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EU COMMITMENT DECISIONS: WHAT MAKES THEM SO ATTRACTIVE?

-- Note by Jean-François Bellis --

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EU COMMITMENT DECISIONS: WHAT MAKES THEM SO ATTRACTIVE?

Note by Jean-François Bellis¹

1. Regulation 1/2003,² which entered into force on 1 May 2004, introduced a formal commitment procedure under which a company suspected of a breach of EU competition rules may offer commitments to meet the competition concerns expressed by the Commission and the latter may make those commitments binding on the company.³

2. Section 1 of this article places such commitment decisions in their historical context, and notes how commitment decisions were a *de facto* reality even before the adoption of Regulation 1/2003. Section 2 identifies the main reasons why commitment decisions have been so successful, notably because they involve an absence of fines, an absence of a formal finding of an infringement, and allow the undertakings involved and the Commission to craft remedies that might better address the Commission's competition concerns, particularly where the Commission might lack the authority to impose such remedies in an infringement decision.

1. A brief history of settlements under EU Competition law

3. It is important to bear in mind that the possibility to offer commitments existed already prior the entry into force of Regulation 1/2003. Under the previous instrument, Regulation 17/62,⁴ the Commission had developed an extensive informal settlement practice under which it would put an end to an investigation and close the file after having received commitments to terminate or amend infringing conduct by the companies concerned. The most famous informal settlement case involved IBM, which undertook on 1 August 1984 to introduce a number of changes in its marketing practices with regard to its most powerful range of computers, the System/370. In essence, IBM undertook: (i) to offer its System/370 CPUs in the Community either without main memory or with only such capacity as was strictly required for testing; (ii) to disclose sufficient interface information to enable competing companies in the Community to attach both hardware and software products of their own design to System/370; and (iii) to disclose adequate and timely information to competitors to enable them to interconnect their systems or networks with IBM's System/370 Network Architecture.⁵ Upon receipt of this undertaking, the Commission decided to suspend the infringement proceeding for breach of Article 86 EEC (currently Article 102 TFEU) which it had initiated against IBM in December 1980. In a letter sent to IBM on the day the undertaking was offered the then-Commissioner in charge of Competition, Mr. Andriessen, warned

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² Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L1/1.

³ Article 9 of Regulation 1/2003.

⁴ EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 1962 P13/204.

⁵ Commission's XIVth Report on Competition Policy 1984, points 94-95.

IBM that its implementation would be reviewed annually by the Commission services. The undertaking, which was found by the Commission to operate satisfactorily, was terminated on 6 July 1995.⁶

4. The IBM settlement was remarkable in that it was the first and only informal settlement the terms of which were fully publicly disclosed by the Commission.⁷ Other informal settlements reached by the Commission were the subject of only a brief description in the Commission's *Annual Report on Competition Policy* or in the *Bulletin of the European Communities*.⁸ Another unusual feature of the IBM settlement was that, in contrast to other informal settlements which were accepted at the level of the services of the Directorate-General for Competition or that of the Commissioner in charge of Competition, the decision to suspend the proceeding against IBM was taken by the Commission acting as a collegiate body.⁹

5. In addition to informal settlements proper, a large number of cases were also *de facto* settled in the context of the notification procedure set up by Regulation 17/62 (and ultimately abolished by Regulation 1/2003). Under that procedure, notifying parties frequently undertook to amend the agreements notified for an individual exemption, or take specific steps when implementing such agreements, to obtain negative clearance or an individual exemption from the Commission. Such formal negative clearance and individual exemption decisions also had their informal equivalent: the so-called "comfort letters".¹⁰ These were administrative letters signed by an official of the Directorate-General for Competition stating that no action would be taken with respect to a particular notified agreement. Some of the early Article 9 commitment decisions adopted shortly after the entry into force of Regulation 1/3003 are in fact based on notifications made by the parties under Articles 2 and 4 of Regulation 17/62.¹¹ If the notification procedure had not been abolished, most, if not all, of the commitment decisions involving Article 101 TFEU issues would probably have taken the form of an old-style exemption decision.

6. Although informal settlements were far from unusual, they nevertheless had their disadvantages. One main drawback of the informal nature of the procedure, at least so far as the Commission was concerned, was that there was no sanction for failure to comply with the undertakings offered to the Commission. In case of breach, the only step the Commission could take was to reactivate the proceeding if it had been suspended (as was exceptionally done in the IBM case), or to open a new proceeding if it had been closed. At the conclusion of the proceeding, the Commission could adopt a prohibition decision and impose a fine. This was a cumbersome procedure but, interestingly, it was never applied because no reported breach of an informal settlement ever took place.

7. Another drawback of the informal settlements was that the public information about their content or even simply their existence was scarce. As already indicated, a small number of informal settlements were mentioned in the Commission's annual *Report on Competition Policy* or gave rise to a press release,

⁶ XXIVth Report on Competition Policy 1994, page 365.

⁷ XIVth Report on Competition Policy, fn. 5.

⁸ See, for example, Xth Report on Competition Policy 1980, point 126.

⁹ I. Van Bael, *The Antitrust Settlement Practice of the EEC Commission*, 1986, Common Law Market Review 23, page 75.

¹⁰ *Ibid*, pages 77 and seq.

¹¹ See, *De Beers*, Case 38381, OJ 2006 L204/24, Summary Decision; available in full on the Commission's website; *Bundesliga*, Case 37214, OJ 2005 L134/46 (Summary Decision); available in full on the Commission's website; *Repsol CCP*, Case 38348, OJ 2006 L176/104 (Summary Decision); available in full on the Commission's website; and *Cannes Agreement*, Case 38681, OJ 2007 L296/27 (Summary Decision); available in full on the Commission's website.

but even these often did not provide much detail and thus could not give guidance to other undertakings. For example, some settlements were referred to in generic terms in a routine statement appearing in the Reports which simply stated “[m]any of the cases concerned distribution and licensing agreements...which could be settled after having been brought to line with existing block exemptions or notices”.¹² Many other settlements were not reported at all. Thus, the entire process was characterized by a lack of transparency.

2. Why commitment decisions under Article 9 of Regulation 1/2003 have been so successful

8. Since the entry into force of Regulation 1/2003, 37 commitment decisions have been adopted by the Commission. They deal with competition concerns raised under both Article 101 and Article 102 TFEU, and relate to a wide range of sectors, including energy, IT and financial. During the same period, the Commission adopted 71 prohibition decisions. In other words, commitment decisions have accounted for one third of all EU antitrust decisions in the last ten years.

9. Two immediate reasons explain why the Article 9 commitment procedure has attracted such spectacular success is that it has cured the two deficiencies described in Section 1 of this article. Firstly, the Commission is now entitled to impose fines and periodic penalty payments in case of breach of any commitment.¹³ Since 2005, there was only one case in which the Commission had to impose a fine for breach of a commitment decision and it was very substantial - € 561 million.¹⁴ Second, as regards transparency, the Article 9 commitment procedure is a formal procedure which gives rise to Commission decisions published in the Official Journal.¹⁵

10. The remainder of this Section discusses additional reasons for the rather spectacular success enjoyed by the Article 9 commitment procedure since its creation. As will be shown, this procedure presents many advantages for both the companies involved in competition proceedings and the Commission.

11. In this connection, one factor that has played a major role in the appeal of commitments is the generally limited review of Commission decisions carried out by the EU judiciary which tends to uphold Commission decisions on most substantive issues and rarely, if ever, uses its unlimited jurisdiction to reduce fines on proportionality grounds. In such a context, the exponential increase in the level of fines imposed by the Commission since the entry into force of Regulation 1/2003 has significantly raised the attractiveness of a procedure such as the commitment procedure which makes it possible for companies suspected of having infringed EU competition rules to escape the imposition of a fine. Accordingly, the first benefit for companies of the Article 9 commitment procedure as compared to the Article 7 infringement procedure that will be discussed in this article is the absence of fines.

2.1 Absence of fines

12. Perhaps the most important incentive for companies to make use of the Article 9 commitment procedure is the absence of a fine.¹⁶ Indeed, a remarkable feature of the Commission’s enforcement

¹² I.Van Bael, *The Antitrust Settlement Practice of the EEC Commission*, fn.9, page 65.

¹³ Articles 23(2)(c) and 24(1)(c) of Regulation 1/2003.

¹⁴ *Microsoft*, Case 39530, OJ 2013 C120/15 (Summary Decision); available in full on the Commission’s website.

¹⁵ Article 30 of Regulation 1/2003.

¹⁶ Recital 13 of Regulation 1/2003: “Commitment decisions are not appropriate in cases where the Commission intends to impose a fine”.

practice in the last twenty years has been the constant increase in the fines imposed for infringements of Articles 101 and 102 TFEU. There was a time when a fine of € 1 million, or rather ECUs, was regarded as a substantial fine, and it was only in the mid-1980's that fines of around € 10 million were first imposed.¹⁷ It took almost ten more years for fines to reach the threshold of € 20 million, which was reached for the first time in 1994.¹⁸ It only took four more years before the € 100 million mark was reached in 1998 with the € 102 million fine imposed on Volkswagen for market partitioning practices.¹⁹

13. Since that time, there has been a continuous and spectacular increase in the level of fines, particularly during the tenure of Commissioners Monti (1999-2004) and Kroes (2004-2009). Fines imposed in cases decided under Commissioner Monti reached levels which made the European Commission the world champion for antitrust fines as illustrated by the fines of € 462 million imposed on Hoffmann La Roche in 2001²⁰ and € 497 million on Microsoft in 2004.²¹ Commissioner Kroes subsequently took EU fines to an even higher level and imposed fines that reached two important milestones: a global fine of € 1 billion for a cartel²² and an individual fine of more than € 1 billion for an abuse of dominance.²³ While very substantial fines were also imposed during the tenure of Commissioner Almunia, which ended in 2014,²⁴ the trend of ever higher fines plateaued under his helm. Significantly, in *Google*, a case which in terms of international media visibility presented many similarities with the *Microsoft* case 10 years earlier, Mr. Almunia spent considerable time and efforts to conclude the *Google* investigation with a negotiated solution without a fine.²⁵ These efforts were ultimately unsuccessful and the case is still pending.

14. Strong evidence for the fact that the absence of fines has contributed to the success of the Article 9 commitments procedure is that Article 9 commitments are mostly used to resolve abuse of dominance cases, which have attracted some of the highest fines ever imposed (including the highest fine to date). Indeed, more than half of all the commitment decisions adopted since 2005 have concerned Article 102 TFEU cases.²⁶

¹⁷ In *ECS/AKZO* (Case 30698, OJ 1985 L374/1), the Commission imposed a fine of € 10 million. In *Polypropylene* (Case 31149, OJ 1986 L230/1), a fine of € 11 million was imposed on Montedipe.

¹⁸ *Cartonboard*, Case 33833, OJ 1994 L243/1.

¹⁹ *Ford Volkswagen*, Case 33814, OJ 1993 L20/14. On appeal, the fine was reduced to €90 million (Case T-62/98, *Volkswagen v Commission*, EU:T:2000:180).

²⁰ *Vitamins*, Case 37512, OJ 2003, L6/1.

²¹ *Microsoft*, Case 37792, OJ 2007 L32/23 (Summary Decision); available in full on the Commission's website.

²² *Elevators and escalators*, Case 38823, OJ 2008 C75/19 (Summary Decision); available in full on the Commission's website. The total fines imposed amounted to € 990 million.

²³ *Intel*, Case 37990, OJ 2009 C227/13 (Summary Decision); available in full on the Commission's website.

²⁴ For example, the Commission imposed total fines of € 1.71 billion on eight financial institutions for participating in cartels in the interest rate derivatives industry (*Euro interest rate derivatives*, Case 39914, not yet published; *Yen interest rate derivatives*, Case 39861, not yet published).

²⁵ The Commission opened its investigation against Google upon allegations of antitrust violations in November 2010 (*Google Search*, Case 39740). To this date, the case is still pending.

²⁶ To date, 21 of the 37 commitment decisions adopted by the Commission relate to Article 102 TFEU concerns. These decisions are: *Coca-Cola*, Case 39116, OJ 2005 L253/11 (Summary Decision); available in full on the Commission's website; *De Beers*, fn.11; *Distrigaz*, Case 37966, OJ 2008 C9/8 (Summary Decision); available in full on the Commission's website; *German electricity balancing market*, Case 39389, OJ 2009 C36/8 (Summary Decision); available in full on the Commission's website; *German*

15. While fines have significantly increased, the chances of a company to succeed in having them annulled or simply reduced by the EU judicature have not. As regards abuses of dominance specifically, the last time a finding of abuse of dominance was annulled on substantive grounds was in 1983 when the Court of Justice dismissed the tying allegations in the *Michelin I* decision.²⁷ In the last 25 years, every single fine for abuse of dominance imposed by the Commission has been upheld by the General Court and the Court of Justice even where, as happened in *Telefonica*,²⁸ the Court's Advocate General recommended that the fine be reduced on proportionality grounds considering that, a few years earlier, exactly the same infringement committed by Deutsche Telekom had been sanctioned by a substantially lower fine.²⁹

16. Against such a background, it is not surprising that companies would seek to have their case concluded by an Article 9 commitment decision rather than by an Article 7 prohibition decision with fines. But this is not the only benefit of the Article 9 commitment procedure. In addition to coming without a fine, commitment decisions also come without a finding of infringement, a feature which, as discussed below, presents advantages for both companies and the Commission.

2.2 *Absence of a finding of infringement*

17. As made clear in the Recitals of Regulation 1/2003, commitment decisions limit themselves to finding that there are no longer grounds for action by the Commission “*without concluding whether or not there has been or still is an infringement*”.³⁰

18. For companies whose case is concluded by a commitment decision, a significant benefit is that the risk of civil enforcement will be reduced. Aggrieved private parties seeking damages for harm caused by the conduct which gave rise to the investigation will not be able to rely on the commitment decision to establish the existence of a cause of action.³¹

electricity wholesale market, Case 39388, OJ 2009 C36/8 (Summary Decision); available in full on the Commission's website; *RWE gas foreclosure*, Case 39402, OJ 2009 C133/10 (Summary Decision); ***GDF foreclosure, Case 39316, OJ 2010 C57/13*** (Summary Decision); available in full on the Commission's website; *Long term electricity contracts in France*, Case 39386, OJ 2010 C133/5 (Summary Decision); available in full on the Commission's website; *Rambus*, Case 38636, OJ 2010 C30/17 (Summary Decision); available in full on the Commission's website; *Microsoft*, Case 39530, OJ 2010 C36/7 (Summary Decision); available in full on the Commission's website; *E.On gas foreclosure*, Case 39317, OJ 2010 C278/9 (Summary Decision); available in full on the Commission's website; *Swedish Interconnectors*, Case 39351, OJ 2010 C142/28 (Summary Decision); available in full on the Commission's website; *ENI*, Case 39315, OJ 2010 C352/8 (Summary Decision); available in full on the Commission's website; *Standard & Poor's*, Case 39592, OJ 2011 C31/8 (Summary Decision); available in full on the Commission's website; *IBM - Maintenance Services*, Case 39692, OJ 2011 C18/6 (Summary Decision); available in full on the Commission's website; *Rio Tinto Alcan*, Case 39230, available in full on the Commission's website; *CEZ*, Case 39727, OJ 2013 C251/4 (Summary Decision); available in full on the Commission's website; *Reuters Instrument Codes*, Case 39654, OJ 2013 C326/4 (Summary Decision); available in full on the Commission's website; *Deutsche Bahn I/II*, Cases 39678 and 39731, OJ 2014 C86/4 (Summary Decisions); available in full on the Commission's website; *Samsung*, Case 39939, OJ 2014 C350/8 (Summary Decision); available in full on the Commission's website.

²⁷ Case 322/81, *Michelin v Commission*, EU:C:1983:313.

²⁸ Case C-295/12, *Telefónica v Commission*, Advocate General Opinion, EU:C:2013:619.

²⁹ *Deutsche Telekom AG*, Cases 37451, 37578, 37579, OJ 2003 L263/9 (Summary Decision).

³⁰ Recital 13 of Regulation 1/2003.

³¹ In contrast, Article 16(1) of Regulation 1/2003 provides that infringement decisions adopted by the Commission have binding force before national courts.

19. It is true that Recitals 13 and 22 of Regulation 1/2003 expressly state that commitment decisions are without prejudice to the powers of competition authorities and courts of Member States to make a finding of infringement and decide upon the case. Therefore, the fact that the Commission has closed its proceeding through a commitment decision does not prevent a national competition authority from opening a case and, eventually, finding an infringement. Nor are interested private parties prevented from seeking damages before national courts for infringing conduct of the addressee of a commitment decision. To this date, however, national competition authorities have not found breaches of Article 101 or Article 102 TFEU with regard to conduct on the basis on which the Commission has adopted an Article 9 commitment decision.

20. Another benefit of the absence of a finding of infringement is that the company will not be considered as a repeat infringer should it engage in the same conduct after the expiry of the commitment. Since the 2006 Fining Guidelines provide for an increase in the amount of the fine of up to 100 percent on account of this aggravating circumstance,³² and given that claims of recidivism are frequently made by the Commission,³³ companies may find additional comfort in a commitment decision for this reason.

21. The absence of a finding of infringement in a commitment decision may also be attractive to the Commission. As already noted, a large number of commitment decisions have involved alleged abuses of dominance. One of the reasons for the widespread use of commitment decisions in such cases may be the conflict inside the Commission between those who favor an “effects-based” approach to the interpretation of Article 102 TFEU and those who support the traditional “form-based” approach defended by the Commission’s Legal Service. The extent of the conflict was brought to light by the public reactions to the 2014 General Court *Intel* judgment which was praised by one senior Commission official³⁴ and criticized as “wrong” by another senior official.³⁵ In such a polarized environment, commitment decisions which impose remedies without any underlying formal finding of infringement, thus doing away with the need to choose between the two competing approaches, may be seen as a particularly convenient solution.

2.3 Ability to craft remedies which go further than those allowed in an article 7 prohibition decision

22. An additional benefit of the commitment procedure is that it makes it possible to develop remedies which go beyond those that could be imposed in an Article 7 prohibition decision. While at first sight this might be seen as a benefit that is of interest only to the Commission, it may also be of interest to companies which may take advantage of this unique feature of the commitment procedure to leverage their way out of a procedure which would otherwise end with a prohibition decision and a possibly high fine.

23. The *Microsoft* case³⁶ has shown that there are limits to the measures which the Commission may lawfully impose in a prohibition decision. One of the obligations imposed on Microsoft by the 2004

³² Fining Guidelines, point 28.

³³ For example, the Commission increased the fines imposed on Akzo by 100 percent in the *Calcium Carbide* case (Case 39396, OJ 2009 C301/18, Summary Decision; available in full on the Commission’s website). A 90 percent increase was imposed on Arkema for its involvement in *Heat Stabilizers* (Case 38589, OJ 2009 C307/9, Summary Decision; available in full on the Commission’s website).

³⁴ W. P.J. Wils, *The Judgment of the EU General Court in Intel and the So-Called More Economic Approach to Abuse of Dominance*, 2014, 37 *World Competition*, Issue 4, pages 405 and seq.

³⁵ L. Peeperkorn, *Conditional pricing: Why the General Court is wrong in Intel and what the Court of Justice can do to rebalance the assessment of rebates*, February 2014, *Concurrences Review* N° 1-2015, pages 43 and seq.

³⁶ *Microsoft*, fn. 21.

decision, which found Microsoft guilty of two abuses of dominance, was to submit a proposal to the Commission for the appointment of a monitoring trustee independent from Microsoft who would have the right to access, independently of the Commission, Microsoft's information, documents, premises as well as the source code of Microsoft's relevant products. Microsoft also had to bear all the costs of the appointment of the monitoring trustee, including its remuneration.³⁷

24. Microsoft challenged the legality of this obligation before the General Court on the grounds that the Commission lacked authority to delegate to a private individual the enforcement powers conferred on the Commission by Regulation 17/62, or to require that Microsoft bear the costs of the monitoring trustee. The General Court upheld Microsoft's plea. It ruled that, while the Commission may be assisted by experts in the exercise of its powers of investigation, as well as require companies to provide information, it could not require the appointment of an independent trustee entrusted with powers which the Commission was not authorised to confer on a third party.³⁸ In addition, the General Court considered that the Commission had exceeded its powers by making Microsoft responsible for all the costs associated with the appointment of the monitoring trustee. The Court therefore annulled the monitoring mechanism imposed by the 2004 decision.

25. Had the Microsoft case been concluded by a commitment decision rather than by a prohibition decision, a monitoring trustee of the type envisaged in the 2004 Decision could have been validly put in place if Microsoft had proposed this as a component of its commitment.

26. By allowing the Commission to exceed its powers to impose remedies for infringements under Article 7 of Regulation 1/2003, commitment decisions can also be useful to craft remedies that might better address the Commission's competition concerns. This is perhaps also best exemplified by the Microsoft case. One of the two abuses identified in that decision was the tying of Windows Media Player with Windows. To remedy this infringement, the Commission imposed on *Microsoft* an obligation to offer in the EEA a version of the Windows Client PC Operating System without Windows Media Player ("Windows N"). Microsoft could continue to provide a complete version of the Windows PC Operating System provided that it was sold at a lower price than Windows N but, considering that media players are provided for free, the two versions could be sold at the same price.

27. As one might expect, there was no demand for Windows N and the remedy imposed by the Commission was pointless.³⁹ During the administrative proceeding, however, Microsoft had proposed to the Commission an informal settlement under which three rival players besides Windows Media Player would be bundled with Windows and consumers would be enabled to choose the default player. This proposal was seriously considered by the Commission services and it was only a few days before the adoption of the decision that Commissioner Monti announced that "despite substantial progress, a settlement could not be reached".⁴⁰ This ended the possibility of a more sensible remedy because the Commission considered that the only remedy it could impose to address its tying concerns was untying.⁴¹

³⁷ Case T-201/04, *Microsoft v Commission*, EU:T:2007:289, para. 1278.

³⁸ Ibid, paras 1266-1271.

³⁹ In a press release, Microsoft reported in April 2006 that only 1,787 copies of Windows N had been ordered by retailers and distributors in Europe, and more significantly, OEMs clearly stated "*that they were not interested in installing and selling computers with a less than fully function version of Windows*" (Microsoft News Center, Fact sheet: Windows XP N Sales, April 2006).

⁴⁰ Van Bael & Bellis, *Competition Law of the European Community*, Fifth Edition, page 1158.

⁴¹ The Commission later learned its lesson. In 2008, the Commission again initiated a formal investigation against Microsoft with respect to *inter alia* the tying of Internet Explorer with the Windows PC Operating

28. Another example of a situation where the Commission has gone beyond what it could require as part of an infringement decision is the acceptance of divestiture commitments. These have been accepted several times to deal with competition concerns essentially related to the vertically integrated structure of energy companies⁴² and consisted in full ownership divestment of energy infrastructures.⁴³

29. The Commission's power to accept commitments that go beyond what the Commission could itself impose in an Article 7 prohibition decision was expressly confirmed by the Court of Justice in *Alrosa*.⁴⁴ In that case, the Court accepted that the principle of proportionality does not have the same extent and content depending on whether it is considered in the context of an Article 7 prohibition procedure or that of an Article 9 commitment procedure.⁴⁵ Finally, the Court made it clear that the standard of judicial review for commitment decisions is whether the Commission's assessment is manifestly incorrect.⁴⁶

30. By this judgment, the Court of Justice has in effect granted the Commission a broad licence to secure from companies suspected of infringements of Articles 101 and 102 TFEU commitments which are not subject to a strict proportionality requirement. This pragmatic judgment preserves all the incentives for companies and the Commission to develop mutually beneficial negotiated solutions to competition concerns identified by the Commission.

3. Conclusion

31. The Commission's commitment practice has attracted critical comments from a number of commentators who have raised the question of whether the Commission can, in the name of effectiveness, use its bargaining power to request commitments which it knows are over-reaching and which may unduly restrict the ability of undertakings to compete on the market.⁴⁷ Concerns over the parties' limited procedural rights combined with the Commission's tendency to avoid the complexity of articulating a theory of harm that could withstand the scrutiny of EU Courts have also been expressed.⁴⁸ In the same line

System. *Microsoft*, Case 39530, OJ 2010 C36/7 (Summary Decision); available in full on the Commission's website. This time, however, instead of adopting an Article 7 prohibition decision, the Commission chose to follow the Article 9 commitment procedure. The remedy for the tying allegation was a commitment by Microsoft to give European users of Windows a choice among different web browsers and to allow computer manufacturers and users the possibility to turn Internet Explorer off. In essence, this remedy was not dissimilar from that unsuccessfully proposed by Microsoft for Windows Media Player in the investigation that led to the 2004 decision.

⁴² To date, the Commission has adopted ten commitment decisions in the energy sector: *Distrigaz*, fn. 26; *German electricity wholesale market*, fn. 26; *German electricity balancing market*, fn. 26; *RWE gas foreclosure*, fn. 26; *GDF foreclosure*, fn. 26; *Long term electricity contracts in France*, fn. 26; *Swedish Interconnectors*, fn. 26; *E.On gas foreclosure*, fn. 26; *ENI*, fn. 26; *CEZ*, fn. 26.

⁴³ J-F. Bellis, *Commitment Decisions in Article 102 TFEU Cases – An Alternative to Infringement Decisions with Fines*, Presentation to the Brussels School of Competition, 2013: "The Commission effectively managed to secure from E.ON voluntary but legally binding structural commitments through competition enforcement at a time when its parallel negotiations with Member States on regulatory unbundling of their energy companies was struggling".

⁴⁴ Case C-441/07, *Commission v Alrosa*, EU:C:2010:377, para. 48.

⁴⁵ *Ibid*, para. 38.

⁴⁶ *Ibid*, para. 42.

⁴⁷ For example, see F. Jenny, *Worst decision of the EU Court of Justice: the Alrosa judgment in context and the future of commitment decisions*, 2014, *International Antitrust Law & Policy*, Fordham University School of Law, page 405.

⁴⁸ *Ibid*.

of thought, some authors see in the adoption of commitment decisions a loss of legal certainty, given that legal principles are not clearly defined but can only be extrapolated from non-authoritative guidance.⁴⁹ Finally, there have been discussions over whether the Commission is entitled to use its powers to enforce competition law under Article 9 in order to in fact “regulate” a certain sector such as the energy sector.⁵⁰

32. While there is certainly merit in these criticisms, the commitment procedure fulfils a useful function in the EU public enforcement system in which the Commission enjoys a wide discretion and judicial review is essentially limited to a control of the legality of decisions adopted by the Commission. Commitment decisions are the product of a bargaining process which the Court of Justice accurately described in *Alrosa* as one in which companies “consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the regulation” in exchange for an outcome which allows them to “avoid a finding of an infringement of competition law and a possible fine”.⁵¹

⁴⁹ For further discussions, see F. Wagner-Von Papp, *Best and even better practices in commitment procedures after Alrosa: the dangers of abandoning the “struggle for competition law”*, 2012, *Common Market Law Review* 49, page 929.

⁵⁰ For example, see N. Dunne, *Commitment decisions in EU competition law*, *Journal of Competition Law & Economics*, 2014 10 (2), page 399.

⁵¹ *Commission v Alrosa*, fn.44, para. 48.