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Abstract

The so-called “commitment decision” procedure, introduced into European competition law with Art. 9 of Regulation 1/2003, was meant to provide the Commission with the possibility to dispose of competition law cases by way of a kind of formal settlement, roughly analogous to the US consent decree. It has quickly become an important instrument of European competition law enforcement. Since May 2004, roughly 50 % of all Commission decisions applying Art. 81 or Art. 82 in non-hardcore-cartel cases have been taken under Art. 9 of Reg. 1/2003. However, the CFI’s *Alrosa* judgment of 11 July 2007 calls into question the Commission’s commitment decision practice in various respects. *Alrosa* does not conceive commitment decisions as “settlements” proper, but treats them as public law enforcement largely analogous to infringement decisions under Art. 7 of Reg. 1/2003. It emphasizes the Commission’s duty to investigate and clearly formulate the competitive concern, insists on a full judicial review of the proportionality of the commitments and underlines the full judicial protection of the concerned undertakings’ procedural rights, namely the right to access to the file and the right to be heard.

This paper provides an overview of the Commission’s commitment decision practice since Art. 9 of Reg. 1/2003 has entered into force, discusses the concerns that this practice has raised and the implications of the *Alrosa* judgment, should it be upheld by the ECJ. According to the author, the *Alrosa* judgment fundamentally re-conceptualizes the function and structure of commitment decision procedures, with likely repercussions on analogous provisions in national competition laws. It creates important safeguards against the real risk that the

Commission’s incentives to settle cases may diverge from the public interest in effective protection of competition.

Keywords:

Alrosa - Commitment decisions - Settlements - Antitrust - Judicial review - Competition law - Right to be heard - Access to the file - Remedies

Commitment Decisions under Art. 9 of Regulation 1/2003: The Developing EC Practice and Case Law

Heike Schweitzer

I. Introduction

Reg. 1/2003[1] has provided the EU Commission with a new instrument to enforce EU competition rules: the so-called "commitment decision" procedure (Art. 9) was meant to introduce a formal settlement procedure into European competition law, roughly analogous to the US consent decree. Art. 9(1) of Reg. 1/2003 reads:

> "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".

If the Commission opts for a commitment decision – which it is never obliged to do[2] – it will dispose of the case without formally establishing that there has been an infringement of EC competition rules.[3] It is, at the same time, relieved of the necessity to fully prove an infringement,[4] as it would need to do in a regular infringement proceeding under Art. 7(1) of Regulation 1/2003. The Commission may therefore be able to resolve the case more easily and speedily, economizing on the use of its scarce

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[1] Council Regulation 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 [2003] OJ L1/1, last amended by Council Regulation No 1419/2006 [2006] OJ L 269/1.

[2] For the finding that it is always within the discretion of the Commission to decide whether to pursue the Article 7(1)-procedure, or whether to accept offers of commitments by the undertakings concerned and to pursue a commitment decision procedure under Art. 9, see CFI, judgment of 11 July 2007, Case T-170/06, para. 96 and para. 130 – *Alrosa* [not yet reported in ECR]. The Commission is not even obliged to give reasons why commitments are not, in its view, suitable to be made binding. See also *Wils*, The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles, this Volume, p. 14 of the manuscript. A version of the paper will be published in 31 World Comp. forthcoming 2008. According to Wils, the Commission should retain its full discretion in order to be able to balance the costs and benefits of settlements in each individual case.

[3] Article 9(1), second sentence, and second sentence of recital 13: The commitment decision will not conclude "whether or not there has been or still is an infringement".

[4] CFI, *Alrosa*, para. 87

resources.[5] The undertakings concerned, for their part, may be interested in a commitment decision in order to avoid a long, time-consuming and expensive legal controversy over facts, economic assessment and the law, and the reputational damages that might accompany such expanded proceedings. Furthermore, they avoid a formal finding of an infringement that could be used in private damages actions in the Member States' courts and that could possibly lead to the imposition of a fine.[6]

The commitment decision procedure formalizes a long-standing practice of informal settlements under Regulation 17.[7] Compared to this practice, it facilitates the enforcement of commitments offered by the undertakings concerned. While a breach of commitments accepted under the informal practice could only be sanctioned by re-opening the case and ultimately proving an infringement of competition rules, non-compliance with commitments made binding under Art. 9 Reg. 1/2003 is itself a legal offence that can be sanctioned through the imposition of fines or periodic penalty payments (Articles 23(2)(c) and 24(1)(c) of Reg. 1/2003).[8] In this regard, commitment decisions share important features of exemption decisions under Art. 81(3) with conditions and obligations attached, which the Commission could issue under the old regime of Reg. 17,[9] but which are no longer available under the new legal exception regime.

Commitment decisions under Art. 9 of Reg. 1/2003 must be clearly distinguished from the settlement procedure in cartel cases that is about to be introduced into EU competition law under the proposed new Article 10a of Commission Regulation

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[5] For the efficiency-justification for the introduction of the commitment decision procedure see EU Commission, MEMO/04/217; and *George Stephanov Georgiev*, Contagious Efficiency: The Growing Reliance on U.S.-Style Antitrust Settlements in EU Law, Utah Law Rev. 2007, 971, at 973-974. For a more complete set of reasons why the Commission may be interested in a commitment procedure see *John Temple Lang*, Commitment Decisions and Settlements with Antitrust Authorities and Private Parties under European Antitrust Law, in: 2005 Annual Proceedings of the Fordham Corporate Law Institute (Barry Hawk ed., 2006), 265, at 274-276; and *Christopher Cook*, Commitment Decisions: The Law and Practice Under Article 9, 29(2) World Comp. 2006, 209, at 212-213.

[6] For a more complete summary of the reasons companies may have for offering commitments see: *Temple Lang*, in: 2005 Annual Proceedings of the Fordham Corporate Law Institute (Barry Hawk ed., 2006), 265, at 271-274. See also *Cook*, 29(2) World Comp. 2006, 209, at 210-212.

[7] See *Wouter Wils*, Settlements of Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003, in: Wils, Efficiency and Justice in European Antitrust Enforcement, 2008, p. 25, at 27-28; *Richard Whish*, Commitment Decisions under Article 9 of the EC Modernisation Regulation: Some Unanswered Questions, in: M.Johansson, N. Wahl and U. Bernitz (eds), LiberAmicorum in Honour of Sven Norberg – A European for All Seasons, (Bruylant, 2006), p. 555, at 556; *Joachim Bornkamm*, Die Verpflichtungszusage nach § 32b GWB, in: Brinker / Scheuing / Stockmann (eds.), FS `ür Rainer Bechthold zum 65. Geburtstag, 2006, p. 45, at 46. For the practice of informal settlements under which the Commission frequently linked the closing of proceedings to commitments offered by the undertakings concerned, see: Commission's XIVth Report on Competition Policy 1984, points 94-95. For a list of further examples, see *Richard Whish*, Competition Law, 5th ed., 2003, at 210. See also *Lorenzo Federico Pace*, European Antitrust Law, 2007, p. 237.

[8] *Temple Lang*, in: 2005 Annual Proceedings of the Fordham Corporate Law Institute (Barry Hawk ed., 2006), 265, at 286.

[9] See Art. 8(1) of Reg. 17/62; and Art. 15(2)(a) for the possibility to impose fines in case of non-respect. See, however, *Whish*, in: M.Johansson, N. Wahl and U. Bernitz (eds), LiberAmicorum in Honour of Sven Norberg, 2006, p. 555, at 558: "… the Commission will wish to ensure that the Article 9 procedure does not become a surrogate for notification for the old system of individual exemption under Regultion 17/62 …".

773/2004 and Commission Notice on the conduct of settlement procedures in cartel cases.[10] In cartel cases, the Commission will continue to establish an infringement under Art. 7 and to impose fines under Art. 23 of Reg. 1/2003, but wants to open the possibility of a simplified and speedier procedure leading up to these decisions, combined with the possibility to reduce the fines.

Commitment decisions, by contrast, replace a finding of an infringement under Art. 7 with a finding that "there are no longer grounds for action by the Commission without concluding whether there has been or still is an infringement".[11] Based on such a finding, no fines can be imposed – neither in the commitment decision itself, nor in a decision under Art. 23 Reg. 1/2003.[12] The Commission has therefore excluded the use of commitment decisions in hardcore cartel cases.[13] More generally, "[c]ommitment decisions are not appropriate where the Commission intends to impose a fine" (Recital 13 of Reg. 1/2003).

Instead, commitment decisions aim at putting an end to an (alleged) infringement – or, as some argue, at meeting the Commission's competitive concerns to a degree that the case no longer figures among the Commission's enforcement priorities.[14] For this purpose, commitment decisions can impose behavioural or structural remedies.[15] The commitments may – but need not necessarily[16] – be limited in time.

The rules guiding the commitment decision procedure are only incompletely developed in Reg. 1/2003. Commitment decision proceedings are formal proceedings, and require a formal initiation of proceedings,[17] which may either predate or coincide with the issuing of a "preliminary assessment" referred to in Art. 9(1) of Reg. 1/2003. In the

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[10] The documents are available under http://ec.europa.eu/comm/competition/cartels/legislation/ cartels_ settlements/procedure_regulation_en.pdf and http://ec.europa.eu/comm/competition/cartels/ legislation/ cartels_settlements/procedure_notice_en.pdf. See also: *Wils, supra* note 2; and *M.L. Tierno Centella / E. Cuziat*, La procédure de transaction communautaire, (2008) Concurrences, No. 2, pp. 76-83.

[11] Recital 13 of Reg. 1/2003.

[12] See Fourth sentence of recital 13 in the preamble of Regulation 1/2003: Commitment decisions are "not appropriate in cases where the Commission intends to impose a fine". See also *Wils*, *supra* note 2, pp. 6-7; *Cook*, 29(2) World Comp. 2006, 209, at 213.

[13] See EU Commission, MEMO/04/217, 17 Sept. 2004. According to *Wils*, commitment decisions are not appropriate in cases of serious, clear-cut infringements, more generally, since in such cases, the main enforcement objectives should be deterrence and public censure, through the finding of the infringement and the imposition of penalties (*Wils*, *supra* note 2, p. 13). The Commission's commitment decision practice reveals, however, that at least in some cases, commitment decisions have been used in cases of rather serious infringements. If the *E.ON* case and the *RWE* case are ultimately dealt with under Art. 9, these would be the most obvious examples.

[14] Whether the latter would suffice, or whether a commitment decision must pursue the goal to put an infringement to an end, is a matter of controversy – see below, at IV.5.

[15] EU Commission, MEMO/04/217, 17 Sept. 2004. See also: *Temple Lang*, in: 2005 Annual Proceedings of the Fordham Corporate Law Institute (Barry Hawk ed., 2006), 265, at 294-295.

[16] *Temple Lang*, in: 2005 Annual Proceedings of the Fordham Corporate Law Institute (Barry Hawk ed., 2006), 265, 323 provides strong arguments in favor of a general practice to limit commitments to 3-5 years: "Companies should not be asked to tie their hands for longer than that, and officials should not imagine that they can see further into the future than that with confidence. Excessively long commitments will inevitably give rise to the need for formal amendments".

[17] See Art. 2 of the EU Commission's Regulation (EC) Nol 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, [2004] OJ L 123/18 ("Implementing Regulation").

"preliminary assessment" – which may, and sometimes is, replaced by a more elaborate "statement of objections" – the Commission must specify its concerns about possible infringements of Art. 81 or Art. 82 EC. The "preliminary assessment" is conveyed to the undertakings concerned and provides the basis for the negotiations on commitments. Where the Commission in principle takes a positive view of the commitments offered and intends to make them binding, it must publish a concise summary of the case and the main content of the commitments in the Official Journal (Art. 27(4) of Reg. 1/2003). In addition, it publishes the full text of the commitments in their original language on the Internet.[18] Interested third parties then have the opportunity to comment within a period of at least one month. If this "market test" reveals weaknesses, the Commission can renegotiate the commitments or abandon the commitment decision option altogether.[19] All commitment decisions ultimately adopted must be published.[20] Compared to the earlier practice of informal settlements, the commitment decision procedure thus provides for a greater degree of transparency.[21]

A commitment decision will normally protect its addressees against a reopening of an infringement procedure by the Commission. According to Art. 9(2) of Reg. 1/2003, the Commission may, however, 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".

No use has been made of Art. 9(2) so far. In its *Distrigaz* decision, the Commission has, however, specified that proceedings may also be reopened under Art. 9(2)(a) in order to lift or relieve commitments where new facts are presented that prove them to be disproportionate to the underlying competition concern.[22]

II. The Commission's Commitment Decision Practice

When the commitment decision procedure was introduced into Regulation 1/2003, it was unclear which role it would come to play in practice. According to *John Temple Lang*, the Commission initially believed that commitment decisions would be unusual and rare.[23] Instead, commitment decisions have quickly become a popular and important

[18] EU Commission, MEMO/04/217.

[19] EU Commission, MEMO/04/217. For the legal constraints see: CFI, *Alrosa*, at paras. 194-195 and section III.2.b) of this paper.

[20] See Art. 30 of the EU Commission's Implementing Regulation 773/2004.

[21] Commitment decisions must be published in accordance with Article 30(1) of Reg. 1/2003.

[22] EU Commission, Commitment Decision of 11.10.2007, Case COMP/B-1/37.966 – *Distrigaz*, paras. 36, 37.

[23] *Temple Lang*, in: 2005 Annual Proceedings of the Fordham Corporate Law Institute (Barry Hawk ed., 2006), 265, at p. 270.

instrument of competition law enforcement[24] – sometimes at the initiative of the Commission,[25] and sometimes at the initiative of the undertakings concerned[26] (see 1.). At the same time, important concerns have been voiced (see 2.).

1. The Developing Commitment Decision Practice

Since the entry into force of Reg. 1/2003 in May 2004, 11 commitment decisions have been issued[27] (see list in Annex 1). In five additional cases, a market test notice has been published,[28] while the ultimate decision is still pending. In at least one more case, undertakings have offered commitments to settle ongoing antitrust investigations.[29]

Commitment decisions have been used to settle both Art. 81 cases[30] and Art. 82 cases.[31] Within the field of Art. 81, commitment decisions seem to be perceived as a useful instrument in particular in those cases where the pro-competitive effects of an agreement restrictive of competition are uncontroversial, but the Commission wants to ensure that the restriction of competition does not go beyond what is necessary to achieve the pro-competitive effects. The four commitment proceedings concerning different agreements concluded between European collecting societies fall into this

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[24] See *Georgiev*, Utah Law Rev. 2007, 971, at 1005. According to the Commission's own assessment, commitment decisions have become "an effective means of addressing competition problems" – see EU Commission, Annual Report 2006, p. 12-13. See, however, *Whish*, in: M.Johansson, N. Wahl and U. Bernitz (eds), LiberAmicorum in Honour of Sven Norberg, 2006, p. 555, at 564, who cautions that the Art. 9-procedures may have been "used to some extent as a way of clearing the backlog of difficult 'legacy' cases from the days of Regulation 17/62".

[25] In the *Bundesliga* case, for instance, the Commission seems to have envisioned a commitment decision from the start: instead of a statement of objection, it published a preliminary assessment. The same happened in the cases against *Fiat, Toyota,DaimlerChrysler* and *General Motors*.

[26] In *CISAC*, for instance, the Commission initially issued a statement of objections, not merely preliminary findings – which appears to indicate that the Commission at least contemplated an Art. 7 proceeding. Similarly, the proceedings in *Distrigaz* and in *SkyTeam* were opened by adopting a statement of objections. Furthermore, in *E.ON* and, more recently, *RWE*, the initiative for the proposal of the divestiture commitments appears to have come from E.ON and RWE themselves, driven by the interest to avoid a high fine.

[27] COMP/37.214 – *Deutsche Bundesliga;* COMP/39.116 – *Coca-Cola;* COMP/38.381 – *De Beers-Alrosa;* COMP/38.173 – *Premier League;* COMP/38.348 – *Repsol;* COMP/38.681 – *Cannes Agreement;* COMP/38.140-143 – *DaimlerChrysler; Toyota; General Motors; Fiat;* COMP/37.966 – *Distrigaz.*

[28] COMP/39.152 – *BUMA;* COMP/39.151 – *SABAM;* COMP/37.749 – *Austrian Airlines/SAS;* COMP/38.698 – *CISAC;* COMP/37.984 – *SkyTeam*; COMP/B-1/39.388 and COMP/B-1/39.389 – *E.ON*.

[29] See EU Commission, MEMO/08/346, 28 May 2008, together with EU Commission, MEMO/07/186, 11 May 2007, for the ongoing negotiations with RWE on possible commitments to divest its gas transport network in North Rhine-Westphalia in order to settle Art. 82-antitrust proceedings in which RWE is charged with anti-competitive market foreclosure.

[30] COMP/37.214 – *Deutsche Bundesliga;* COMP/38.173 – *Premier League;* COMP/38.348 – *Repsol;* COMP/38.681 – *Cannes Agreement;* COMP/38.140-143 – *DaimlerChrysler; Toyota; General Motors; Fiat;* COMP/39.152 – *BUMA* (pending)*;* COMP/39.151 – *SABAM* (pending)*;* COMP/37.749 – *Austrian Airlines/SAS* (pending)*;* COMP/38.698 – *CISAC* (pending)*;* COMP/37.984 – *SkyTeam* (pending).

[31] COMP/39.116 – *Coca-Cola;* COMP/38.381 – *De Beers-Alrosa* (annulled)*;* COMP/37.966 – *Distrigaz.*

group,[32] as do two commitment decisions on the joint selling of media rights for football matches by football leagues,[33] and the two proceedings against airline alliances.[34] In all these cases, there appears to be a real need, perceived both by the Commissions and the undertakings concerned, for a flexible procedural framework outside the normal infringement proceeding to negotiate conditions and obligations fine-tuned to the requirements of Art. 81(3). Commitment decisions here serve as a substitute for exemption decisions in application of Art. 81(3) with conditions and obligations attached under Art. 8(1) of Reg. 17/62.[35] Compared to the latter procedure, commitment

[32] COMP/38.681 – *Cannes Agreement* (4 October 2006); COMP/39.152 – *BUMA* (pending)*;* COMP/39.151 – *SABAM* (pending); COMP/38.698 – *CISAC. BUMA* and *SABAM* concern the so-called "Santiago Agreement" – an agreement concluded between all collecting societies in the EEA relating to the licensing of public performance rights for musical works on the Internet, and implementing the principle of a "one-stop shop" for commercial users for all relevant countries. The Commission objected to the rule that such rights had to be obtained in the country in which the user was economically resident. SABAM and BUMA offered to abandon this requirement. The *CISAC* decision was based on similar concerns. CISAC, the international association of authors' collecting societies, had drafted a standard model contract regarding cooperation in the management of public performance rights between collecting societies. The Commission objected to two clauses, namely a membership clause, according to which no collecting society should accept as a member any member of one of the other collecting societies having the nationality of one of the countries in which the other societies operated, and a territoriality clause, according to which commercial users could only obtain a licence from the local collecting society. The collecting societies offered to remove these clauses. The *Cannes Agreement* decision related to two clauses in the Cannes Extension Agreement concluded between the major publishers and 13 European collecting societies regarding the relations between the two groups in the administration and licensing of mechanical copyright of musical works for the reproduction of sound recordings on physical carriers, like CDs and tapes. In the mid-1980s, the parties had introduced a Central Licensing Agreement, according to which a record company could conclude a single licensing agreement with a single collecting society covering the whole of the EEA territory. According to the Commission, one clause of the agreement de facto restricted the possibility of collecting societies to compete for the signing up of record companies by granting rebates. Another clause restricted potential competition between collecting societies and publishers. The parties offered to amend or delete these clauses.

[33] COMP/37.214 – *Deutsche Bundesliga;* COMP/38.173 – *Premier League*. In both cases, the Commission was concerned that the central marketing / joint selling of media rights to League matches by the Leagues would restrict competition between the clubs, and thus restrict the output of media rights and raise price, and that new media such as broadband internet providers and mobile operators would be restricted in their access to premium football content. The commitments made binding require that the rights for live TV broadcast be sold in several packages by an open, non-discriminatory procedure for a maximum of three seasons. Each single club is free to sell rights to deferred broadcasts to free TV and radio, and to sell the coverage of its home games on mobile phone networks.

[34] COMP/37.749 – *Austrian Airlines/SAS* (pending); COMP/37.984 – *SkyTeam* (pending). Both cases concern cooperation agreements between airlines, including cooperation in the planning of schedules, coordination of pricing policies, and a joint Frequent Flyer Program. The commitments offered include, *inter alia*, the promise to make take-off and landing slots available to a new entrant (in *Austrian Airlines/SAS)* / to competitors (in *SkyTeam*), to enter into an interlining agreement with a new entrant, an to participate in a new entrant's frequent flyer program on request. According to *Whish*, in: M. Johansson, N. Wahl and U. Bernitz (eds), Liber Amicorum in Honour of Sven Norberg, 2006, p. 555, at 564, these cases may be paradigmatic for situations where the Art. 9-procedure is particularly useful, because these are transactions that in many ways are like mergers, but nevertheless are to be analyzed under Art. 81, and may require complex remedies.

[35] For the potential functional equivalence between commitment decisions and conditions imposed in formal Commission decisions under Art. 81(3) under the old regime see already *Joachim Bornkamm*, Die Verpflichtungszusage nach § 32b GWB, in: Brinker / Scheuing / Stockmann (eds.), FS für Rainer Bechthold zum 65. Geburtstag, 2006, p. 45, at 46; *Temple Lang*, in: 2005 Annual Proceedings of the

decisions have, from the perspective of the undertakings concerned, the significant disadvantage that the commitments they offer will be much more difficult to appeal in court.[36]

Among the Art. 81 proceedings, the commitment decisions issued against four major vehicle manufacturers[37] are of a slightly different kind: they address four car manufacturers' failure to provide brand-specific repair information to independent repairers. According to the Commission's view, independent repairers are important to maintain competition in the market, because they are the only ones able to exert competitive pressure on the car manufacturers' own authorised repair networks. The motor vehicle block exemption regulation 1400/2002[38] therefore provides, in Art. 4(2), that full and non-discriminatory access to technical information must be given to independent repairers in a manner proportionate to their needs. Fiat, Toyota, DaimlerChrysler and General Motors had not complied with these rules. In a preliminary assessment, the Commission found a possible violation of Art. 81(1). The commitments proposed and ultimately made binding essentially amount to a specification of the requirements under Art. 4(2) of Reg. 1400/2002, i.e. a specification of the principles of equal treatment in terms of the scope of technical information to be made available to independent repairers, a specification of the scope of any possible exceptions by virtue of which technical information may be legitimately withheld, and a specification of the principle of proportionality with regard to access to technical information.[39] Another commitment decision concerning non-compete clauses in distribution agreements for motor fuel between Repsol and service station operators which allegedly had a foreclosure effect on the Spanish retail market,[40] has been appealed by service station operators. The case is currently pending before the CFI.[41]

Fordham Corporate Law Institute (Barry Hawk ed., 2006), 265, at 268 and 291, who has seen a need for a substitute for the latter in particular in joint venture or patent pool cases. In fact, a significant number of cases in which commitment decisions have been issued so far have started out under the old regime with notifications and an application for negative clearance or an individual exemption under Art. 81(3) and fall into this category of cases – see, for example, COMP/37.214 – *Deutsche Bundesliga;* COMP/38.173 – *Premier League;* COMP/38.348 – *Repsol;* COMP/38.381 – *De Beers-Alrosa;* COMP/39.152 – *BUMA* (pending)*;* COMP/39.151 – *SABAM* (pending)*;* COMP/37.749 – *Austrian Airlines/SAS* (pending).

[36] See *Waelbroeck,* Le développement en droit européen de la concurrence des solutions négociées (engagement, clémence, non-contestation des faits et transactions): que va-t-il rester aux juges?, Global Competition Law Centre Working Paper 1/08, p. 7, with the remark: "*On ne peut d'ailleurs s'empecher de penser que c'est particulièrement cet attrait du système qui a amené la Commission à remplacer le mécanisme des décisions conditionelles antérieures par un système de décisions d'engagements*".

[37] Namely DaimlerChrysler, Fiat, Toyota, General Motors.

[38] Commission Regulation No. 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, [2002] OJ L 203/30.

[39] For elaboration see: *John Clark/Anna Nykiel-Mateo,* Four decisions bind DaimlerChrysler, Fiat, Toyota and General Motors to commitments to give independent repairers proper access to repair information, Competition Policy Newsletter 2007/3, pp. 50-53.

[40] The commitments made binding included the introduction of a right to terminate the distribution agreements, the imposition of a maximum 5-year duration for new agreements, and the commitment not to buy any stations not supplied exclusively by Repsol.

[41] See Case T-45/08 *Transportes Evaristo Molina v. Commission*, [2008] OJ C 92/36: The claim is that the commitments made binding go beyond the aim of Art. 9 of Reg. 1/2003, in that they are not based on a correct interpretation of the competition rules, and that they violate the proportionality principle.

The three Art. 82 commitment decisions which have so far been issued[42] concern very different types of infringements. The *Coca-Cola* decision[43] followed a long investigation by the Commission and some national competition authorities[44] into various business practices by Coca-Cola and its three major bottlers, in particular exclusivity agreements, target and growth rebates, tying arrangements and certain restrictions to the installation of technical sales equipments such as beverage coolers, fountain dispensers or vending machines. The Commission's main concern was that Coca-Cola and its bottlers were leveraging their collective market power between various product categories. The commitments ultimately made binding for a period of 5 years – *inter alia* the commitment not to impose exclusivity provisions, not to offer growth or target rebates, not to tie the supply of coca-cola to other beverages and to allow outlets to use 20 % of a cooler provided by Coca-Cola for other companies' products where no other chilled drink capacity is available in the outlet – had apparently been negotiated between the EU Commission and Coca-Cola before the proceeding were officially opened on Sept. 29, 2004: the Commission published its preliminary assessment on 15 October 2004. Coca-Cola and its bottlers submitted their commitments only 4 day later, namely on 19 October 2004. Interestingly, the commitments offered by Coca-Cola are not limited to the Member States in which anti-competitive practices had mainly been investigated,[45] but extend essentially to the whole of the EU:[46] Coca-Cola is required to use its best efforts to ensure that all EU bottlers of Coca-Cola carbonated soft drinks, including independent companies in territories that had not been part of the Commission's investigation, will abide by the terms of the commitment decision.[47]

The *Distrigaz* decision[48] addressed concerns that long-term gas supply contracts which the dominant incumbent Distrigaz had concluded with industrial gas users in Belgium had the effect to foreclose the market to alternative suppliers and therefore hindered the development of competition following liberalisation in the gas sector. The commitments

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Another appeal against the *Repsol* commitment decision has been dismissed as inadmissible – see Case T-274/06 *Estaser El Mareny v. Commission*, dismissed by Order of the CFI of 25 October 2007.

[42] Case COMP/A.39.116/B2 – *Coca-Cola* (Commission decision of 22 June 2005)*;* Case COMP/B-2/38.381 (Commission Decision of 22 February 2006) – *De Beers-Alrosa;* Case COMP/B-1/37.966 (Commission Decision of 11 October 2007) – *Distrigaz.*

[43] Case COMP/A.39.116/B2 – *Coca-Cola* (Commission decision of 22 June 2005). For a summary and comment see also: *Philipp Gasparon / Blaz Visnar*, Coca-Cola: Europe-wide remedies in fizzy drinks, Competition Policy Newsletter, Autumn 2005/3, pp. 60-64.

[44] See, in particular for the investigations by the Spanish Competition Authority: *Oriol Armengol / Alvaro Pascual*, Some Reflections on Article 9 Commitment Decisions in the Light of the Coca-Cola Case, 27(3) ECLR 2006, 124 et seq.

[45] The Commission had undertaken dawn raids on Coca-Cola premises in Austria, Belgium, Denmark, Germany and the UK. According to *Gasparon / Visnar*, Competition Policy Newsletter, Autumn 2005/3, p. 60, the Commission had, however, also gathered evidence against Coca-Cola in all other Member States.

[46] The commitments apply in all EU Member States in which Coca-Cola's carbonated soft drinks account for more than 40% of sales and more than twice the share of the nearest competitor.

[47] See *Cook*, 29(2) World Comp. 2006, 209, at 212-213 with Fn. 6. The CFI has clarified in *Alrosa* that in such a case, in which a commitment decision directly affects third parties, those third parties must, with regard to their procedural rights, be treated like "undertakings concerned", i.e. they have a right to be heard and they must have access to the file.

[48] Case COMP/B-1/37966 (Commission Decision of 11 October 2007) – *Distrigaz*.

made binding for a period of 4 years include an assurance by Distrigaz that in each calendar year, a minimum of 65 % of the gas volumes supplied by itself will be open for alternative suppliers to make competing offers, and unilateral termination rights of Distrigaz's existing customers after 5 years.

The *De Beers* decision, which was reviewed by the CFI in *Alrosa* will be discussed in more detail below (see III.). Important Art. 82 cases currently pending before the Commission are the *E.ON* and the *RWE* case. In response to ongoing antitrust investigations by the Commission against E.ON regarding alleged infringements of Art. 82 on the German electricity wholesale market consisting in withdrawing available production capacity in order to raise electricity prices, and on the market for secondary balancing energy in the E.ON network area consisting, *inter alia*, in preventing power producers from other Member States from selling balancing energy into the E.ON balancing market, E.ON has offered to divest its electricity transmission network to an operator with no interest in the electricity generation and / or supply businesses, and to divest generation capacity in Germany to competitors. The Commission is currently market-testing E.ON's proposals.[49] In a proceeding by the Commission against RWE concerning alleged infringements of Art. 82 in the German gas market, RWE has recently followed suit, offering to divest its gas transport network in North Rhine-Westphalia in order to settle charges of anti-competitive market foreclosure, in particular by creating artificial obstacles for new entrants to access to the network.[50]

Considering the traditionally relatively low number of Art. 82-proceedings, the number of three Art. 82 commitment decisions plus some ongoing commitment decision procedures is remarkable. It has been observed that the uncertain state of Art. 82-case law may be an important reason why commitment decisions have a particular attraction for the EU Commission, and possibly also for undertakings, in this field.[51]

Based on which criteria the Commission decides whether a commitment decision would be appropriate to resolve a case, or whether to pursue infringement proceedings under Art. 7(1) of Reg. 1/2003, is not publicly known. Frequently, the choice between a commitment decision under Art. 9(1) and an infringement decision under Art. 7(1) of Reg. 1/2003 is left open for some time.[52] Some proceedings which have ended in a commitment decision have started with the publication of a statement of objection, which is normally only required for infringement proceedings under Art. 7(1). Sometimes, a "preliminary assessment" is published, which implies that the Commission has decided to pursue a commitment procedure under Art. 9(1) of Reg. 1/2003. It appears that the *Coca-Cola*-practice to publish the preliminary assessment only once the commitments have already been agreed[53] has remained the exception.[54] In

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[49] See [2008] OJ C 146/34.

[50] RWE has submitted its proposals for commitments to the Commission on May 28, 2008 – see EU Commission, MEMO/07/186, 11 May 2007, for the general charges, and EU Commission, MEMO/08/346, 28 May 2008 for the confirmation on the ongoing negotiations.

[51] *Temple Lang*, in: 2005 Annual Proceedings of the Fordham Corporate Law Institute (Barry Hawk ed., 2006), 265, at 274 and 321. See also *Georgiev*, Utah Law Rev. 2007, 971, at 1028 with a critical view on the fact that the Commission used a commitment decision to address the controversial issue of fidelity rebates in *Coca-Cola*.

[52] See, for example, the cases of E.ON and RWE.

[53] See Case COMP/A.39.116/B2 – *Coca-Cola* (Commission decision of 22 June 2005) and above; and *Cook*, 29(2) World Comp. 2006, 209, at 215-216.

most cases, the time lag between the publication of the preliminary assessment and the offer of commitments suggests that negotiations have taken place in between.[55] The "market test" under Art. 27(4) of Reg. 1/2003 has frequently resulted in an adjustment or fine-tuning of the commitments.

So far, two commitment decisions have been challenged by third parties before the CFI: Alrosa's appeal against the *De Beers*-decision resulted in its annulment. Third-party actions against the *Repsol* decision are still pending. In no case have the undertakings that offered the commitments tried to challenge these commitments in the European courts so far.[56]

2. Concerns and Open Questions

The Commission's developing commitment decision practice has confirmed the practical need for a procedure that allows for a speedier resolution of competition cases.[57] At the same time, commentators have raised important concerns regarding the commitment decision procedure's potentially problematic effects on European competition policy and the absence of safeguards to prevent its abuse.[58]

In the name of administrative efficiency, the Art. 9 procedure – understood as a flexible settlement procedure – appeared to largely liberate the Commission from judicial control[59] and from the constraints inherent in its mandate to enforce the competition rules. The Commission's broad discretion in the use and design of commitment procedures seemingly diluted the otherwise direct and indispensable link between an

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[54] A practice similar to the *Coca-Cola*-practice can be observed in COMP/38.348 – *Repsol*.

[55] This proceeding would also seem to be required by the CFI's *Alrosa* judgment, according to which the preliminary assessment has an equivalent function to the statement of objections in an Art. 7-proceeding, and is meant to be a significant check on the Commission when it discusses possible commitments. In order to have this function, the preliminary assessment must precede the negotiation on commitments.

[56] See the discussion on the possibility of such an action below.

[57] For the overall positive reaction to the introduction of the commitment decision procedure into EU competition law, see, for instance, *Cook,* 29(2) World Comp. 2006, 209, at 228: The commitment decision is a welcome addition to the range of possible resolutions of Article 81 and 82 EC investigations. In principle, settlement represents a cheaper and faster way of addressing the harmful effects of anticompetitive conduct, which is the primary goal of enforcement policy. See also *Bornkamm*, in: Brinker / Scheuing / Stockmann (eds.), FS für Rainer Bechthold zum 65. Geburtstag, 2006, p. 45, at 58; *Temple Lang*, in: 2005 Annual Proceedings of the Fordham Corporate Law Institute (Barry Hawk ed., 2006), 265; and *Georgiev*, Utah Law Rev. 2007, 971, at 1024, who points to the fact that the length of regular infringement proceedings is out of step with the fact that, in dynamic sectors, the competitive landscape may change rapidly.

[58] See, for example, *Ernst-Joachim Mestmäcker*, The EC Commission's Modernization of Competition Policy: a Challenge to the Community's Constitutional Order, EBOR 2000, 401, 441; *Temple Lang*, in: 2005 Annual Proceedings of the Fordham Corporate Law Institute (Barry Hawk ed., 2006), 265, at 316-321; *Waelbroeck*, Global Competition Law Centre Working Paper 1/08*; Whish*, in: M.Johansson, N. Wahl and U. Bernitz (eds), LiberAmicorum in Honour of Sven Norberg, 2006, pp. 555 et seq.; *Georgiev*, Utah Law Rev. 2007, 971 et seq.

[59] Highly critical in this regard: *Waelbroeck*, Global Competition Law Centre Working Paper 1/08, p. 3, mentioning the risk that the Commission might use the commitment procedure "*pour développer ainsi une politique parallèle de concurrence qui échappe entièrement au controle du juge et aux garanties minimales auxquelles notre Etat de droit reste attaché*".

alleged infringement of competition rules and the remedies imposed and would enable the Commission to suggest commitments that it could not have imposed as remedies under Art. 7 of Reg. 1/2003. Disassociating or even just weakening this link as well as the intensity of judicial control would, however, come with serious risks: The Commission could be tempted to use the commitment procedure to deal with cases where the law is unclear, and thus shape its own competition policy outside the control of the European courts. The Commission's self-interest in expanding the scope of its powers would then come to conflict with the public interest in public censure, deterrence and, most importantly, the development of legal doctrine based on clear precedents that only infringement proceedings can bring.[60] Also, the Commission could be induced to use its bargaining power in commitment procedures to reach beyond the goal to remedy a given infringement and to pursue more ambitious strategies, attempting to restructure markets according to its own vision[61] or to implement non-competition goals.[62] Commitment decisions could thus become a powerful instrument for regulating markets.

The requirement that the undertakings concerned must consent to the commitments is not necessarily a sufficient safeguard against these risks:[63] The threat of long and costly legal proceedings with possibly damaging effects on the companies' reputation, may induce companies to offer commitments even in cases which they believe to be without merits.[64] In cases of more clear-cut infringements, the threat of high fines may induce companies to offer more far-reaching remedies than those the Commission might have been able to impose.[65] In some cases, the Commission's regulatory interests and the defendant's economic interests may become aligned in the course of a commitment procedure, which may result in collusion to the detriment of third parties[66] – *Alrosa* may illustrate the practical relevance of this risk.[67]

These concerns were all the more acute because the rules governing commitment proceedings were (and are) in many respects incomplete. Important question relating to the legal constraints which the Commission must respect when employing the commitment decision procedure (a), the procedural rights of the undertakings concerned

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[60] *Wils*, in: Wils, Efficiency and Justice in European Antitrust Enforcement, 2008, p. 25, at 31; *Georgiev*, Utah Law Rev. 2007, 971, at 876 and 1023.

[61] *Georgiev*, Utah Law Rev. 2007, 971, at 1031-1032, suggesting that "EU commitment decisions reflect regulatory policy, rather than antitrust law".

[62] *Mestmäcker*, EBOR 2000, 401, 441. For similar concerns regarding the use of consent decrees in the US, see *Douglas Melamed*, Antitrust: The New Regulation, Antitrust, Fall 1995, 13, at 14: "antitrust law is coming to the point [where] what matters is not what the law requires, but rather what the present government wants".

[63] See *Waelbroeck*, Global Competition Law Centre Working Paper 1/08, p. 3: "*La négociation avec une autorité n'est en effet en rien une négociation à 'armes égales' … Il s'agit au contraire d'une négociation avec une autorité qui dispose – en tout cas en droit de la concurrence – d'un pouvoir de sanction*".

[64] *Cook*, 29(2) World Comp. 2006, 209, at 212-213.

[65] For this risk see *Temple Lang*, in: 2005 Annual Proceedings of the Fordham Corporate Law Institute (Barry Hawk ed., 2006), 265, at 275 and 316-317. This may be a concern in the *E.ON* and *RWE* cases.

[66] *Pace*, European Antitrust Law, 2007, p. 237 sees the risk of regulatory capture.

[67] For the serious and direct economic effects imposed by both commitment decisions upon third parties who were not a party to the proceeding, see: *Georgiev*, Utah Law Rev. 2007, 971, 1021.

as well as of third parties (b) and the legal effects of commitment decisions vis-à-vis national courts and competition authorities (c) remain(ed) open.

(a) Before the CFI handed down the *Alrosa* judgment, it was completely unclear within which legal limits the Commission could decide to make commitments binding – and whether there were any such limits at all. How seriously must the Commission investigate competition infringements, and how precisely must it define its competitive concern, before entering into commitment negotiations? What information must the "preliminary assessment" entail, as compared to a full "statement of objection" which is required in an infringement proceeding under Art. 7(1) of Reg. 1/2003?[68] Can the Commission accept, and make binding, any commitments that the undertakings concerned voluntarily offer, or does it have to inquire into the proportionality of the commitments? If so, how intense does this analysis have to be? Can the Commission make binding commitments in geographic or product markets that did not form part of its investigation – as apparently happened in the *Coca-Cola* case?[69] Can the Commission trade off a fine it would normally impose for a like infringement of competition rules against a far-reaching remedy that it can not be sure courts would accept?[70] Not entirely surprisingly, the Commission was of the view that it should be able to use the commitment decision procedure as flexibly as possible. Burdening the procedure with legal obligations would undermine its very purpose to promote effectiveness. The fact that all commitments are offered voluntarily should generally be a sufficient safeguard. Any judicial review should be limited to a control for manifest errors in a complex economic assessment carried out to determine whether the commitments meet the competitive concerns expressed.[71]

(b) Another set of questions relates to the procedural rights in commitment decision procedures: do the undertakings concerned, as well as third parties, enjoy essentially the same rights as in an infringement proceeding under Art. 7 of Reg. 1/2003, in particular as regards the right to be heard and the right to access to the file, or can these rights be curtailed for reasons of procedural efficiency?[72] Furthermore, can a commitment decision be appealed by the undertakings that have offered the commitments, or does the voluntary nature of commitments impede such a complaint?[73]

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[68] There is agreement that the "preliminary assessment" can be shorter and less formal than the statement of objections – but the Commission's Implementing Regulation 773/2004 does not contain any more specific rules.

[69] Case COMP/A.39.1 1 6/B2 – *Coca-Cola* (Commission decision of 22 June 2005) – see *Cook,* 29(2) World Comp. 2006, 209, at 212-213: The Commission's investigation had covered only four Member States. The negotiated commitments, however, applied in all EU Member States in which Coca-Cola's carbonated soft drinks accounted for more than 40% of sales and more than twice the share of the nearest competitor. In addition, Coca-Cola was required to use its best efforts to ensure that all of its EU bottlers – including those that were not part of the Commission's investigation – agreed to abide by the commitments.

[70] This question is arguably raised by the *E.ON*- and the *RWE*-case.

[71] See CFI, *Alrosa,* paras. 80-81.

[72] See for discussion: *Whish,* in: M.Johansson, N. Wahl and U. Bernitz (eds), LiberAmicorum in Honour of Sven Norberg, 2006, p. 555, at 564-566; *Temple Lang,* in: 2005 Annual Proceedings of the Fordham Corporate Law Institute (Barry Hawk ed., 2006), 265, at 277-278.

[73] In favour of a right to appeal commitment decisions see, for instance, *Wils,* in: Wils, Efficiency and Justice in European Antitrust Enforcement, 2008, p. 25, at 44, pointing out, the preconditions that Art. 230 EC sets out for the admissibility of an appeal are at least formally fulfilled; similar *Waelbroeck,*

(c) Finally, the legal effects of commitment decisions on national courts and competition authorities remain an open question. According to Recital 13 of Reg. 1/2003, commitment decisions do not conclude "whether or not there [...] still is an infringement" and are "without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case".[74] In fact, there is broad agreement that commitment decisions can in no way prevent private parties from bringing or continuing private actions in national courts to obtain damages on the basis that the *past* conduct of the addressees of the commitment decision (before the commitments were complied with) constituted an infringement of Articles 81 or 82 EC.[75] Neither a finding by a national court that there has been no infringement nor a finding that there has been an infringement (which would, however, remain to be proven[76]) would in any way run counter to the Commission's commitment decision within the meaning of Article 16(1) of Reg. 1/2003 or would violate Art. 10 EC. Similarly, a national competition authority could – although this is unlikely to happen in practice[77] – continue to investigate the past conduct of the addressees of the commitment decision and find an infringement of Art. 81 or Art. 82 EC, possibly even imposing fines, without undermining the full effect of the commitment decision's operative part (within the meaning of Art. 16(2) of Reg. 1/2003). It is more controversial whether national courts and competition authorities could find that there

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Global Competition Law Centre Working Paper 1/08, p. 23-24. Against a right to appeal commitment decisions: *Cook*, 29(2) World Comp. 2006, 209, at 222-223; *Temple Lang*, in: 2005 Annual Proceedings of the Fordham Corporate Law Institute (Barry Hawk ed., 2006), 265, at 296. More cautious: *Whish*, in: M.Johansson, N. Wahl and U. Bernitz (eds), LiberAmicorum in Honour of Sven Norberg, 2006, p. 555, at 570: "Given that the Article 9 procedure is voluntary on the part of the parties that offer commitments, they will presumably not appeal against an Article 9 commitment decision …".

[74] Third sentence of recital 13. Similarly in the third sentence of recital 22: "Commitment decisions adopted by the Commission do not affect the power of the courts and the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty".

[75] See, for instance, *Whish*, in: M. Johansson, N. Wahl and U. Bernitz (eds), Liber Amicorum in Honour of Sven Norberg – A European for All Seasons, (Bruylant, 2006), p. 555, at 567; *Armengol / Pascual*, 27(3) ECLR 2006, 124, at 125; *Wils*, in: Wils, Efficiency and Justice in European Antitrust Enforcement, 2008, p. 25, at 41-42.

[76] In their proposed commitments, the undertakings typically take great care to avoid any admission of a violation of Art. 81 or Art. 82. Also, the commitment decision itself does not establish an infringement. *Wils*, in: Wils, Efficiency and Justice in European Antitrust Enforcement, 2008, p. 25, at 42 points out that, although the existence of the infringement indeed remains to be proven, national courts may take into account in their assessment that the Commission, when opening the commitment decision proceedings, must have had serious doubts as to the compatibility of the undertakings' past conduct with Articles 81 and 82 EC. Similarly: *Temple Lang*, in: 2005 Annual Proceedings of the Fordham Corporate Law Institute (Barry Hawk ed., 2006), 265, at p. 287.

[77] See *Whish*, in: M. Johansson, N. Wahl and U. Bernitz (eds), Liber Amicorum in Honour of Sven Norberg, 2006, p. 555, at 567-568. According to Art. 14 Reg. 1/2003, the Advisory Committee must be consulted before a commitment decision is issued. The Advisory Committee is composed of representatives of the competition authorities of the Member States. The *Coca-Cola* case provides an example of how the coordination between the Commission and the national competition authorities works in practice: The Spanish competition authority, which had investigated against Coca-Cola alongside of the Commission for a significant period of time, closed the case after the Commission had issued its commitment decision without making any explicit statement as to the existence or absence of an infringement of Art. 81 or Art. 82 – see *Armengol / Pascual*, 27(3) ECLR 2006, 124.

continues to be an infringement of Art. 81 or Art. 82 EC despite the commitments imposed, and grant injunctive relief[78] or impose further remedies.[79]

Many of these controversial issues have been addressed, directly or implicitly, by the CFI in the *Alrosa* judgment.

III. The CFI's Alrosa Judgment

Alrosa is the first case in which the CFI has been asked to review a commitment decision under Art. 9 of Reg. 1/2003.[80] The CFI has seized the opportunity to clarify the nature and function of commitment decisions, the duties of the Commission within the framework of the commitment decision procedure, and some fundamental due process requirements. In doing so, it redefines the rules of the commitment decision procedure, and creates important safeguards against some of the risks inherent in this instrument. *Alrosa* certainly is a landmark ruling, should it be confirmed on appeal.

1. The Facts of the Case

De Beers and Alrosa – the No. 1 and No. 2 producer and supplier of rough diamonds in the world – intended to formalize their long-standing commercial relationship by concluding an agreement regulating Alrosa's supply of rough diamonds to De Beers. Under this 5-year agreement, Alrosa would essentially sell the entire production of rough diamonds meant for export outside the Community of Independent States (CIS) to De Beers. In March 2002, Alrosa and De Beers notified the agreement to the Commission, with a view to obtaining negative clearance or an individual exemption under Art. 81(3). Finding that neither a negative clearance nor an exemption was available, the Commission sent a statement of objection to both Alrosa and De Beers. It sent a separate statement of objections to De Beers, expressing the opinion that the agreement could also constitute an abuse of a dominant position prohibited by Art. 82. In December 2004 – the Reg. 1/2003 had meanwhile entered into force – Alrosa and De Beers offered joint commitments to the Commission under Art. 9 Reg. 1/2003 in order to settle the case. The commitments provided for a progressive reduction in the sales of rough diamonds from Alrosa to De Beers, the value of which was to go down from $ 700 million in 2005 to $ 275 million in 2010, to subsequently be capped at that level. The Commission – finding that these commitments prima facie met its competitive concerns – submitted them to a "market test" in accordance with Art. 27(4) of Reg. 1/2003. Negative comments by third parties induced the Commission to change its

[78] In the case that private parties have brought an action before a national court.

[79] In the case that national competition authorities are acting.

[80] A second case is currently pending before the CFI – see Case T-45/08 *Transportes Evaristo Molina v. Commission*, [2008] OJ C 92/36: The case involves a third-party application for annulment of the Commission's commitment decision in *Repsol*. The claim is that the commitments made binding go beyond the aim of Art. 9 of Reg. 1/2003, in that they are not based on a correct interpretation of the competition rules, and that they violate the proportionality principle. Another appeal against the *Repsol* commitment decision has been dismissed as inadmissible – see Case T-274/06 *Estaser El Mareny v. Commission*, dismissed by Order of the CFI of 25 October 2007.

initially favorable position and to ask Alrosa and De Beers to submit fresh joint commitments which should lead to a complete cessation of their trading relationship from 2009 on. Alrosa was unwilling to comply with this request. De Beers, however, decided to offer individual commitments which complied with the Commission's request. These individual commitments were forwarded to Alrosa, together with an invitation to submit comments. But only three weeks later, and before Alrosa could fully make use of its right to be heard, the Commission adopted an Art. 9 decision addressed to De Beers in which it made De Beers' proposed commitments binding. Alrosa applied to the CFI to annul that decision.

2. The Judgment

The CFI starts by confirming that Alrosa's action for annulment is admissible: although Alrosa was not the addressee of the Commission's decision, it was of direct and individual concern to it (Art. 230(4) EC). The decision was aimed at bringing to an end the trading relationship between Alrosa and De Beers, and therefore directly and immediately affected Alrosa's legal situation and its competitive position on the market (para. 38-40).

Turning to the substance, the CFI finds that Alrosa's action for annulment succeeds on two grounds: the commitment decision infringes the principle of proportionality, and the Commission has violated Alrosa's right to be heard.

a) Infringement of the Principle of Proportionality:

The CFI's analysis of the principle of proportionality and its application to commitment decisions is a core part of the judgment, and, if upheld, will change the way the commitment decision procedure is conceived and employed. Alrosa had complained that the Commission had exceeded its legal powers by ordering the complete cessation of the trading relationship and prohibiting any future contracts for the sale or purchase of rough diamonds between Alrosa and De Beers for an indefinite period of time. This, according to Alrosa, went beyond what was appropriate and necessary to meet the Commission's concerns under Art. 82. The Commission, on the other hand, argued that it should not be obliged to conduct a full proportionality assessment in the course of a commitment decision procedure, because this would undermine its purpose to allow for more administrative efficiency. The Commission should be obliged to reject commitments that are *manifestly* excessive, but since commitments are offered voluntarily, this should be a rare case. The judicial review should, in any case, be limited to verifying whether there has been a *manifest* breach of the principle of proportionality, or more generally a manifest error in the complex economic assessment carried out by the Commission.

The CFI outright rejects the Commission's arguments, and finds that the principle of proportionality – a general principle of Community law – applies to Art. 9-decisions in the same way as it applies to infringement decisions under Art. 7(1), even though it is not explicitly mentioned in Art. 9(1) of Reg. 1/2003 (para. 92 and para. 95). The Commission is obliged to perform a full proportionality analysis before it makes commitments binding under Art. 9(1). The voluntary nature of the commitments does not relieve the Commission of the need to comply with the principle of proportionality

(para. 105): it is the Commission's decision alone which makes the commitments binding and has legal consequences for the undertakings (para. 86). The Commission therefore bears full and sole responsibility for the content of its commitment decisions in essentially the same way it bears responsibility for the content of infringement decisions under Art. 7(1) of Reg. 1/2003 (see paras. 86-88).

The CFI refuses to accord a contractual character of some sort to commitment decisions. Instead, it emphasizes that a commitment decisions is essentially of the same nature as an infringement decision under Art. 7(1) of Reg. 1/2003: it constitutes "a binding measure which puts an end to an infringement or a potential infringement" (para. 87). In a commitment decision procedure, the Commission "exercises all the prerogatives conferred on it by Articles 81 EC and 82 EC, with the only distinctive feature being that the submission of offers of commitments by the undertakings concerned means that the Commission is not required to pursue the regulatory procedure laid down under Article 85 EC and, in particular, to prove the infringement" (para. 87). Commitment decisions may indirectly have legal effects erga omnes, which the undertaking concerned would not have been in a position to create on its own (para. 88). The Commission is, therefore, responsible to ensure that commitments made binding are an adequate and proportionate response to the infringement alleged.[81]

Both infringement decisions and commitment decisions pursue the aim to ensure the effective application of the competition rules (para. 95): infringement decisions put an end to a clearly established competition law *infringement*, commitment decisions put an end to a clearly established competition *concern* (para. 100). When deciding to make commitments offered under Art. 9(1) of Reg. 1/2003 binding, the Commission must ensure that the measures adopted do not exceed what is appropriate and necessary to achieve this aim (para. 98), namely to re-establish compliance with the rules infringed (para. 102). When there is a choice between several appropriate measures, the Commission must take recourse to the least onerous (para. 98). In order to ensure compliance with these principles in the context of an Art. 9 decision, an analysis of the market and an identification of the infringement envisaged are required, which may be less definitive than the analysis required for the application of Article 7(1) of Regulation 1/2003, but should be sufficient to allow a review of the appropriateness of the commitment (para. 100). The CFI emphasizes that Art. 9-decisions cannot be used to require undertakings to comply with commitments which would, under Art. 7(1) of Regulation 1/2003, be disproportionate to the infringement (para. 101). As to the judicial review of the proportionality of commitments made binding, the CFI accepts that it is limited to a manifest error assessment where the Commission has in fact engaged in a complex economic assessment. But where such assessment is lacking, a full review of the proportionality will be performed by the court (para. 110-111).

In applying these principles to the facts of the case, the CFI finds that a commitment which prohibits absolutely any future trading relations between Alrosa and De Beers for

[81] See CFI, *Alrosa*, para. 88: "[The Commission] is not obliged in any way to take into account, and, *a fortiori*, to take into account on a take-it-or-leave-it basis, the offers of commitment which the undertakings concerned submit to it". See also para. 105: "… the voluntary nature of the commitment … does not relieve the Commission of the need to comply with the principle of proportionality, because it is the Commission's decision which makes those commitments binding. The fact that an undertaking considers, for reasons of its own, that it is appropriate at a particular time to offer certain commitments does not of itself mean that those commitments are necessary".

an indefinite period of time is disproportionate to the alleged infringement of Art. 82 EC. If the Commission's concern was that the conclusion of the notified agreement would have prevented Alrosa from operating as an independent supplier on the rough diamond market and would have eliminated a source of supply for potential customers, a prohibition to implement that agreement would have sufficed to put an end to the abuse (paras. 113-114). If the Commission's concerns related to the existence of long-standing relations between Alrosa and De Beers, the continuation of which the agreement merely ensured, and the aim pursued by the Commission was therefore to end all practices which prevented Alrosa from establishing itself as an effective competitor on the market, the Commission would have at least been obliged to assess whether the commitments offered jointly be Alrosa and De Beers would have been sufficient to achieve this aim. This, the Commission failed to do, claiming that "the identification of alternative solutions to the commitments that were made binding would have required a complex economic assessment which Article 9 of Regulation 1/2003 was intended to avoid" (para. 124). According to the CFI, this constitutes a manifest error of assessment:

> "[A]lthough Article 9 does not require the Commission to adduce evidence of the infringement targeted by the proceedings, that does not relieve it of the necessity of establishing an analytical framework which is sufficient to allow an effective judicial review of the proportionality of the measures adopted" (para. 125).

Compliance with the proportionality principle "requires that, when measures that are less onerous than those it proposes to make binding exist, and are known by it, the Commission should examine whether those measures are capable of addressing the concerns which justify its action before it adopts, in the event of their proving unsuitable, the more onerous approach" (para. 131).

According to the CFI, the Commission could not, absent exceptional circumstances which were not identified, have lawfully adopted under Art. 7(1) a decision which would have required De Beers to bring to an end, with effect from 2009, for an indefinite period, all direct or indirect trading relations with Alrosa. Such a decision, which would require Alrosa to make significant changes to its commercial structure in order to compete effectively with the dominant company – De Beers – would have violated the principle of proportionality (para. 140). The same is then true for a commitment decision under Art. 9(1).

b) Infringement of the Right to be Heard:

The CFI also finds an infringement of the right to be heard, which would in itself justify an annulment of the Commission's decision.

The CFI emphasizes the fundamental importance of the right to be heard, which is recognized as a fundamental principle of Community law (para. 191), and also acknowledged in Art. 41(2) of the Charter of Fundamental Rights (para. 188). It is furthermore an essential part of the rights of defence recognized under Art. 27(2) of Reg. 1/2003. The rights of defence also include a right to access to the Commission's file (para. 189).

Under the circumstances of the case, Alrosa should have been granted the full set of rights of defence as they are normally granted to a defendant, or an "undertaking

concerned" (para. 187). This is true although technically speaking, De Beers alone was the "undertaking concerned" in the proceedings conducted by the Commission under Art. 82 EC. Alrosa was, however, the contracting partner of De Beers in the context of a long-lasting bilateral trading relationship which the commitment decision against De Beers brought to an end, and it was a party to the parallel proceedings brought against both Alrosa and De Beers based on Art. 81 EC. In a competition law case centering around the lawfulness of a contractual relationship which could have been, and in effect was, brought both under Art. 81 and Art. 82, Alrosa could not be treated as a mere "interested third party" to the proceedings against De Beers for the purposes of Art. 27(4) of Regulation 1/2003. In such "hybrid" cases, the Commission's choice to procede under Art. 82 cannot invalidate the procedural rights that the parties would enjoy in an Art. 81-proceeding.

When the Commission decided, in response to the third party comments on the joint commitments initially proposed by Alrosa and De Beers, that contrary to its earlier assessment, these commitments were not sufficient to address its competition concerns, but that a definitive cessation of relations between the parties was required, the Commission was under a duty to hear Alrosa and De Beers (para. 194). The CFI seizes the opportunity to formulate clear and strict rules on how the Commission may react to negative third-party comments received during the so-called "market testing" procedure under Art. 27(4) of Reg. 1/2003. It acknowledges that the Commission is entitled to take the view, after receipt of the observations from the third parties, that the commitments proposed by the parties did not address the concerns set out in its preliminary assessment (para. 195). But according to the CFI, "[i]t is clear that the Commission can depart from the assessment made of the joint commitments only if the factual background has changed or if that assessment was undertaken on the basis of incorrect information" (para. 194) – that is under preconditions similar to those listed in Art. 9(2) of Reg. 1/2003 as preconditions for reopening proceedings once commitments have been made binding. The CFI thereby implicitly rejects the Commission's former practice, which has treated the Art. 27(4) procedure as a market check for the adequacy of the commitments offered, meant to compensate to some extent for the lack of a full investigation into the case. If the Commission is obliged to perform an investigation "sufficient to allow a review of the appropriateness of the commitment" and to fully assess the appropriateness and proportionality of the commitments offered, as the CFI has argued in the first part of the *Alrosa* judgment (para. 100), only additional facts brought forward by third parties should be able to make the Commission change its mind. Of such new facts, the undertakings concerned must be informed, and they have a right to be heard (para. 196). This procedure addresses concerns that third parties could use the market testing procedure strategically in order to induce the Commission to impose a straightjacket upon a competitor. In the present case, Alrosa initially only received a summary of the conclusions which the Commission had drawn from the third-party observations (para. 196), but was not granted full access to the Commission's file, as would have been required in order to ensure an effective protection of its rights of defence. When Alrosa finally received those observations, it was not granted an opportunity to provide an effective reply and to propose new joint commitments with De Beers (para. 201). The *Alrosa* decision has been appealed and is currently pending before the ECJ.[82]

[82] Case C-441/07 P – *Commission v. Alrosa.*

IV. Implications of Alrosa and some Remaining Questions

Should the *Alrosa*-judgment be upheld by the ECJ, it will fundamentally re-conceptualize the function of commitment decisions and the structure of commitment decision procedures, with likely repercussions on analogous provisions in national competition laws.[83] *Alrosa* does not conceive commitment decisions as "settlements", i.e. as essentially voluntary bilateral agreements based on a negotiated bargain by which the defendant accepts certain constraints in return for an end to the official charges. A negotiated settlement procedure would imply a broad margin of discretion for the authorities in striking a bargain, as the Commission has in fact claimed. In the view of the CFI, by contrast, commitment decisions under Art. 9(1) of Reg. 1/2003 are public law enforcement in the same way as infringement decisions under Art. 7(1) of Reg. 1/2003. Both pursue the aim to put infringements to an end. In both proceedings, the Commission is fully bound by the substantive rules of competition law, namely Art. 81 and Art. 82 EC, and by the general principles that apply to any exercise of public authority under European Community law, including the proportionality principle and the procedural guarantees. For commitment decisions to be lawful, the Commission's investigations of a case must be sufficiently serious and substantial to clearly identify and circumscribe a competitive concern and to assess the adequacy and the proportionality of commitments offered.[84] The one advantage that the commitment decision procedure offers for the Commission is that it does not have to prove an infringement of Art. 81 or Art. 82 in full. It will, however, have to substantiate its case, and remains subject to all other duties and controls that apply in regular infringement proceedings. Most importantly, commitment decisions remain fully subjected to judicial review. In the eyes of the CFI, the commitment decision procedure as introduced by Art. 9 of Reg. 1/2003 is not a sufficient basis for trading off fundamental legal guarantees and controls against administrative efficiency. This is true at least where commitments made binding affect the rights of third parties which were not themselves a party to the commitment proceedings, as was the case in *Alrosa*.[85] The Commission must not make binding commitments which negatively affect third parties in a way that they would not be affected in an infringement proceeding under Art. 7(1). The Commission must ensure not to go beyond the pure enforcement of Art. 81 or Art. 82 (para. 149).

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[83] For a brief overview see: *Temple Lang*, in: 2005 Annual Proceedings of the Fordham Corporate Law Institute (Barry Hawk ed., 2006), 265, at 306-308. For a discussion of the German § 32b GWB see: *Bornkamm*, in: Brinker / Scheuing / Stockmann (eds.), FS für Rainer Bechthold zum 65. Geburtstag, 2006, pp. 45 et seq. For some remarks on the French, the Belgian and the Irish system see: *Georgiev*, Utah Law Rev. 2007, 971, at 994-995.

[84] Article 7(1) of Reg. 1/2003 specifies that the Commission may impose in infringement decisions "any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy".

[85] See CFI, *Alrosa*, para. 88, where the CFI stresses the fact that Art. 9-decisions "may indirectly have legal effects *erga omnes*" as one of the reasons why the Commission has a particular responsibility for commitments made binding, despite the fact that they have been offered voluntarily by the undertaking concerned.

Beyond these fundamental principles, the *Alrosa* judgment provides answers to some of the more concrete questions raised above.

1. Function, Form and Content of the Preliminary Assessment

The CFI has clarified that the commitment decision procedure does not relieve the Commission from the obligation to engage in a sufficiently profound and serious analysis of the market and the allegedly illegal practices so as to have a clear picture of the nature, scope and competitive relevance of the alleged infringements and of the types of remedies that are necessary to put them to an end.[86] The result of this investigation must be reflected in the preliminary assessment. Although such a preliminary assessment can, and typically will be shorter and less detailed than a statement of objections, it must fully set out and substantiate the Commission's competitive concerns and provide a sound basis for the assessment whether the commitments offered are proportionate to the infringement of competition rules. This is vital for the full protection of the rights of the undertakings concerned,[87] and it is an essential precondition for an effective judicial control meant to ensure that the Commission remains limited to enforcing the substance of the competition rules.

With a view to this function of the "preliminary assessment", a course of action like the one apparently chosen in the *Coca-Cola* case as well as in *Repsol*, where the preliminary assessment seems to have followed extended negotiations between the Commission and the undertakings concerned, and was arguably written to fit the commitments agreed, would likely not withstand judicial control. Where commitment decision procedures are perceived as public law enforcement, and not as settlements proper, due process rules and principles of administrative transparency will require the Commission to clearly define and set out the alleged infringement first before it enters into negotiations on commitments or remedies.[88]

2. Proportionality and Close Correspondence between Competitive Concerns and Commitments Made Binding

The core insight from the *Alrosa* judgment is that in case of an action for annulment the commitments made binding will be subject to a full proportionality review by the court. In substance, the commitments must clearly correspond to the alleged infringement of Art. 81 or Art. 82 EC as explicated in the preliminary assessment. Only such commitments may be made binding which could have been imposed in a formal

[86] See also: *Wils*, in: Wils, Efficiency and Justice in European Antitrust Enforcement, 2008, p. 25, at 33: The "preliminary assessment" must follow an investigation of the case, sufficiently serious to have allowed the Commission to take a preliminary position about the existence of an infringement and about the likely imposition of fines, and sufficiently detailed to serve as a benchmark against which to evaluate any commitment proposals.

[87] Emphasized by *Waelbroeck*, Global Competition Law Centre Working Paper 1/08, p. 20 et 21.

[88] In a large number of commitment procedures, the Commission has initially issued a full "statement of objections" – e.g. Case COMP/B-1/37.966 (Commission Decision of 11 October 2007) – *Distrigaz*; Case COMP/37.984 – SkyTeam, [2007] OJ C 245/46.

infringement procedure, had the facts alleged been fully proved.[89] It is therefore doubtful whether a commitment not to engage in certain types of conducts on geographic markets which were not investigated by the Commission – as was done in *Coca-Cola* – would stand up to the CFI's scrutiny.

Furthermore, the Commission has to carry out a full economic assessment whether the commitments are necessary, i.e. whether they do not go beyond what would be appropriate and necessary if the infringement had been fully established, or whether other, less onerous commitments would suffice. In the view of the CFI, it is not the purpose of the commitment decision procedure under Art. 9 of Reg. 1/2003 to allow the Commission to save costs and time by skipping or abbreviating this scrutiny.

In light of *Alrosa*, trading off the imposition of a potentially high fine against a commitment by the defendant to implement a radical structural remedy the proportionality of which is controversial – as is currently envisioned in *E.ON* and *RWE* – may be a legally questionable strategy.[90] According to Recital 13 of Reg. 1/2003, "[c]ommitment decisions are not appropriate where the Commission intends to impose a fine". The Commission has apparently chosen to read this recital narrowly so as to exclude commitment decisions only in cases of hardcore cartels where the goal of effective deterrence appears to require the imposition of a fine. But effective deterrence may also be important in non-cartel cases. Furthermore, recital 13 arguably responds to a more general concern: the purpose of the commitment procedure is to alleviate the burden of proof for an infringement of competition rules. It is not to boost the Commission's power to bargain for far-reaching and possibly legally vulnerable remedies in exchange for a "waiver" of fines. A concrete threat of high fines will almost always raise the specter that the process of "bargaining" for commitments is inherently skewed.[91] The *Alrosa* judgment, with its emphasis on ensuring the proportionality of commitments vis-à-vis the alleged competition law infringement underlines the relevance of this concern.

In another respect, the Commission has meanwhile reacted to the *Alrosa* judgment: *Distrigaz*[92] – the first commitment decision issued after the *Alrosa* judgment was published –includes a detailed discussion on the proportionality of the commitments made binding, a specification of the finding on which this assessment is based, and a specification of some of the circumstances under which the Commission would reopen the proceedings under Art. 9(2) Reg. 1/2003 in order to alleviate the commitments. This is an important evolution of the Commission's commitment decision practice which

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[89] *Temple Lang,* in: 2005 Annual Proceedings of the Fordham Corporate Law Institute (Barry Hawk ed., 2006), 265, at 283; *Waelbroeck,* Global Competition Law Centre Working Paper 1/08, p. 26.

[90] From a policy perspective also: *Whish*, in: M. Johansson, N. Wahl and U. Bernitz (eds), Liber Amicorum in Honour of Sven Norberg, 2006, p. 555, at 570-571: "… there is much to be said for pursuing serious infringements right through to a formal decision, including the imposition of fines: failure to do so may mean that the full impact of the law is obscured"; and *Georgiev,* Utah Law Rev. 2007, 971, at 1025 and 1026.

[91] According to *Waelbroeck,* Global Competition Law Centre Working Paper 1/08, p. 26, the threat of a fine puts into doubt the voluntariness of the commitment offers by the undertakings concerned. Therefore, all procedural guarantees should apply, including the right to appeal the decision, where commitments are accepted in light of the threat of a fine.

[92] Case COMP/B-1/37.966 (EU Commission Decision of 11 October 2007) – *Distrigaz.*

goes some way to address the concerns and will – where complex economic assessments are at issue – affect the intensity of the CFI's judicial review.

3. Procedural Safeguards: the Right to be Heard, and the Right to Access to the File

Contrary to some initial concerns,[93] the right to be heard and the right to access to the file are fully guaranteed in the context of commitment decisions. The procedural rights of the undertakings concerned are equivalent to the rights they enjoy in infringement proceedings under Art. 7(1) of Reg. 1/2003.[94] The right of full access to the file – including access to the third parties' observations in the context of a market test which convinces the Commission that commitments must be amended or changed – is essential to enable the undertakings concerned to assess the legal situation and make an informed judgment which commitments to offer, if any.[95] It is an important part of the right to defence,[96] but also an additional safeguard that no disproportionate commitments will be imposed.[97]

The rights of third parties during an Art. 9 procedure remain open after *Alrosa*, on the other hand. Alrosa's full right to access to the file was justified by the fact that it was to be treated like an undertaking concerned. It is not clear whether in other situations third parties have a right to receive a non-confidential version of the preliminary assessment, analogous to their right to receive a non-confidential version of the statement of objections in Art. 7 procedures.[98] However, the parallel treatment of Art. 7 procedures and Art. 9 procedures which the CFI advocates suggests that such a right does exist.[99] If the Art. 9 procedure is construed as public competition law enforcement similar to the enforcement under Art. 7 of Reg. 1/2003, there appears to be no justification for putting third parties in a significantly worse position.[100] This is true in particular if the Commission's commitment decisions in effect also bind national courts and competition

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[93] See *Cook*, 29(2) World Comp. 2006, 209, at 219-220; *Whish*, in: M.Johansson, N. Wahl and U. Bernitz (eds), LiberAmicorum in Honour of Sven Norberg, 2006, p. 555, at 564-566. For further discussion see *Wils*, in: Wils, Efficiency and Justice in European Antitrust Enforcement, 2008, p. 25, at 34-36.

[94] See: Commission's Notice on the rules for access to the Commission file, 13 December 2005, [2005] OJ C 325/7 – the Notice does not refer explicitly to the Art. 9-procedure; but it follows from the CFI's *Alrosa* judgment that the same principles will apply. See also: *Temple Lang*, in: 2005 Annual Proceedings of the Fordham Corporate Law Institute (Barry Hawk ed., 2006), 265, at 277.

[95] See *Whish*, in: M.Johansson, N. Wahl and U. Bernitz (eds), LiberAmicorum in Honour of Sven Norberg, 2006, p. 555, at 566.

[96] *Whish*, in: M.Johansson, N. Wahl and U. Bernitz (eds), LiberAmicorum in Honour of Sven Norberg, 2006, p. 555, at 566.

[97] For this additional dimension, see: *Wils*, in: Wils, Efficiency and Justice in European Antitrust Enforcement, 2008, p. 25, at 36.

[98] For this right, see Art. 6 of the EU Commission's Implementing Regulation 773/2004.

[99] See also: *Temple Lang*, in: 2005 Annual Proceedings of the Fordham Corporate Law Institute (Barry Hawk ed., 2006), 265, at 280.

[100] Similar: *Whish*, in: M.Johansson, N. Wahl and U. Bernitz (eds), LiberAmicorum in Honour of Sven Norberg, 2006, p. 555, at 565. See also *Temple Lang*, in: 2005 Annual Proceedings of the Fordham Corporate Law Institute (Barry Hawk ed., 2006), 265, at 319 for the concern that the commitment procedure may not adequately protect the interests of third parties.

authorities: in this case, the Commission must ensure that the rights of third parties are fully protected in the commitment decision procedure.[101]

4. The Concerned Undertakings' Right to Appeal

While *Alrosa* does not explicitly address the controversial question whether undertakings whose commitments have been made binding might have a right to appeal the decision in court,[102] the CFI's reasoning makes it likely that such an action would be admissible in principle.[103] This follows from the CFI's emphasis on the fact that commitment decisions constitute public law enforcement, and that the Commission ultimately bears full and sole responsibility for the commitments made binding and their proportionality. The CFI explicitly refers to the parallel case law on commitments offered in merger control proceedings, which – even if they have been offered voluntarily by the merging parties – can be appealed based on Art. 230 EC[104] (paras. 106-107).

Even if the appeal is admissible under Art. 230 EC, the fact that commitments have been offered voluntarily to achieve a desired result may affect the intensity of judicial review. In the field of merger control, parties will be successful in appealing commitments only if they can show that they have been "arbitrarily forced" by the Commission to propose these measures.[105] Similar principles might apply in the context of commitment decision procedures. Concerns that the Commission will loose interest in the commitment decision procedure if the addressees of commitment decisions retain their right to appeal are therefore likely unfounded, all the more since appeals against commitments will be much less frequent than appeals by the addressees of decisions under Article 7 of Regulation 1/2003.[106]

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[101]See, however, *Waelbroeck*, Global Competition Law Centre Working Paper 1/08, pp. 18-19: the rights of third parties are sufficiently protected, at least after *Alrosa*.

[102]In favour of a right to appeal commitment decisions see, for instance, *Wils*, in: Wils, Efficiency and Justice in European Antitrust Enforcement, 2008, p. 25, at 44, pointing out, the preconditions that Art. 230 EC sets out for the admissibility of an appeal are at least formally fulfilled: the undertakings concerned are the addressee of the commitment decision which adversely affects their legal position in that it makes the commitments binding on them. Similar: *Waelbroeck*, Global Competition Law Centre Working Paper 1/08, p. 23-24. Against a right to appeal commitment decisions: *Cook*, 29(2) World Comp. 2006, 209, at 222-223; *Temple Lang*, in: 2005 Annual Proceedings of the Fordham Corporate Law Institute (Barry Hawk ed., 2006), 265, at 296.

[103]Similar: *Waelbroeck*, Global Competition Law Centre Working Paper 1/08, p. 24.

[104]See ECJ, Case C-89/85 et al. [1993] ECR I 1307, para. 181 – *Woodpulp*: the Court rejected the Commission's argument that because an undertaking constituted a unilateral act, the companies who had offered the undertaking were not entitled to appeal. "The obligations imposed on the applicants by the undertaking must be regarded in the same way as orders requiring an infringement to be brought to an end, as provided for by Article 3 of Regulation No. 17... In giving that undertaking, the applicants thus merely assented, for their own reasons, to a decision which the Commission was empowered to adopt unilaterally."

[105]CFI, 23 February 2006, Case T-282/02, para. 319 – *Cementbouw*; confirmed by ECJ, 18. December 2007, Case C-202/06 P– *Cementbouw*.

[106]See to the same effect: *Waelbroeck*, Global Competition Law Centre Working Paper 1/08, p. 24.

5. Binding Effect on National Courts and National Competition Authorities

It is not clear what, if anything, follows from *Alrosa* with regard the important question of whether and to what extent commitment decisions bind national competition authorities and courts in the assessment of future conduct which is in compliance with the commitments made binding: Can national courts find that the commitments imposed by the Commission don't suffice to put the infringement of Art. 81 or Art. 82 to an end and grant injunctive relief against conduct that the Commission has analyzed within the framework of the commitment decision procedure but ultimately not prohibited,[107] and can national competition authorities for the same reason impose further-reaching remedies?[108]

This question has been highly controversial. Based on the clear wording of Recitals 13 and 22 of Regulation No. 1/2003 *Wouter Wils* and others have argued that commitment decisions will not prevent private actions in national courts for injunctive relief or the imposition of further remedies by national competition authorities, unless the injunction or the additional remedies would make it impossible for the undertaking concerned to comply (also) with the commitments made binding by the Commission's decision.[109] Only then would the national measure "run counter" to the Commission's decision within the meaning of Art. 16(1) or Art. 16(2) of Reg. 1/ 2003, and violate Article 10 EC.[110] The main argument in favour of a continued decentralized enforcement of competition rules is the understanding that commitment decision – contrary to infringement decisions under Art. 7(1) of Reg. 1/2003 – are not necessarily meant to bring infringements to an end, but are merely a statement that the case no longer represents an enforcement priority from the Commission's point of view.[111] Others have contested this understanding. According to *Denis Waelbroeck,* a continued decentralized enforcement would be irreconcilable with the ECJ's *Masterfoods* decision and the objective of Art. 16 of Reg. 1/2003 to ensure a "one-stop-shop" system.[112] Statements by DG Comp officials in the context of the *Coca-Cola*-decision[113] have contributed to the doubts whether DG Comp would accept a continued pursuit of competition law infringements by NCAs. In a summary of the case, *Gasparon* and *Visnar* emphasized that "Member States would not be allowed to run counter to the *effet*

[107]In the case that private parties have brought an action before a national court.

[108]In the case that national competition authorities are acting.

[109]*Wils*, in: Wils, Efficiency and Justice in European Antitrust Enforcement, 2008, p. 25, at 42-43; *Whish*, in: M. Johansson, N. Wahl and U. Bernitz (eds), Liber Amicorum in Honour of Sven Norberg, 2006, p. 555, at 569. Similar: *Armengol / Pascual*, 27(3) ECLR 2006, 124, at 125-126.

[110]*Wils*, in: Wils, Efficiency and Justice in European Antitrust Enforcement, 2008, p. 25, at 43. For a good discussion see also: *Temple Lang*, in: 2005 Annual Proceedings of the Fordham Corporate Law Institute (Barry Hawk ed., 2006), 265, at 301-304.

[111]For the fact that the EU Commission is generally free to act on its priorities, see CFI, Case T-24/90, [1992] ECR II 2223 – *Automec II*.

[112]*Waelbroeck*, Global Competition Law Centre Working Paper 1/08, p. 12-13. See also *Pace*, European Antitrust Law, 2007, p. 242: "When faced with a commitment decision, national authorities and national courts must close the file on all cases covered by the decision in respect of the period after the decision has been taken". For a summary of the arguments for both sides see: *Temple Lang*, in: 2005 Annual Proceedings of the Fordham Corporate Law Institute (Barry Hawk ed., 2006), 265, at 287-290.

[113]Case COMP/A.39.1 1 6/B2 – *Coca-Cola* (Commission decision of 22 June 2005)

utile of the Commission's commitment decision".[114] For Coca-Cola, the prospect to end all proceedings, including those before NCAs, was certainly one of the attractions of the commitment procedure under Art. 9 of Reg. 1/2003. In fact, after the Commission had issued its commitment decision, all national competition authorities closed the case.

The *Alrosa* judgment does not deal with the effect of commitment decisions on national competition authorities and courts directly. The CFI emphasizes, however, that the aim of a commitment decision – like of an Art. 7-decision – is to put an infringement of the competition rules to an end (para. 87). It also emphasizes the parallels between Art. 7 procedures and Art. 9 procedures and the fact that the Commission is fully bound by substantive competition law when it decides to proceed under Art. 9 of Reg. 1/2003. If this is so, the Commission is arguably obliged, once it opens proceedings under Art. 9 and thereby relieves the NCAs of their competence to apply Art. 81 and Art. 82 for the duration of the proceedings (Art. 11(6) of Reg. 1/2003), to address the alleged infringement of competition rules in full.[115] If the commitment decision is not a settlement procedure proper, but part of public competition law enforcement along the same lines as infringement proceedings under Art. 7 of Reg. 1/2003, the Commission should be required to take full account of the public interest to protect competition, and should no longer be free to deal with the infringements set out in the preliminary assessment only in part, according to its own enforcement priorities.[116] As a necessary corollary of this interpretation, Art. 16 of Reg. 1/2003, according to which national courts and competition authorities have to respect (and possibly to enforce[117]) the commitments made binding under Art. 9 of Reg. 1/2003, would bar national courts from granting injunctive relief and NCAs from imposing additional remedies with a view to the infringements addressed by the commitment decision – despite the text of Recital 13 and 22 of the Reg. 1/2003.[118] To acknowledge this re-centralization effect of commitment decisions[119] is only to acknowledge the effects that the Commission's commitment decisions actually have in practice: national competition authorities and

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[114]See: *Gasparon / Visnar*, Competition Policy Newsletter, Autumn 2005/3, p. 60, 64

[115]For a similar interpretation of the *Alrosa* judgment, see *Waelbroeck*, Global Competition Law Centre Working Paper 1/08, p. 12

[116]*Temple Lang*, in: 2005 Annual Proceedings of the Fordham Corporate Law Institute (Barry Hawk ed., 2006), 265, at 289 has rightly pointed out that this will make it more difficult for the Commission to adopt commitment decisions, and to some extent compromises the goal of the commitment decision procedure to enable the Commission to handle cases more efficiently. It is, however, in line with the CFI's finding in *Alrosa* that the commitment decision procedure cannot be used to avoid a sufficiently serious investigation of the case to have a clear and substantiated view of the relevant infringements.

[117]This is the position of the EU Commission – see MEMO/04/217: "… national courts must enforce the commitments by any means provided for by national law, including the adoption of interim measures". Similar: *Temple Lang*, in: 2005 Annual Proceedings of the Fordham Corporate Law Institute (Barry Hawk ed., 2006), 265, at 290. For discussion see *John Davies / Manish Das*, Private Enforcement of Commission Commitment Decisions: A Steep Climb, Not a Gentle Stroll, in: Fordham Corp. L. Inst., 2006, pp. 199 et seq.; *Whish*, in: M. Johansson, N. Wahl and U. Bernitz (eds), Liber Amicorum in Honour of Sven Norberg, 2006, p. 555, at 569-570: if national competition authorities and national courts are not bound by an Art. 9 decision, "how can they, nevertheless, be bound by a duty to enforce the same decision?".

[118]National courts and NCAs would, of course, still be competent to act outside the scope of the competitive concerns addressed by the commitment decision.

[119]*Georgiev*, Utah Law Rev. 2007, 971, at 1030.

courts almost inevitably take them as a signal that there no longer is a need to act.[120] The decentralized application of competition rules has not been an effective instrument to address any remaining concerns.

Should the Commission use (and, contrary to the opinion defended here, be allowed to use) commitment decisions merely to state that the case is no longer an enforcement priority, it should at least be required to make that very clear in the text of the commitment decision,[121] so as to avoid misleading signals to national competition authorities and courts.[122] This, however, would compromise the value that a commitment decision would have for the undertakings concerned.

6. Conclusions

When the EU Commission proposed to introduce commitment decisions, it perceived them to be a form of negotiated settlement, modelled in part along the lines of the US consent decree.[123] The conditions for the use of this new settlement procedure should be flexible, and the Commission should be able to agree to a settlement where its commitment to an efficient use of its limited resources and its enforcement priorities justified this choice.[124] In *Alrosa*, the CFI has refused to conceive and interpret commitment decisions along those lines.[125]

The court's reasoning has a firm basis in principles of European law. With a view to competition law, the Commission's mandate is set out in Art. 85 EC. It is to "ensure the application of the principles laid down in Articles 81 and 82", and, if it finds that there has been an infringement, to "propose appropriate measures to bring it to an end". Both in its content and in its limits, this clear mandate is the basis for guaranteeing the effectiveness of European competition law. Ensuring that the Commission remains closely tied to the substance of the competition rules and providing for an effective judicial review are essential for protecting the balance of powers and the rule of law. In light of these principles, the CFI has re-established four fundamental safeguards against possible abuses of the commitment decision procedure: the Commission's duty of investigation and clear formulation of the charge; full judicial review of the proportionality of the commitments; full protection of the concerned undertakings'

[120]This is emphasized by *Waelbroeck*, Global Competition Law Centre Working Paper 1/08, p. 13.

[121]For this position, see: *Temple Lang*, in: Fordham Corp. Law Inst. 2005 (2006), 265, at 290: "The better interpretation seems to be that the Commission may take its enforcement priorities into account, but that it should make the firmest statement it can about the unlikelihood of any infringement occurring if the commitment is fully carried out".

[122]*Waelbroeck*, Global Competition Law Centre Working Paper 1/08, pp. 13-14 argues that this will not suffice: National courts and competition authorities will nontheless refuse to act.

[123]*Wils*, *supra* note 2, p. 7; *Whish*, in: M. Johansson, N. Wahl and U. Bernitz (eds), Liber Amicorum in Honour of Sven Norberg, 2006, p. 555, at 557. For the relevance of consent decrees in US antitrust law and a description and discussion of the system, see: *Georgiev*, Utah Law Rev. 2007, 971 et seq.

[124]EU Commission, MEMO/04/217.

[125]For the thesis that the US system of consent decrees cannot be transferred to the EU with its different institutional framework without more see *Georgiev*, Utah Law Rev. 2007, 971, at p. 1007-1008. One important difference between the European system of commitment decisions and the US system of consent decrees is that in the US, based on the Tunney Act of 1974, all consent decrees by the DOJ are reviewed by a district court that must consider whether the consent decree is in the public interest. The European system of commitment decisions has not provided for a similar type of judicial control.

procedural rights, namely the right to access to the file and the right to be heard; and protection of the concerned undertaking's right to appeal to the courts. The judicial safeguards have been developed in a special setting – namely in the context of a "hybrid" Art. 81/Art. 82 case – but their relevance extends to all commitment proceedings, despite the fact that in "non-hybrid" cases, violations will be harder to bring before the court.

Should *Alrosa* be upheld by the ECJ, the commitment decision procedure may lose some of its attraction for the Commission:[126] Based on the *Alrosa* principles, it will not be able to use the commitment decision the way it had intended to. On the other hand, the legal constraints on the Commission's freedom of action may be read as a judicial acknowledgment that the Commission's and the undertakings incentives to settle and the public interest in effective protection of competition may diverge. The Commission may be biased in favor of administrative flexibility and underestimate the value of binding precedent and the evolution of legal doctrine. It may sometimes pursue regulatory goals, reaching beyond the important limits of competition law, and it may have incentives to avoid judicial control which, in the longer run, is essential for its legitimacy. With a view to this potential divergence of public and administrative interests, the CFI's refusal to rely on the Commission's exercise of self-restraint alone[127] may have been wise: In the EU, the law and judicial review provide the strongest – and frequently the only meaningful – mechanisms for ensuring accountability of public action. In this perspective, the somewhat narrower scope for administrative cost-saving may be an acceptable price to pay.

[126]See *Wils*, in: Wils, Efficiency and Justice in European Antitrust Enforcement, 2008, p. 25, at 32, who regards the saving of the cost and delay of judicial review as precisely one of the benefits justifying the use of commitment decisions.

[127]As suggested, for instance, by *Wils*, in: Wils, Efficiency and Justice in European Antitrust Enforcement, 2008, p. 25, at 32-33.

Annex 1: List of Art. 9 commitment procedures before the EU Commission

		Case	Type of competition concern	Market test notice (Art. 27(4))	Outcome
1	COMP/37.214	DFB – Deutsche Bundesliga Joint selling of media rights	Art.81	14.09.2004 [2004] OJ C 229/13	Decision (19.01.2005)
2	COMP/39.116	Coca-Cola	Art.82	26.11.2004 [2004] OJ C 289/10	Decision (22.06.2005)
3	COMP/38.381	Alrosa + De Beers group	Art.82 / Art.81	03.06.2005 [2005] OJ C 136/32	Decision (22.02.2006) Decision annulled by the CFI (11 July 2007, T-170/06) Appealed to ECJ (C-441/07 P)
4	COMP/38.173	Football Association PremierLeague Joint selling of media rights	Art.81	30.04.2004 (Art. 19(3) of Reg. 17/62) [2004] OJ C 115/3	Decision (22.03.2006)
5	COMP/38.348	Repsol	Art.81	20.10.2004 [2004] OJ C 258/7	Decision (12.04.2006) Appealed to the CFI (T-45/09)
6	COMP/38.681	Cannes Agreement	Art.81	23.05.2006 [2006] OJ C 122/2	Decision (04.10.2006)
7-10	COMP/39.143 - 39.140	DaimlerChrysler Toyota GM Fiat	Art.81	22.03.2007 [2007] OJ C 66/18; C 66/21; C 66/24; C 66/27	Decision (14.09.2007)
11	COMP/37.966	Distrigaz	Art.82	05.04.2007 [2007] OJ C 77/48	Decision (11.10.2007)
12	COMP/39.152; COMP/39.153	BUMA / SABAM – Santiago Agreement	Art.81	03.08.2005 [2005] OJ C 200/11	Pending
13	COMP/37.749	Austrian Airlines & SAS	Art.81	22.09.2005 [2005] OJ C 233/18	Pending
14	COMP/38.698	CISAC	Art.81	09.06.2007 [2007] OJ C 128/12	Pending
15	COMP/37.984	SkyTeam	Art.81	19.10.2007 [2007] OJ C 245/46	Pending
14	COMP/B-1/39.388; COMP/B-1/39.389	E.ON	Art. 82	12.6.2008 [2008] OJ C 146/34	Pending
16	COMP/39.402	RWE Gas	Art. 82		