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Article 9 Regulation (EC) 1/2003 introduced the commitment procedure into European Union ("EU") law.[2] What was initially expected to be a marginal modification of the Commission's existing practice, intended to make the informal practice of settling cases more transparent, has since developed into the de facto default type of decision for non-cartel cases.[3] In a speech delivered on March 8, 2013, the Vice President of the European Commission Joaquín Almunia noted with a certain pride that "in the ten years since Regulation 1/2003 gave the commitment option to companies," "[o]ut of 41 decisions taken by the Commission, we have had 15 prohibitions and 26 commitments."[4]

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[2] Article 9 Regulation (EC) 1/2003 provides:

1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.
2. The Commission may, upon request or on its own initiative, reopen the proceedings:
    a. where there has been a material change in any of the facts on which the decision was based;
    b. where the undertakings concerned act contrary to their commitments; or
    c. where the decision was based on incomplete, incorrect or misleading information provided by the parties.

[3] Cf. Heike Schweitzer, *Commitment Decisions in the EU and in the Member States: Functions and Risks of a New Instrument of Competition Law Enforcement Within a Federal Enforcement Regime*, E-COMPETITIONS Special Issue on Commitment Decisions, August 2, 2012, *available at* http://ssrn.com/abstract=2101630, 2. For a comparison with the U.S. practice, see Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent*, in: WILLIAM E. KOVACIC – AN ANTITRUST TRIBUTE, LIBER AMICORUM, VOL. 1 (Nicolas Charbit, Elisa Ramundo et al., eds, 2012) 177-189.

[4] Joaquín Almunia, Remedies, Commitments and Settlements in Antitrust (March 8, 2013), SPEECH/13/210. Given that Regulation (EC) 1/2003 was to be applied only from May 1, 2004 (Article 45 of the Regulation), the procedure has actually been available only for slightly less than nine years. The number of "15 prohibitions" appears to exclude all those decisions for which the commitment procedure would not have been appropriate in the first place because the Commission "intend[ed] to impose a fine" (Recital 13 to the Regulation). This latter restriction is narrowly interpreted to denote decisions on "secret cartels that fall under the Notice on immunity from fines and reduction of fines in cartel cases" (*see* Commission Notice on Best Practices for the Conduct of Proceedings Concerning Articles 101 and 102 TFEU, [2011] *Official J.* C 308/6 at [116]) or in other, less technical, words "hardcore cartel cases" (as the Commission's MEMO/04/217 of September 17, 2004, had put it). For a discussion of this restriction *see* Florian Wagner-von Papp, *Best and Even Better Practices in Commitment Procedures After Alrosa*,

There are various reasons why the Commission has grown fond of the commitment procedure, many of which are perfectly legitimate.[5]

The commitment procedure may be speedier and less costly than the infringement procedure.[6] Especially in the presence of network effects, the early stages of a technology's dissemination are often decisive for the technology's success. If there is any anticompetitive conduct at this stage that could pre-determine the winner of the race, competition authorities must either object immediately, or forever hold their peace (or be relegated to picking up the pieces).

In such a scenario, the lengthy process of investigating the case until it is ripe for an infringement decision that will hold up in court may be inappropriate. One solution would be to employ interim measures under Article 8 Regulation (EC) 1/2003 as soon as a *prima facie* case of an infringement can be established. However, the competition authorities appear relatively reluctant to use this device, possibly because premature intervention could produce an equally harmful Type I error—interim measures against legitimate forms of competition stifle competition and could pick the "wrong" winner of the race.[7]

On a benign reading, the Commission may try to avoid such Type I errors for the sake of competition. An alternative reason for the Commission's reluctance to order interim measures could be the wish to avoid the enormous damages it might face if the exercise of discretion in an interim measures decision subsequently turns out to have been manifestly erroneous.[8] Instead of ordering interim measures followed by an infringement decision, the Commission prefers to arrive at an early permanent arrangement with the parties through the commitment procedure.

More controversially, the Commission has used the commitment procedure to use remedies it could, or would, not have imposed in an infringement decision. For example, the Commission has never dared order a structural remedy in an infringement decision under Article 7 of Regulation (EC) 1/2003. The Commission has not hesitated, however, to make

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49 COMMON MKT. L. REV. 929, 944-945 in n. 65 (2012) with further references. For a list of commitment decisions until the end of 2011, *cf. id.*, at 942 in nn. 55-58. Since then, the Commission has adopted three more commitment decisions: Commission, June 18, 2012, Case COMP/39.736 – *Siemens/Areva*; Commission, December 12, 2012, Case COMP/39.847 – *E-BOOKS*; Commission, December 20, 2012, Case COMP/39.654 – *Reuters Instrument Code*.

[5] *See*, e.g., Christopher J. Cook, *Commitment Decisions: The Law And Practice Under Article 9*, 29 WORLD COMPETITION 209, 210-213 (2009); Suzanne Rab, Daphne Monnoyeur & Anjali Sukhtankar, *Commitments In EU Competition Cases*, 1 J. EUR. COMPETITION L. & PRACTICE, 171, 175-176 (2010); Wagner-von Papp, *supra* note 4, at 958-960; Wouter P.J. Wils, *Settlements of EU Antitrust Investigations: Commitment Decisions Under Article 9 of Regulation 1/2003*, 29 WORLD COMPETITION 345, 349-352 (2006).

[6] Firat Cengiz, *Judicial Review And The Rule of Law In The EU Competition Law Regime After Alrosa*, COMPETITION L. J. 127, 130 (2011); Cook, *supra* note 5, at 210; Wagner-von Papp, *supra* note 4, at 959; Wouter P.J. Wils, *The Use of Settlements In Public Antitrust Enforcement: Objectives And Principles*, 31 WORLD COMPETITION 335, 343-344 (2008).

[7] *See* Stephen Kinsella, *Hurry Up And Wait*, CPI ANTITRUST CHRONICLE March 2013, No. 2.

[8] Cf., in the merger context, European Court of Justice, Joined Cases C-440/07 P (*Commission v. Schneider Electric*), [2009] ECR I-6413 ¶¶ 160 *et seq*.

structural commitments binding on the parties in the commitment procedure in a number of energy cases.[9]

This practice of seeking remedies that would not be available in the infringement procedure is seen by some as a positive development:[10] A case can be made that the European Court should allow the Commission to be more proactive in infringement decisions.[11] Perhaps the Commission should be allowed to do more than just "restore compliance with the rules infringed."[12]

Nevertheless, the ability to circumvent the limits the law places on remedies—in particular that they be proportionate—simply by choosing the commitment procedure is not unproblematic. After all, the exercise of the Leviathan's power has been constrained by the law for a reason.[13]

The easy answer to this problem would be that the commitment procedure merely substitutes the negotiations of the parties for the legal constraints. In contractual bargaining, we generally assume that each party is able to safeguard its own interest, and that this sufficiently guarantees the substantive fairness of the outcome. *Mutatis mutandis*, if the firm agrees to commitments that objectively seem to be "disproportionate," the explanation may simply be that the cost of the disadvantageous commitments is (more than) offset by some concession on part of the competition authority. Increasing the range of available remedies on the negotiating table may increase the surplus to be made from bargaining, potentially benefitting both parties to the negotiations.[14]

It seems doubtful, however, that it would be appropriate to leave the safeguarding of the parties' interests entirely up to the process of negotiations. The Commission is able to extract more than its "fair" share. It is not so much that the Commission can threaten to order remedies in an infringement decision and impose a high fine if the negotiations break down. It is, after all, not unusual to bargain in the shadow of outside options. As long as the Commission's expected

[9] *See* on the E.On and RWE cases, *e.g.*, Hubertus von Rosenberg, *Unbundling Through the Back Door ... the Case of Network Divestiture As a Remedy in the Energy Sector*, 30 EUR. COMPETITION L. REV. 237-254 (2009).

[10] Cook, *supra* note 5, at 212-213; George Stephanov Georgiev, *Contagious Efficiency: The Growing Reliance on US-Style Antitrust Settlements in EU Law*, Utah L. Rev. 971, 1012 (2007).

[11] Wagner-von Papp, *supra* note 4, at 931, 966-967. For a comprehensive treatment of remedial discretion *see* Ioannis Lianos, *Competition Law Remedies in Europe: Which Limits for Remedial Discretion?*, CLES Research Paper Series 2/2013 (January 2013), http://www.ucl.ac.uk/cles/research-paper-series/research-papers/cles-2-2013. For the companies, however, agreeing to fencing-in remedies bears the danger that infringements of commitments—even if they prohibit conduct that, as such, would be permissible—may result in high fines. A breach of a commitment may result in a fine of up to 10 percent of the undertaking's worldwide annual turnover, Article 23(2)(c) Regulation (EC) 1/2003. Additionally, the proceedings may be reopened, Article 9(2)(b) Regulation (EC) 1/2003. For the first fine for a breach of a commitment, *see* Press Release, EU Commission, Commission Fines Microsoft for Non-Compliance with Browser Choice Commitments (March 6, 2013), IP/13/196; the amount (€561m) for a relatively minor and apparently inadvertent breach exceeded the amount imposed in the 2004 infringement decision.

[12] European Court of Justice, Joined Cases C-241 and 242/91 P (*RTE and ITP v. Commission*), [1995] ECR I-743 ¶ 93.

[13] See the dangers described in Ginsburg & Wright, supra note 3 (describing various abuses and misuses of power in the settlement procedure, pointing to mission creep, and warning about the effects on case selection).

[14] For an elaboration *see* Wagner-von Papp, *supra* note 4, at 959-960.

outside option would be a proportionate infringement decision, there is no reason why the parties—even if they are risk averse—would agree to disproportionate commitments.[15]

The reasons why the Commission may be able to extract disproportionate commitments after all are threefold:[16]

1. It is possible that the parties expect the Commission's outside option to be a disproportionate response. While disproportionate remedies and sanctions in an infringement decision could be challenged before the Court of Justice (and could therefore be considered a threat that is not credible), there is a non-zero probability that the Court may defer to the Commission's assessment, or erroneously consider the infringement decision to be proportionate. To the extent the parties fear such a judicial error, the Commission may be able to extract disproportionate commitments.
2. It is possible that the parties expect that the Commission will treat them in a less forthcoming way in separate (future or concurrent) proceedings if they do not agree to the commitments the Commission is looking for.
3. The commitment procedure allows the Commission to extract commitments that go beyond the remedies and sanctions it could impose in an infringement decision by de facto precluding the possibility of third-party private claims: Commitment decisions do not contain a finding of an infringement, and therefore do not support follow-on actions, and they do not contain sufficiently detailed findings of fact to facilitate stand-alone actions.

For a short while, it looked as if the danger of disproportionate commitments could—at least partially—be tempered by judicial review. In the *Alrosa* case, the General Court applied a strict proportionality test to commitment decisions.[17] Unfortunately, the Advocate General and the Court of Justice disagreed on appeal, and instead relied nearly exclusively on the assumption that negotiations between the Commission and the parties would ensure a balanced outcome.[18]

Just as the negotiations cannot guarantee that the commitments are proportionate, they do not necessarily guarantee that the commitments are adequate. The Commission does not have the benefit of a full investigation into the facts, and may inadvertently even agree to commitments that do themselves have anticompetitive effects.[19] The dynamics of commitment

[15] *Id.*, at 943-948.

[16] *Id.*, at 948-950; see also Lianos, *supra* note 11, at 66 *et seq*.

[17] General Court, Case T-170/06 (*Alrosa v. Commission*), [2007] ECR II-2601. On the General Court's judgment, *see, e.g.,* Heike Schweitzer, *Commitment Decisions Under Article 9 of Regulation 1/2003: The Developing EC Practice and Case Law*, in: EUROPEAN COMPETITION LAW ANNUAL 2008: ANTITRUST SETTLEMENTS UNDER EC COMPETITION LAW (Claus-Dieter Ehlermann & Mel Marquis, eds, 2010) 547; John Temple Lang, *Commitment Decisions Under Regulation 1/2003,* in ALTERNATIVE ENFORCEMENT TECHNIQUES IN EC COMPETITION LAW (Charles Gheur & Nicolas Petit, eds, 2009) 121. For further references, see Wagner-von Papp, *supra* note 4, at 930 n. 4.

[18] European Court of Justice, Case C-441/07 P (*Commission v. Alrosa*) [2010] ECR I-5949. For commentary, *see* Lianos, *supra* note 11, at 71 *et seq*.; Wagner-von Papp, *supra* note 4, at 934-943 and passim; further references *id.*, at 930 n. 5.

[19] Wagner-von Papp, *supra* note 4, at 961-970.

negotiations may make them more focused on achieving an agreement than on safeguarding competition.[20]

Nor can one rely on the National Competition Authorities ("NCAs") to jump into the breech. Quite apart from the controversial question to what extent NCAs may intervene as a matter of law where the Commission has made commitments binding on the undertakings,[21] it is unlikely that NCAs are going to spend their scarce resources on conduct which has de facto been given the Commission's stamp of approval.[22]

Arguably the most toxic influence the rise of the commitment procedure has, however, is the danger that there will be too few infringement decisions and legal certainty is lost.[23] The positive externalities that legal actions have because they clarify the allocation and boundaries of legal rights are lost if disputes are negotiated instead of being adjudicated. This danger is particularly high where novel legal issues come up. Here, the temptation for the Commission is to resolve the case quickly by negotiating commitments: A commitment decision as a precedent will influence the conduct of third parties nearly as much as an infringement decision would have, and there is no risk of losing the case on appeal.

Where the initial allocation of property rights becomes increasingly unclear, negotiations will not lead to efficient results. At the same time, an unclear definition of property rights makes it less likely that the parties risk litigating; instead, they will resort more and more to a resolution of cases in the commitment procedure.

Even at the best of times, the demarcation between desirable vigorous competition by dominant firms and exclusionary abuse is difficult. In the future, the question will not really be whether the conduct in question is legal or illegal. It will be how much a dominant firm is willing to give to buy the right to engage in borderline conduct. Such haggling has its proper place in a bazaar. As long as competition authorities want to be seen to uphold the rule of law, they should resist the temptation of an easy bargain.

[20] *Id.*, at 951 with n. 85.

[21] *Id.*, at 952-953.

[22] *Id.*, at 953-954.

[23] *Id.*, at 930-931, 961-970 with further references at 961 n. 123; Ian Forrester, *Creating New Rules Or Closing Easy Cases?*, in EUROPEAN COMPETITION LAW ANNUAL 2008: ANTITRUST SETTLEMENTS UNDER EC COMPETITION LAW (Claus-Dieter Ehlermann & Mel Marquis, eds, 2010) 637-638, 647-648; Georgiev, *supra* note 10, 1026-1029; Wils, *supra* note 5, 351-352; idem, *supra* note 6, 344-346; see also Ginsburg & Wright, supra note 3, 178.