement. From the companies’ perspective, commitments allow them a closer management of the resolution of the case which could otherwise end with significant fines and a high risk of follow-on private actions. The absence of reputational damage provides also a strong incentive to enter into commitment negotiations. Companies are perceived to be cooperating with the agencies to resolve a competition problem and the impact on public opinion is favourable, unlike that of a finding of competition infringement.

62. However, a systematic reliance on negotiated resolution of antitrust cases to the detriment of more orthodox infringement decisions has raised criticisms. In particular, the limited legal certainty and the lack of judicial review may deprive businesses of necessary guidance on how to apply the competition law, especially if commitment decisions are used in areas of law which are still unsettled or in highly dynamic sectors where businesses may have more difficulties in screening legal from illegal conduct. Other concerns relate to a possible softening of due process safeguards and transparency in the name of speedier procedures.

63. The extensive use of commitment procedures has put into question the role of competition authorities and flagged a risk of a drift towards a ‘quasi-regulatory’ function of competition law enforcement. Commitment decisions allow agencies to soft regulate markets and influence market structures and companies’ behaviours in a way which would not be possible (or would be possible under stricter conditions) in infringement procedures.

64. Some of the concerns associated with an extensive use of commitment decisions could be addressed by competition authorities in a variety of ways:

- The adoption of self-binding guidelines would allow agencies to clarify more precisely when and how the use of commitment decisions would be preferable and more efficient than a full-fledged investigation. Self-regulation would frame the agency’s discretion and would likely reduce the number of instances in which competition authorities rely on commitment decisions.
- Guidance could also cover the types of commitment that agencies may accept in specific cases. Agencies would thus increase legal certainty and predictability for businesses, as to whether a case is likely to be resolved by commitments. Businesses would enter into commitment negotiations with more certainty as to what is considered an appropriate remedy. This in turn would also ensure proportionality between the commitments and the concerns at stake.
- Commitment decisions could be drafted in a more detailed way to include more factual background on the circumstances of the case and on the preliminary concerns of the agency. This would allow commitment decisions to serve at least as a preliminary reference for plaintiffs when preparing their claims in private actions.
- Agencies could strengthen the due process rights of the parties, for example by granting broader access to the case file or by publishing the results of the market testing of the proposed commitments. Increased transparency can improve proportionality between the proposed commitments and the concerns of the agency and reduce the risk that businesses would be required to offer far-reaching commitments.
- Commitment decisions could include provisions on voluntary compensations for plaintiffs who are in a position to prove an infringement in a law suit, or in case they suffer damages from non-compliance with the binding commitments. This would contribute to strengthening the deterrent effect of commitment decisions and to some extent compensate for the difficulties in bringing civil suits based on such decisions alone.

ENDNOTES

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- ¹ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ('Regulation 1/2003').
- ² This paper only deals with commitment decisions or other similar types of consensual enforcement tools in antitrust cases and not with commitments offered by companies in the context of merger control.
- ³ See European Commission (2008).
- ⁴ See Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11).
- ⁵ See for example France, Italy, Netherlands, Poland, Spain and the United Kingdom.
- ⁶ See for example France and the United Kingdom.
- ⁷ See Georgiev (2007).
- ⁸ See Georgiev (2007).
- ⁹ See Ginsburg and Wright (2013)
- ¹⁰ Disgorgement of illicit profit is possible in consent orders by the FTC, but in practice it is quite uncommon (see Georgiev, 2007). It is arguable that the European Commission can include some form of monetary payment and/or compensation to the victims as long as it is voluntarily offered by the parties and the requirements of Article 23 Reg. 1/2003 are met (see Wagner-von Papp, 2012).
- ¹¹ Japan is considering introducing a commitment procedure similar to that in the European Union, as a consequence of the Trans-Pacific Strategic Economic Partnership Agreement (TPP) signed on 4 February 2016 by 12 Pacific Rim countries and not yet entered into force (<https://ustr.gov/sites/default/files/TPP-Final-Text-Competition.pdf>). The relevant bill was submitted to the Diet, Japan's legislature, in March 2016. In addition to Japan, more TPP signatories will introduce commitment decisions or other consensual remedies after the entry into force of the TPP.
- ¹² Switzerland has a procedure called "amicable settlement" which includes the possibility of future commitments. However, it appears that such commitments are only used as a mitigating factor in the calculation of fines.
- ¹³ In Turkey, a draft amendment of the competition in 2014 included the introduction of commitment decisions, but the amendment procedure is still pending.
- ¹⁴ See Annex I.
- ¹⁵ The fundamental steps of the commitment proceeding are similar in all jurisdictions within the European Union (see ECN, 2012).
- ¹⁶ Ireland has court-endorsed commitment agreements; the competition agency can apply to the Irish High Court to make commitment agreements a court decision.
- ¹⁷ See for example the Competition and Market Authority (CMA) in the United Kingdom.

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- 18 In case of the European Commission, Commission Regulation No. 622/2008 of 30 June 2008 amending Regulation No. 773/2004, as regards the conduct of settlement procedures in cartel cases.
- 19 See OECD (2008) and OECD (2006).
- 20 See European Commission (2008).
- 21 In Australia, however, the authority can close cases with commitments by the company the procedure requires an acknowledgement or an admission of the company that the conduct at stake constitutes or is likely to constitute a breach of the Australian competition law (see Guidelines on the use of enforceable undertakings by the Australian Competition and Consumer Commission, April 2014).
- 22 For instance, in the EU the Commission rewards settlements with a reduction of the fine up to 10%.
- 23 According to Italianer (2013a) virtually all competition regimes in Europe have introduced the possibility for commitment decisions.
- 24 See Ginsburg and Wright (2013).
- 25 See European Commission (2014a).
- 26 Wils (2015) compares informal commitments under Reg. 17/1962 (in the form of exemption or negative clearance at that time) and formal commitments under Reg. 1/2003. He states that “[e]ven if the formal instrument of commitment decisions was not provided for under Regulation 17, many investigations into suspected infringements of Articles 101 or 102 TFEU were in fact also closed following commitments offered by the companies concerned.”
- 27 See European Commission (2014b).
- 28 See GCR –The European Antitrust Review 2016 (France: Abuse of Dominance).
- 29 See GCR –The European Antitrust Review 2016 (Italy: Cartels). The authority Italian competition has made less use of commitment decisions recently. The 2014 annual report of the authority to OECD Competition Committee reports less inclination to use commitment procedures, which were used only in one case in 2014 (DAF/COMP/AR(2014)26).
- 30 See GTDT Dominance (2016), Germany.
- 31 See Schweitzer (2012a).
- 32 See GTDT Vertical (2015) according to which in 2014 the authority has continued on the trend of resolving vertical anti-competitive agreements without imposing a fine but accepting voluntarily submitted commitments by the alleged offenders.
- 33 According to GTDT (2016), the Croatian competition authority is recently dependent on commitment decisions in abuse of dominance cases to restore effective competition (GTDT Dominance, 2016).
- 34 For example under Article 9(2) of Regulation 1/2003, the European Commission may, upon request or on its own initiative, re-open proceedings where there has been a material change in any of the facts on which the decision was based; where the undertakings concerned acted contrary to their commitments; or where the decision was based on incomplete, incorrect or misleading information provided by the parties. Commitment decisions may also contain more specific review clauses.
- 35 See European Commission (2014b).

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- 36 See European Commission (2014b).
- 37 See European Commission (2014a). This seems to be consistent with a need for flexibility in markets where the competitive landscape may change substantially over a very short period of time.
- 38 This excludes cartel cases, procedural cases and Article 102 and 106 of TFEU cases.
- 39 See Nicolas Bessot (2014).
- 40 See for instance, Commission Decision of 4 May 2010 in Case COMP/39.317 *E.On* (summary available at OJ C278/9, 2010); Commission Decision of 18 March 2009 in Case COMP/39.402 *RWE* (summary available at OJ C133/10, 2009); and Commission Decision of 10 April 2013 in Case/COMP 39.727 *CEZ* (summary available at OJ C 251/4, 2013).
- 41 See for instance, Commission Decision of 29 September 2009 in Case/COMP 39.315 *ENI* (summary at OJ C 352/8, 2010).
- 42 See for instance, Commission Decision of 12 May 2015 in Case/COMP 39.964 *Air France/KLM/Alitalia/Delta* (summary available at OJ C 212/05, 2015), Commission Decision of 23 May 2013 in Case/COMP 39.595 *Continental/United/Lufthansa/Air Canada* (summary available at OJ C 201/8, 2013), and Commission Decision of 14 July 2010 Case/COMP 39.596 in *British Airways/American Airlines/Iberia* (summary available at OJ C 278/09, 2010).
- 43 See for instance, Commission Decision of 17 March 2010 in Case/COMP 39.386 *EDF* (summary available at OJ C 133/5, 2010) and Commission Decision of 22 May 2005 in Case/COMP 39116 *Coca-Cola* (summary available at OJ L 253/21, 2005) in the EU and online hotel booking platform cases in Europe (for instance, see press release by the European Commission; http://europa.eu/rapid/press-release_IP-14-2661_en.htm), and PGNiG (gas incumbent) in Poland (Decisions DOK – 1/2012 and DOK – 2/2012).
- 44 See for instance, Commission Decisions in 2007 in Case/COMP 39.140-39.143 *DaimlerChrysler, Fiat, Toyota and General Motors* (summary available at OJ L 317/76, L 332/77, L 329/52 and L 330/44, 2010) and Commitment Decision of 13 December 2011 in Case/COMP 39.692 in *IBM* (summary available at OJ C 18/6, 2011) in the EU.
- 45 See for instance, three major mobile operators case in the Netherlands (Case number: 13.0612.53).
- 46 See for instance, Commission Decision of 26 February 2014 in Case/COMP 39.398 *Visa* (summary available at OJ C 147/7, 2014), Commission Decision of 15 November 2011 in Case/COMP 39.592 *Standard & Poor's* (summary available at C 31/8, 2012), Commission Decision of 9 December 2009 in Case COMP/38.636 *Rambus* of 9 December 2009 (summary available at OJ C30/17, 2010) in the EU, *Coca-Cola* in Belgium (No. 2005-I/O-52 of 30 November 2005) and *MOL* case (Case Vj/50/2010) in Hungary.
- 47 See for instance, Commission Decision of 18 December 2013 in Case/COMP 39.678 *Deutsche Bahn* (summary available at OJ C 86/4, 2014) in the EU.
- 48 See for instance, Commission Decision of 16 December 2009 in Case/COMP 39.530 *Microsoft* (summary available at OJ C 36/7, 2010) and Commission Decision of 20 December 2012 in Case/COMP 39.230 in *Rio Tinto Alcan* (summary available at OJ C89/5, 2013) in the EU.
- 49 See for instance, Commission Decision of 29 April 2014 Case/COMP 39.939 *Samsung* (summary available at OJ C 350/8, 2014) in the EU.

- 50 See for instance, Commission Decision of 25 July 2013 in Case/COMP 39.847 E-book (summary available at OJ C 378/25, 2013) in the EU, Pharmaceutical cases in France (for instance, Nos. 07-D-22 (*Boehringer* etc.), 07-D-45 (*Pfizer*) and 07-D-46 (*GlaxoSmithKline*)), and several cases concerning central marketing of media rights for sports events such as Commission Decision of 22 March 2006 in Case/COMP 38.173 *The Football Association Premier League* (summary available at OJ C 7/18, 2008) in the EU and in some European countries.
- 51 See <https://www.ftc.gov/enforcement/cases-proceedings/1210120/motorola-mobility-llc-google-inc-matter>.
- 52 See Commission Decision of 29 April 2014 Case/COMP 39.939 *Samsung* (summary available at OJ C 350/8, 2014) (see IP 14/490). See also MEMO/14/322.
- 53 See Commission Decision of 9 December 2009 in Case COMP/38.636 *Rambus* (summary available at OJ C30/17, 2010) in the EU.
- 54 For comprehensive analysis in the EU and its member states, see ECN (2012).
- 55 See Case C-441/07 P, *Commission v Alrosa*, judgement of 29 June 2010.
- 56 See Comunicazione sulle Procedure di Applications dell'Articolo 14-ter della Legge 10 Ottobre 1990, n. 287, available at <http://www.agcm.it/component/joomdoc/normativa/concorrenza/P23863-comunicazione.pdf/download.html>.
- 57 See CMA (2014).
- 58 See Annual report on competition policy developments in Greece in 2014 to OECD Competition Committee [DAF/COMP/AR(2015)3].
- 59 See for example, the Czech Republic (see GCR – The European Antitrust Review 2016, Czech Republic), Slovenia (see GTDT Cartel Regulation 2015) and People's Republic of China (ICLG, Cartels and Leniency, China).
- 60 See CMA (2015).
- 61 See the European Commission's press release on the launch of markets tests by the French, Swedish and Italian competition authorities (http://europa.eu/rapid/press-release_IP-14-2661_en.htm).
- 62 OECD Competition Committee held a hearing on Across Platform Parity Agreements in October 2015. For more details see <http://www.oecd.org/daf/competition/competition-cross-platform-parity.htm>.
- 63 For instance, France, Italy, Sweden, Austria, Denmark, Germany, Greece, Hungary, Ireland, Netherlands, Poland, Switzerland and United Kingdom.
- 64 On the substantive issues, France enacted a law (the Macron Law) on 6 August 2015, which included provisions regarding contracts between hotels and online travel agents. Under the modified law, price parity clauses are altogether illegal and unenforceable, irrespective of the channel concerned (online or offline). Hotels remain free to grant their customers any reduction or rebate, and any clause to the contrary shall be deemed null and void.
- 65 See *Skyscanner v CMA* [2014] CAT 16.
- 66 Despite closing the investigation, the CMA continues to monitor pricing practices in the hotel online booking sector in the UK. See <https://www.gov.uk/cma-cases/online-travel-agents-monitoring-of-pricing-practices>.

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- 67 See Decision B9 – 66/10 *HRS-Hotel Reservation Services*.
- 68 See OLG Düsseldorf, VI – Kart 1/14 (V).
- 69 Under wide best price clauses, hotels were obliged to offer in the hotel booking portal their lowest room prices, maximum room capacity and most favorable booking and cancellation conditions available on all online and offline booking channels.
- 70 Under narrow best price clauses, Booking.com allows the hotels to offer their rooms cheaper on other hotel booking portals but still requires that the prices which they display on their own websites may not be lower than the ones on Booking.com hotel portal.
- 71 See ECN (2012).
- 72 For instance, a set of commitments may include an obligation by the parties to submit a status report on the fulfilment of other commitments and/or to attend at a hearing before a competition authority with interested parties.
- 73 See ECN (2012) and Gippini-Fournier (2008). For recent examples of independent monitoring trustees, see Samsung in the European Union, and Conai and Corepla in Italy (GTDT Dominance, 2016).
- 74 See OECD (2013), OECD (2011) and OECD (2003).
- 75 Botteman and Patsa (2013) point out that the selection of a monitoring trustee should carefully consider the qualification and independence of the trustee from the parties, and suggest that the appointment should be made as early as possible in the process.
- 76 See Commission Decision of 29 April 2014 Case/COMP 39.939 *Samsung* (summary available at OJ C 350/8, 2014).
- 77 See Commission Decision of 22 May 2005 in Case/COMP 39116 *Coca-Cola* (summary available at OJ L 253/21, 2010).
- 78 See the French Competition Authority Decision No. 15-D-06 of 21 April 2015, Booking.com.
- 79 The CMA in the United Kingdom for example cannot impose fine for breach of commitments.
- 80 See Commission Decision of 06 March 2013 in Case/COMP 39.530 *Microsoft* (summary available at OJ C 120/15, 2013).
- 81 Proceedings no. I689C.
- 82 See GTDT Dominance 2016, Italy.
- 83 See GCR the European Antitrust Review 2016, Romania.
- 84 See Italianer (2013b).
- 85 For example, the monitoring of commitments can prove demanding and compensate the procedural economies in terms of human capital and duration of proceedings.
- 86 In the case of the European Commission, for example, this implies that it will not be necessary to hold an oral hearing or to grant the investigated undertaking access to file.

87 See Wils (2015).

88 See Ginsburg and Wright (2013).

89 See Wagner-von Papp (2012).

90 See for example Gerard (2014) and Mariniello (2014). Mariniello concludes that quicker resolution by way of commitment decisions should not be taken for granted, especially in abuse of dominance cases.

91 Jenny (2015, p. 733) shows scepticism about the alleged quicker enforcement in high-tech abuse of dominance cases via commitment decisions.

92 See IP/15/4780. The Commission also opened a separate parallel formal proceeding against Google to investigate its conduct in relation to the Android mobile operating system as well as applications and services for smartphones and tablets (see MEMO/15/4782). The Commission's concern was that Google may have illegally hindered the development and market access of rival mobile operating systems, mobile communication applications and services.

93 See Almunia (2014).

94 See Dunne (2014).

95 See Gerard (2014).

96 The market test would not work as an effective "check & balance" if the binding commitments are very broad or disproportionate to the concerns identified. Far-reaching commitments would likely be welcome by competitors who would not flag that as a concern in the market test. However, the detrimental effects on the investigated companies of far-reaching commitments would persist over time as the scope for the company who has voluntarily submitted commitments to appeal for the annulment of the decision may be quite limited.

97 This benefit is less obvious in jurisdictions such as the US and Israel, where agencies can order through commitment decisions to the companies to pay back the illicit profits gained from anti-competitive behaviour.

98 Italianer (2013b) describes that commitment decisions would "*limit the reputational damage that goes with the finding of an infringement*".

99 See Temple Lang (2009).

100 See Wagner-von Papp (2012)

101 Dunne (2014) concludes that it is fairly clear that there is the shift toward regulatory antitrust, both in procedural and substantive terms. Gerard (2013) points out that the increasing dependence on consent decrees by the US DOJ means the shift from a law-enforcement to a regulatory approach in the application of antitrust rules. See also Ginsburg and Wright (2013).

102 According to Jenny (2015) the EU law enforcement regime is one example of a system which has shifted from *ex post* assessment of competition law infractions under the limited control by the court to an *ex ante* regulatory approach.

103 It has also been pointed out that the practice to market test commitments offers competitors the possibility to manipulate the process and to game the system (see CMA 2015).

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- 104 Forrester (2008) describes this as coincidences with industries which are subject to regulatory initiatives.
- 105 Commission Decision of 4 May 2010 in Case COMP/39.317 *E.On* (summary available at OJ C278/9, 2010); Commission Decision of 18 March 2009 in Case COMP/39.402 *RWE* (summary available at OJ C133/10, 2009); Commission Decision of 29 September 2009 in Case/COMP 39.315 *ENI* (summary available at OJ C 352/8, 2010); Commission Decision of 26 November 2008 in Case/COMP 39.388 and 39.389 *German Electricity Wholesale Market & German Electricity Balancing Market* (summary at available OJ C 36/8, 2009); Commission Decision of 14 April 2010 in Case/COMP 39.351 *Swedish Interconnectors* (summary available at OJ C 142/28, 2010); Commission Decision of 11 October 2007 in Case/COMP 37.966 *Distrigaz* (summary available at OJ C 9/8, 2008); Commission Decision of 3 December 2009 in Case/COMP 39.316 *GDF* (summary at OJ C 57/13, 2010); Commission Decision of 17 March 2010 in Case/COMP 39.386 *EDF* (summary available at OJ C 133/5, 2010); Commission Decision of 10 April 2013 in Case/COMP 39.727 *CEZ* (summary available at OJ C 251/4, 2013).
- 106 Available at <http://www.siecon.org/online/wp-content/uploads/2015/10/Polo.pdf>.
- 107 See Wils (2006). The European Commission (2014b), para 187 refers to similar factors that the Commission should consider when deciding to start commitment negotiations as opposed to continuing the infringement procedure.
- 108 According to ECN 2012, however, in some jurisdictions the right to appeal a commitment decisions is not foreseen.
- 109 See Wils (2015) and Schweitzer (2008).
- 110 For a detailed analysis, see Rab et al (2010) and Schweitzer (2012b).
- 111 See Schweitzer (2012b).
- 112 France is an exception: standing of complainants is broadly recognised (Schweitzer, 2012b).
- 113 See, for example, the OFT Enforcement Guidelines, December 2004, p. 16: “*Any sufficiently interested person may seek to have a commitments decision reviewed by the CAT*”. Similarly, in France the Cour de Cassation has confirmed that an applicant who brings a case before the Autorité de la Concurrence and who can show a legitimate interest insofar as the commitments accepted in the decision can have an effect on its own situation is entitled to appeal the decision to accept commitments.
- 114 Based on ECN (2012) there have been appeals against commitment decisions also in Denmark, France, Italy and Latvia.
- 115 According to commentators of this decision, it is unclear whether standing should have been granted as standing is narrowly defined in Hungary. See Nagy (2012).
- 116 The United States represent a notable exception. Consent decrees are subject to a judicial review process and the role of the courts has been strengthened by the Tunney (the “Antitrust Procedures and Penalties Act”, P.L.93-528, 88 Stat. 1706 (1974)) precisely to address the concerns that a weak judicial control might lead to unfair and disproportionate remedies.
- 117 See Jenny (2015).
- 118 See Waelbroek (2009).
- 119 Wathelet (2015) states that the paucity of precedent is the strongest criticism levied against the Commissions’ practice of adopting commitment decisions.

120 See Botteman and Patsa (2013).

121 From the companies' perspective, there is a risk that they are pushed to offer disproportionate and unsuitable commitments to competition authorities in order to achieve "finality". Bargaining power in commitment procedures is arguably held by competition authorities, who can return to the infringement proceeding with the associated threat of high fines if they are not satisfied with the remedies proposed. Confronted with such prospect and with the threat of subsequent private actions, companies might feel "coerced" to offer broad ranging commitments. For a thorough analysis on the bargaining power in commitment decisions, see Wagner-von Papp (2012).

122 See Case C-441/07 P, *Commission v Alrosa*, judgement of 29 June 2010.

123 See Jenny (2015). The expectations are that it will be highly unlikely that commitments decisions will be successfully challenged before the EU courts (Schweitzer, 2012b).

124 See Wagner-von Papp (2012).

125 See, for instance, Cavicchi (2011) and Wagner-von Papp (2012).

126 See Case C-441/07 P, *Commission v Alrosa*, judgement of 29 June 2010.

127 See para 41.

128 See OECD (2015).

129 According to Rat (2015), a plaintiff in a damages action based on a commitment decision faces similar challenges as if it was filing a stand-alone action.

130 There have been only a few private damages actions based on commitment decisions in OECD jurisdictions. Private damages actions concerning commitment decisions are more common in the US and, outside of the OECD, the People's Republic of China.

131 For a more in-depth discussion on the relationship between public and private enforcement see OECD (2015)

132 The Paris Commercial Court on 30 March 2015 has ruled, however, that the undertaking having obtained a commitment decisions is still liable for damages (see Duron, 2016).

133 Wagner-von Papp (2012) notes that some of the recent commitment decisions in the EU are more elaborate. The need for more details and more clarity (which might require more time in the drafting of commitment decisions) needs to be balanced with the purpose of achieving a prompt resolution of the case through the commitment decision.

134 But it ultimately granted damages on the losses suffered by the other grounds (early termination).

135 GCR European Antitrust Review 2016, Private Antitrust Litigation, France.

136 For the details of this case, see Duron (2016).

137 Milan Tribunal, 1 October 2013 and Milan Tribunal, 3 April 2014.

138 See GTDT Dominance, 2016.

139 Milan Tribunal, 10 November 2011 and 14 October 2014. See GTDT Private Antitrust Litigation (2016).

¹⁴⁰ The General Court (GC) in *Alrosa* found an infringement of the right to be heard, but the Court of Justice overruled the GC's judgement on this point.

¹⁴¹ According to Article 10a of 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 (OJ L 171, 1.7.2008, p. 3–5): “Parties taking part in settlement discussions may be informed by the Commission of: (a) the objections it envisages to raise against them; (b) the evidence used to determine the envisaged objections; (c) non-confidential versions of any specified accessible document listed in the case file at that point in time, in so far as a request by the party is justified for the purpose of enabling the party to ascertain its position regarding a time period or any other particular aspect of the cartel; and (d) the range of potential fines.” According to the FAQ (MEMO/08/458), however, the Commission will only grant access to non-confidential versions of the document and only “upon reasoned request when it is justified to enable a company to ascertain its position on a given time period or issue, and where this disclosure does not jeopardise the overall efficiency sought with the settlement procedure.” As for the right to be heard, Article 12 of Commission Regulation No 622/2008 clarifies that “[t]he Commission shall give the parties to whom it addresses a statement of objections the opportunity to develop their arguments at an oral hearing, if they so request in their written submissions. However, when introducing their settlement submissions the parties shall confirm to the Commission that they would only require having the opportunity to develop their arguments at an oral hearing, if the statement of objections does not reflect the contents of their settlement submissions.”

¹⁴² See Cook (2006). Apart from access to a file and right to be heard, authorities should also give reasons for opting for a commitment path or rejecting proposed commitments. In *Morningstar v Commission* (Case T-76/14), a breach of the Commission's duty to state reasons is one of the pleas in law. Also, see the CFI in *Alrosa* para. 130.

¹⁴³ Autorité de la Concurrence, Notice on Competition Commitments Issued on March 2nd, 2009, Paragraph 27 allows the undertakings and the complainant an access to file.

¹⁴⁴ See Gheuer and Petit (2009).

¹⁴⁵ With regards to commitment procedure in the European Commission, Wils (2015) concludes that the current formal commitment procedure introduced by Article 9 of Regulation 1/2003 would provide more transparency and better opportunities for third parties to participate in market test than previous informal commitment.

¹⁴⁶ See Wathelet (2015).

¹⁴⁷ Waelbroeck (2009) suggests that “a proper preliminary assessment – similar to a statement of objections – for Article 9 decisions” would be warranted for a more transparent procedure. Mariniello (2014) suggests that the incentives of the Commission and the investigated undertakings for minimal disclosure of information warrant a change in the law to foster better transparency.

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ANNEX I

**INFORMATION ON COMMITMENT DECISIONS IN OECD MEMBER COUNTRIES
AND IN ASSOCIATE/PARTICIPANT JURISDICTIONS TO THE COMPETITION
COMMITTEE (INDICATED BY AN *)**

Jurisdiction	Sources of Information¹
AUSTRALIA	<p>GTDT – Dominance 2016 (Australia): https://gettingthedealthrough.com/area/10/jurisdiction/5/dominance-australia/</p> <p>Guidelines on the use of enforceable undertakings by the Australian Competition and Consumer Commission: https://www.accc.gov.au/publications/section-87b-of-the-competition-consumer-act</p> <p>GCR – The Asia Pacific Antitrust Review 2015 (Australia: Overview): http://globalcompetitionreview.com/reviews/69/sections/235/chapters/2732/australia-overview/</p>
AUSTRIA	<p>GTDT – Dominance 2016 (Austria): https://gettingthedealthrough.com/area/10/jurisdiction/25/dominance-austria/</p> <p>GTDT – Vertical Agreements 2015 (Austria): https://gettingthedealthrough.com/area/41/jurisdiction/25/vertical-agreements-austria/</p>
BELGIUM	<p>GTDT – Dominance 2016 (Belgium): https://gettingthedealthrough.com/area/10/jurisdiction/31/dominance-belgium/</p> <p>GCR - The European Antitrust Review 2016 (Belgium: Overview): http://globalcompetitionreview.com/reviews/72/sections/241/chapters/2904/belgium-overview/</p>
BRAZIL*	<p>GTDT – Vertical Agreements 2015 (Brazil): https://gettingthedealthrough.com/area/41/jurisdiction/6/vertical-agreements-brazil/</p> <p>GCR - The Antitrust Review of the Americas 2016 (Brazil: Cartels): http://globalcompetitionreview.com/reviews/74/sections/277/chapters/2999/brazil-cartels/</p>
BULGARIA*	<p>GTDT – Pharmaceutical Antitrust 2015 (Bulgaria): https://gettingthedealthrough.com/area/26/jurisdiction/64/pharmaceutical-antitrust-bulgaria/</p>

¹ The links are provided for completeness and to allow access to further country information. They were active at 25 March 2016.

CANADA	<p>GCR Know-How: Antimonopoly & Unilateral Conduct (Q54): http://globalcompetitionreview.com/know-how/topics/87/antimonopoly-unilateral-conduct/</p> <p>GCR –The Antitrust Review of the Americas 2016 (Canada: Competition Bureau): http://globalcompetitionreview.com/reviews/74/sections/276/chapters/2992/canada-competition-bureau/</p>
CHILE	<p>GCR – The Antitrust Review of the Americas 2016 (Chile): http://globalcompetitionreview.com/reviews/74/sections/278/chapters/3001/chile-national-economic-prosecutors-office/</p> <p>Accession Report on Competition Law and Policy (2010): http://www.oecd.org/chile/47950954.pdf</p>
COLOMBIA*	<p>GTDT – Dominance 2016 (Colombia): https://gettingthedealthrough.com/area/10/jurisdiction/8/dominance-colombia/</p> <p>OECD’s Peer Review of Competition Law and Policy – Colombia (2009): http://www.oecd.org/daf/competition/44110853.pdf</p>
COSTA RICA*	<p>GCR – The Antitrust Review of the Americas 2016 (Costa Rica): http://globalcompetitionreview.com/reviews/74/sections/280/chapters/3004/costa-rica-overview/</p> <p>OECD and IDB’s Peer Review of Competition Law and Policy in Costa Rica (2014): http://www.oecd.org/daf/competition/CostaRica-PeerReview2014en.pdf</p>
CZECH REPUBLIC	<p>GCR - The European Antitrust Review 2016 (Czech): http://globalcompetitionreview.com/reviews/72/sections/245/chapters/2909/czech-republic-overview/</p>
DENMARK	<p>GTDT – Vertical Agreements 2015 (Denmark): https://gettingthedealthrough.com/area/41/jurisdiction/52/vertical-agreements-denmark/</p> <p>GCR - The European Antitrust Review 2016 (Denmark: Overview): http://globalcompetitionreview.com/reviews/72/sections/246/chapters/2911/denmark-overview/</p>
EGYPT*	<p>GCR - The African and Middle Eastern Antitrust Review 2016 (Egypt): http://globalcompetitionreview.com/reviews/77/sections/290/chapters/3129/egypt-competition-authority/</p>

ESTONIA	<p>GCR - The European Antitrust Review 2016 (Estonia): http://globalcompetitionreview.com/reviews/72/sections/247/chapters/2913/estonia-competition-authority/</p>
EUROPEAN UNION	<p>GTDT – Dominance 2016 (European Union): https://gettingthedealthrough.com/area/10/jurisdiction/10/dominance-european-union/</p> <p>GTDT – Vertical Agreements 2015 (European Union): https://gettingthedealthrough.com/area/41/jurisdiction/10/vertical-agreements-european-union/</p> <p>GCR Know-How: Antimonopoly & Unilateral Conduct (Q54): http://globalcompetitionreview.com/know-how/topics/87/antimonopoly-unilateral-conduct/</p>
FINLAND	<p>GTDT – Dominance 2016 (Finland): https://gettingthedealthrough.com/area/10/jurisdiction/57/dominance-finland/</p>
FRANCE	<p>GTDT – Dominance 2016 (France): https://gettingthedealthrough.com/area/10/jurisdiction/28/dominance-france/</p> <p>GCR - The European Antitrust Review 2016 (France: Abuse of Dominance): http://globalcompetitionreview.com/reviews/72/sections/248/chapters/2915/france-abuse-dominance/</p> <p>Notice on Competition Commitments (issued on March 2nd, 2009): http://www.autoritedelaconcurrence.fr/doc/cpro_enga_2mars09_United.pdf</p>
GERMANY	<p>GTDT – Dominance 2016 (Germany): https://gettingthedealthrough.com/area/10/jurisdiction/11/dominance-germany/</p> <p>GCR Know-How: Antimonopoly & Unilateral Conduct (Q54): http://globalcompetitionreview.com/know-how/topics/87/antimonopoly-unilateral-conduct/</p>
GREECE	<p>GTDT – Dominance 2016 (Greece): https://gettingthedealthrough.com/area/10/jurisdiction/12/dominance-greece/</p> <p>GTDT – Vertical Agreements 2015 (Greece): https://gettingthedealthrough.com/area/41/jurisdiction/12/vertical-agreements-greece/</p>
HUNGARY	<p>GTDT – Cartel Regulations 2016 (Hungary): https://gettingthedealthrough.com/area/5/jurisdiction/68/cartel-regulation-2016-hungary/</p>
ICELAND	<p>Annual Reports to the OECD’s Competition Committee [DAF/COMP/AR(2012)17, DAF/COMP/AR(2013)4 and DAF/COMP/AR(2015)39]</p>

INDIA*	GCR Know-How: Antimonopoly & Unilateral Conduct (Q54): http://globalcompetitionreview.com/know-how/topics/87/antimonopoly-unilateral-conduct/
INDONESIA*	OECD Reviews of Regulatory Reform INDONESIA – Competition Law and Policy (2012): http://www.oecd.org/indonesia/chap%203%20-%20competition%20law%20and%20policy.pdf UNCTAD’s Voluntary Peer Review on Competition Policy (Indonesia) in 2009: http://unctad.org/en/Docs/ditccpl20091_en.pdf
IRELAND	GTDT – Vertical Agreements 2015 (Ireland): https://gettingthedealthrough.com/area/41/jurisdiction/14/vertical-agreements-ireland/
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