



European
University
Institute

DEPARTMENT
OF LAW

The Trend Towards ‘Consensual Competition Law’

A Comparative Study of Commitment Procedures
and Policies in Germany and the United Kingdom

Jonas von Kalben

Thesis submitted for assessment with a view to obtaining the degree of
Master in Comparative, European and International Laws (LL.M.)
of the European University Institute

Florence, October 2014

European University Institute
Department of Law

The Trend Towards ‘Consensual Competition Law’

A Comparative Study of Commitment Procedures and Policies in
Germany and the United Kingdom

Jonas von Kalben

Thesis submitted for assessment with a view to obtaining the degree of
Master in Comparative, European and International Laws (LL.M.)
of the European University Institute

Supervisor

Prof. Giorgio Monti, EUI

© Jonas von Kalben, 2014

No part of this thesis may be copied, reproduced or transmitted without prior
permission of the author

OVERVIEW

A. INTRODUCTION	4
B. JUDICIAL REVIEW OF COMMITMENT DECISIONS	8
C. COMMITMENT PROCEDURES IN GERMANY AND THE UK	13
I. WHAT TO EXPECT FROM THE COMMITMENT PROCEDURE – CONCEPTUALIZING THE RELATIONSHIP TO INFORMAL UNDERSTANDINGS AND INFRINGEMENT PROCEDURES	13
II. SCOPE OF APPLICATION	20
III. NEGOTIATION OF COMMITMENTS	27
IV. PRELIMINARY ASSESSMENT	32
V. CONTENT OF COMMITMENTS	34
VI. THIRD PARTIES	35
VII. IMPLEMENTATION AND ENFORCEMENT	39
VIII. REOPENING OF THE PROCEDURE	41
IX. SUMMARY AND DISCUSSION	44
D. COMMITMENT DECISION POLICIES IN GERMANY AND THE UK	47
I. ENFORCEMENT STRATEGIES OF THE BUNDESKARTELLAMT	50
II. ENFORCEMENT STRATEGIES OF THE OFT, THE CMA AND THE REGULATORS	68
III. SUMMARY AND DISCUSSION	76
E. CONCLUSION	79
F. ANNEX	83
G. LIST OF ABBREVIATIONS	97
H. BIBLIOGRAPHY	99

CONTENTS

A. INTRODUCTION	4
B. JUDICIAL REVIEW OF COMMITMENT DECISIONS	8
C. COMMITMENT PROCEDURES IN GERMANY AND THE UK	13
I. WHAT TO EXPECT FROM THE COMMITMENT PROCEDURE – CONCEPTUALIZING THE RELATIONSHIP TO INFORMAL UNDERSTANDINGS AND INFRINGEMENT PROCEDURES	13
1. THE COEXISTENCE OF ENFORCEMENT TOOLS IN PRACTICE	14
2. WHAT TO EXPECT FROM THE COMMITMENT PROCEDURE?	16
II. SCOPE OF APPLICATION	20
1. THE BROAD SCOPE OF APPLICATION OF THE GERMAN COMMITMENT PROCEDURE	20
2. THE STRICTER APPROACH IN THE UK	21
a) ‘Readily Identifiable’ Competition Concerns	22
b) ‘Serious Abuse of a Dominant Position’	23
c) Deterrence	23
3. EXPLAINING THE DIFFERENCES – THE RATIO OF THE OFT’S GUIDANCE	25
4. DISCUSSION	27
III. NEGOTIATION OF COMMITMENTS	27
1. THE RATHER INFORMAL DESIGN OF COMMITMENT NEGOTIATIONS IN GERMANY	28
2. THE MORE FORMALISED APPROACH OF THE CAT	28
3. DISCUSSION	30
IV. PRELIMINARY ASSESSMENT	32
1. THE CONTENT OF PRELIMINARY ASSESSMENTS – DIFFERENT STANDARDS IN GERMANY AND THE UK	33
2. DISCUSSION	33
V. CONTENT OF COMMITMENTS	34
1. PRIORITISING PROCEDURAL ECONOMY?	34
2. DISCUSSION	35
VI. THIRD PARTIES	35
1. THE REQUIREMENT OF A ‘MARKET TEST’ IN THE UK	36
2. THE LESS EXTENSIVE INVOLVEMENT OF THIRD PARTIES IN GERMAN COMMITMENT PROCEDURES	38
3. DISCUSSION	39
VII. IMPLEMENTATION AND ENFORCEMENT	39
1. DIFFERENT FRAMEWORKS IN GERMANY AND THE UK	40
2. DISCUSSION	41

VIII. REOPENING OF THE PROCEDURE	41
1. REOPENING THE PROCEDURE CONSENSUALLY?	41
2. DISCUSSION	42
IX. SUMMARY AND DISCUSSION	44
<u>D. COMMITMENT DECISION POLICIES IN GERMANY AND THE UK</u>	<u>47</u>
I. ENFORCEMENT STRATEGIES OF THE BUNDESKARTELLAMT	50
1. FOLLOWING INFRINGEMENT DECISIONS	51
2. UTILISING DISTINCT FEATURES OF THE COMMITMENT PROCEDURE	51
a) Shaping Market Structures	52
aa) Example: Excessive Prices for Heating Current	52
bb) Example: Foreclosure of Gas Markets via Long-Term Supply Contracts	54
cc) Example: Marketing of Media Rights	55
b) Preventing Future Harm	57
c) Implementing Findings of Sector Inquiries	60
d) Coordinating ‘Shared Regulatory Space’	62
e) Substituting Conditional Exemptions	63
f) Experimenting in Fast Developing Markets	66
g) Complementing Merger Control in Joint Venture Cases	67
II. ENFORCEMENT STRATEGIES OF THE OFT, THE CMA AND THE REGULATORS	68
1. EFFECTS OF THE OFT’S GUIDELINES ON THE SCOPE OF APPLICATION OF CDS	69
2. STRATEGIES OF THE COMPETITION AUTHORITIES AND THE REGULATORS	71
a) Shaping Market Structures	71
b) Substituting Conditional Exemptions	73
c) Experimenting in Fast Developing Markets	75
III. SUMMARY AND DISCUSSION	76
<u>E. CONCLUSION</u>	<u>79</u>
<u>F. ANNEX</u>	<u>83</u>
<u>G. LIST OF ABBREVIATIONS</u>	<u>97</u>
<u>H. BIBLIOGRAPHY</u>	<u>99</u>

A. Introduction

The introduction of the instrument of Commitment Decisions (CDs) by Regulation 1/2003 initiated what has been called a trend towards ‘consensual competition law’.¹ While ‘consensual’ elements are no novelty – neither in public enforcement regimes in general, nor in public competition law in particular² – it has only been within the last 10 years that ‘consensual tools’ in form of CDs became a prime instrument for public competition law enforcement. This trend reflects not only in the practice of the EU Commission (Commission) but also of National Competition Authorities (NCAs). The year of the 10th anniversary of Regulation 1/2003 (applicable since 1st of May 2004) is a good occasion to analyse the merits, dangers, and limits of this trend.

According to Art. 9 (1) Regulation 1/2003 the Commission can address competition concerns identified in a preliminary assessment by making commitments, which were offered by undertakings to address these concerns, legally binding. In this way the authority can conclude investigations without finding an infringement of competition law. Similarly, pursuant to Art. 5 Regulation 1/2003 NCAs may accept commitments of undertakings to close proceedings. In fact, nearly all Member States (MS) have introduced similar tools into their national enforcement systems.³

The instrument of CDs is subject to controversy since its introduction in 2004.⁴ This debate revolves around fundamental issues, such as the question of the right balance between procedural efficiency and effectiveness or, put differently, the balance between the aim of a quick and inexpensive solution of competition concerns on the one hand, and aims such as deterrence and precedent value on the other; the rule of law and its effects on the margin of

¹ *Florian Wagner-von Papp*, Best and Even Better Practices in Commitment Procedures after Alrosa: The Dangers of Abandoning the "Struggle for Competition Law", *Common Market Law Review*, 49 vol., 2012, p. 966.

² See for informal understandings at Union level e.g. Commission, 1985, Fourteenth Report on Competition Policy (Published in conjunction with the 'Eighteenth General Report on the Activities of the European Communities 1984'), at paras. 94, 95; Commission, 1988, Seventeenth Report on Competition Policy (Published in conjunction with the 'Twenty-first General Report on the Activities of the European Communities 1987'), at para. 81; Commission, 1998, XXVIIth Report on Competition Policy (1997) (Published in conjunction with the General Report on the Activities of the European Union - 1997), at para. 67.

³ Commission, 9 July 2014, Commission Staff Working Document SWD (2014) 230/2 – Ten Years of Antitrust Enforcement under Regulation 1/2003, at para. 196. See for Germany Sec. 32b ARC and the UK Sec. 31A-31E, Sched. 6A CA98.

⁴ See with further reference *Heike Schweitzer*, Commitment Decisions in the EU and in the Member States: Functions and risks of a new instrument of competition law enforcement in a federal enforcement regime, available at <http://ssrn.com/abstract=2101630> (accessed 01 September 2014), 2012, p. 3 fn. 13.

discretion of competition authorities when enforcing the law; the principle of separation of powers and the role of the courts and parliaments in developing and substantiating the substance of the competition rules; or the protection of fundamental rights of the undertakings concerned and of third parties. Nevertheless, it is striking that this vivid discussion is predominantly confined to the practice of the Commission and the Union Courts, while only little attention is given to the evolution of similar procedures and practices at national level. This is all the more surprising as this instrument was introduced by a regulation that aimed at ‘decentralising’ competition law enforcement within the European Union (EU).⁵ In fact, Regulation 1/2003 significantly changed the role of NCAs, which are now empowered to apply EU competition law (Art. 5), and led – with a view to the remaining strong position of the Commission as *primus inter pares*⁶ – at least to a ‘de-concentration’ of competition law enforcement in the EU.

In the light of this gap, the trend towards ‘consensual competition law’ will be analysed from a comparative perspective that focuses on the developments in two MS that represent both the civil law and the common law tradition in the EU – Germany and the United Kingdom. Regulation 1/2003 allows for procedural autonomy and ‘experiments’ with different procedural designs at national level. The very rudimentary rule of Art. 5 does not fully harmonize procedures but rather facilitates procedural diversity amongst European competition enforcement regimes.⁷ Exploring not only the different procedural designs, but furthermore the different practices and policies of NCAs and national courts, may contribute to developing a deeper understanding of the functioning of the instrument, to raising awareness for the problems that emerge, and potentially even to finding innovative solutions that may be transplanted across jurisdictions. The Commission itself cherishes this approach with a view to the work of the European Competition Network (ECN): It stresses that “differences in procedures remain” but at the same time calls CDs “a prime example for procedural convergence based on inspiration from the EU model and the cross-fertilisation of ideas supported by multilateral cooperation”.⁸ Hence, the MS as part of the federal

⁵ Commission, 28 April 1999, White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programm 99/027, OJ C 132/1 (1999), at paras. 82 et seq.

⁶ E.g. pursuant to Art. 11 (6) Regulation 1/2003 the Commission can bring proceedings of NCAs to an end by opening its own proceedings against the same violation. On the remaining central powers of the Commission see also *Giorgio Monti*, Independence, Interdependence and Legitimacy: The EU Commission, National Competition Authorities, and the European Competition Network, EUI Working Papers, 2014, p. 17.

⁷ Commission, 9 July 2014, Ten Years of Antitrust Enforcement under Regulation 1/2003, at para. 200.

⁸ *Ibid.*, at para. 196.

enforcement system of the EU serve as ‘laboratories’:⁹ While EU competition law strongly influenced national legal orders in recent years, given the remaining differences with a view to the commitment procedures and policies, there may be much to learn for the EU itself from the more deeply-rooted legal traditions in the MS.

The inquiry is structured the following way:

It sets out by (briefly) recalling the limited level of *ex post* judicial control of CDs at Union level since the European Court of Justice’s (ECJ) famous *Alrosa*-decision of 2010, and shows that while the situation at MS-level remains to date unclear, there are reasons to expect a stricter approach of national courts (**B.**). Nevertheless, given the reduced standard of judicial control established by the ECJ, it is argued that *ex ante* procedural control mechanisms and self-restraint of competition authorities are called for in order to protect individual rights, and to prevent jeopardizing the supremacy of the rule of law.

Accordingly, the following section turns to procedural *ex ante* control mechanisms implemented in the commitment procedure, and asks in how far these mechanisms sufficiently substitute for full judicial control (**C.**). In order to devise a conceptual framework of what to expect from the commitment procedure, the instrument of CDs will be related to the two main other enforcement routes that competition authorities can potentially take in similar cases, namely: Informal Understandings (IUs) and formal unilateral Infringement Decisions (IDs). Against this background, procedural differences in Germany and the UK will be revealed and illustrated. The question then arises of why these differences exist and, on a more normative level, which procedural design corresponds more closely to the ‘ideal conception’ of the commitment procedure, and is better suited to substitute for the lack of full judicial control.

Subsequently, the analysis turns to the application of the instrument by the NCAs in Germany and the UK (**D.**). It has been criticised that the Commission makes excessive use of the commitment procedure, and stretches competition law enforcement beyond its traditional limits.¹⁰ Against this background, the inquiry focuses on the practice of NCAs in Germany and the UK, and explores the amount of self-restraint to be found at the national level.

⁹ See for this methodology and the origin of the metaphor of ‘states as laboratories’ *Rob van Gestel, Hans-W. Micklitz, and Miguel Poiares Maduro, Methodology in the New Legal World, EUI Working Papers, 13 vol., 2012, p. 16.*

¹⁰ See as an illustration for a recent example of this criticism *Alex Barker, 'Brussels reaches legal limits on Google antitrust settlement', Financial Times, 21 July 2014.*

Similarities and differences of the enforcement strategies applied by NCAs will be analysed. On a more normative level, these strategies will be evaluated in the light of the reduced standard of judicial control.

The final chapter concludes and outlines questions that are left for future research (E.).

B. Judicial Review of Commitment Decisions

The Commission – as investigator, prosecutor, and decision maker – is at the centre of EU competition law enforcement. To counter the risk of prosecutorial biases and to protect individual rights, two instruments are in place: *Ex-ante* procedural guarantees and *ex-post* judicial control. These two instruments complement each other,¹¹ and to a certain extent one can substitute shortcomings of the other.

The question arises whether or not the system of checks-and-balances of EU competition law enforcement has struck the right balance. The principle of separation of powers demands that judicial review keeps in mind the need for some degree of policy discretion of competition authorities, or, put differently, “courts cannot become competition authorities”.¹² On the other hand, Art. 17 (1) TEU clearly states that the Commission oversees the application of Union law under the control of the Court of Justice of the European Union (CJEU), which pursuant to Art. 19 (1) TEU has to ensure that in the interpretation and application of the treaties the law is observed. By self-imposing significant restriction on judicial control of CDs, and thus granting discretion to the Commission when applying EU competition law, the ECJ may have gone too far lately.

Judicial review of the Commission’s CDs is limited for two reasons: The standard of judicial review applied by the courts as well as the right to sue are reduced compared to IDs. The (comparatively) high standard of judicial control applied to the commitment procedure by the General Court (GC) in the *Alrosa*-Case in 2007¹³ evoked hopeful reactions, especially of those that were generally concerned with a view to the protection of the rights of the undertakings concerned and third parties, as well as with the functioning of the instrument within the overall framework of competition law enforcement in the EU.¹⁴ These hopes were

¹¹ See e.g. on the requirements of Art. 6 (1) ECHR *Heike Schweitzer*, 'The European Competition Law Enforcement System and the Evolution of Judicial Review', in Claus-Dieter Ehlermann and Mel Marquis (eds.), *European Competition Law Annual: 2009, The Evaluation of Evidence and its Judicial Review in Competition Cases* (Oxford 2011), p. 83: "The European Court of Human Rights has thereby adopted what has been called a 'composite approach': administrative law enforcement need not be fully 'judicialized' in order to meet the requirements of Art. 6 (1) ECHR. But it must be governed by sufficiently strong procedural guarantees, and must be combined with an effective regime of judicial control with 'full jurisdiction' to review the administrative decision."

¹² *José Carlos Laguna de Paz*, *Understanding the limits of judicial review in European competition law*, *Journal of Antitrust Enforcement*, 2013, p. 7 et seq.; see also *Heike Schweitzer*, *The European Competition Law Enforcement System and the Evolution of Judicial Review*, p. 146.

¹³ GC, 11 July 2007, Case T-170/06, ECR 2007 II-2601 – *Alrosa*.

¹⁴ See e.g. *Heike Schweitzer*, 'Commitment decisions under Art. 9 of Regulation 1/2003: The developing EC practice and case law', in Claus-Dieter Ehlermann and Mel Marquis (eds.), *European Competition Law Annual 2008: antitrust Settlement under EC competition law* (Oxford 2010), p. 562 et seq., 77; *Torsten*

crushed by the ECJ in 2010, which followed the opinion of Advocate General (AG) *Kokott*¹⁵ when setting aside the decision of the GC and significantly lowering the standard of judicial control of CDs.¹⁶

In a nutshell, the ECJ decided that as a consequence of the ‘voluntary nature’ of CDs the principle of proportionality applies only to a limited extent, as the Commission does not have to “seek out less onerous or more moderate solutions than the commitments offered to it” (para. 61), and the content of judicial control is reduced to review “whether the Commission’s assessment is manifestly incorrect” (para. 42). The question as to which parties are entitled to challenge CDs in front of the EU courts remains to a certain extent unclear. Arguably, however, undertakings involved do not have standing as they ‘voluntarily’ offer commitments,¹⁷ while third parties often lack the incentive to sue, especially in cases of Type-I errors (over-enforcement), where competitors are subject to onerous obligations.¹⁸

Körber, 'Rechtliches Gehör, Verpflichtungszusagen nach Art. 9 VO 1/2003 und die Alrosa-Entscheidung', in Wolfgang Weiß (ed.), *Die Rechtsstellung Betroffener im modernisierten EU-Kartellverfahren*, Vorträge des 1. Speyerer Kartellrechtsforums (Baden-Baden 2010), p. 91.

¹⁵ AG Kokott, 17 September 2009, Case C-441/07 P, ECR 2010 I-5949 – Alrosa.

¹⁶ ECJ, 29 June 2010, Case C-441/07 P, ECR 2010 I-5949 – Alrosa. For a discussion of the judgement see only *Florian Wagner-von Papp*, CML Rev. (2012), p. 929 et seq.; *Heike Schweitzer*, 'Verpflichtungszusagen im Gemeinschaftsrecht', in Stefan Bechtold, Joachim Jickeli, and Mathias Rohe (eds.), *Recht, Ordnung und Wettbewerb. Festschrift zum 70. Geburtstag von Wernhard Möschel* (Baden-Baden 2011), p. 640 et seq.

¹⁷ Parties that offered commitments are, as addressees of the commitment decision, adversely affected in their legal position and therefore generally meet the requests of the right to sue pursuant to Art. 263 para. 4 TFEU. However, arguably the voluntary nature of the commitments precludes the possibility of appealing the decision, as this would contradict their previous behaviour (*venire contra factum proprium*). The voluntary offer of commitments may be interpreted as a waiver of future appeals – excluding only exceptional cases involving e.g. coercion or deception. *Heike Schweitzer*, (2012), *Commitment Decisions in the EU and in the Member States*, p. 18, pointing also to ECJ, 29 June 2010, Case C-441/07 P, ECR 2010 I-5949 – Alrosa, at para. 48, where the court underlines that the undertaking concerned consciously accepts certain disadvantages in exchange for certain benefits, when offering commitments.

¹⁸ Affected third parties can bring proceedings against CDs. Pursuant to Art. 263 (4) TFEU they can initiate an annulment proceeding, provided that they can show that the decision is of “direct and individual concern” to them. A question in this context that has yet not been clarified is whether or not this requirement is met, when third parties participated in the ‘market test’. This has been argued with a view to the former situation under Art. 19 (3) Regulation 17/62 by *Thomas Tobias Henning*, *Settlements im Europäischen Kartellverfahren, Eine rechtsvergleichende Untersuchung konsensualer Verfahrensbeendigungsmechanismen unter besonderer Berücksichtigung der Verpflichtungszusageentscheidung*, eds. Ernst-Joachim Mestmäcker, Wernhard Möschel, and Martin Hellwig (*Wirtschaftsrecht und Wirtschaftspolitik*, Baden-Baden, 2010), p. 370. In *Alrosa* the right to sue followed already from the level of participation of Alrosa in the proceedings, and the fact that De Beers offered to terminate all sales relations with Alrosa, see GC, 11 July 2007, Case T-170/06, ECR 2007 II-2601 – Alrosa, at paras. 36 et seq. In cases of over-enforcement third parties will have the right and the incentive to sue only in very exceptional cases (e.g. the *Alrosa*-Case), where the burdensome measure imposed on competitors has negative impact on their business practice as well. The same view takes *Florian Wagner-von Papp*, CML Rev. (2012), p. 968.

The scope of judicial review of CDs in Germany and the UK has not yet been further clarified. Nevertheless, while the situation concerning the right to sue in front of the national courts is similar to the one at Union level, chances are that the national courts will not grant competition authorities the same level of discretion as the ECJ, but will apply a stricter standard of judicial control.¹⁹

With a view to the right to sue, in Germany and the UK it has to be distinguished between the undertakings concerned and third parties: The undertakings concerned can generally not challenge CDs, while third parties generally have standing as long as they are ‘significantly affected’ by the decision.²⁰ Thus, the situation in the MS resembles the setting at Union level.

On the contrary, while the standard of judicial review applied by the Competition Appeal Tribunal (CAT) to CDs is reduced compared to the one applied to IDs, it (nevertheless) appears to be higher compared to the standard of the ECJ: It is one of the distinct characteristics of judicial control of UK competition law that the CAT reviews IDs ‘on the merits’, which is to say that the CAT can assume the role of a primary decision-maker by replacing the decision of the competition authority with its own judgment. On the contrary, however, CDs are subject to “judicial review principles”, which is to say that only the procedure and the plausibility of the decision are being reviewed, while the tribunal cannot replace the decision as such (sched. 8 (3), (3A) CA98).²¹ Hence, the competences of the CAT

¹⁹ The national legislators implemented Art. 5 Regulation 1/2003, when introducing the instrument of CDs into national law. It is well recognized and established by case law that national transposition law has to be interpreted in line with Union law (*Werner Schroeder*, 'Art. 288 AEUV', in Rudolf Streinz (ed.), *EUV/AEUV* (München 2012), at paras. 125 et seq.). However, Art. 5 leaves a very broad margin of discretion to national legislators. Therefore, arguably, there is room for implementing a varying degree of judicial control of CDs as well. The ECJ's *Alrosa*-judgement does not necessarily have to be followed by national legislators or courts but there is room for higher standards of judicial review in the MS.

²⁰ In the UK the undertakings concerned can only challenge the decision refusing the request to release commitments, as well as the decision to release commitments because the authority believes that the competition concerns no longer arise (Sec. 46 (3) lit. g, h CA98). Third parties that have a “sufficient interest in the decision” can additionally demand to have the decision to accept commitments or a (material) variation of commitments reviewed (Sec. 47 (1) lit. b, c, (2) CA98; see also the OFT, 2004, *Enforcement, Incorporating the Office of Fair Trading's guidance as to the circumstances in which it may be appropriate to accept commitments* (hereinafter *Enforcement Guidance*), at paras. 4.25, 4.26). However, a further definition of “sufficiently interested” is missing. Similarly, in Germany undertakings concerned will not enjoy standing, except under very special circumstances. Other parties have to be summoned to the proceeding (Sec. 63 (2) ARC) or the request to be summoned must have been rejected for reasons of procedural economy, in order to enjoy standing. Only parties whose interests are “significantly affected” can make such a request (Sec. 54 (2) ARC). The parties have to show that they are factually or legally affected by the decision. They cannot challenge the decision merely on the ground that the authority should have issued an infringement decision. See for more details *Joachim Bornkamm*, '§ 32b GWB', in Hermann-Josef Bunte (ed.), *Langen/Bunte Kartellrecht, Kommentar* (12 edn., 1 vol., Cologne 2014), at paras. 37 et seq.

²¹ For more details see *Heike Schweitzer*, *The European Competition Law Enforcement System and the Evolution of Judicial Review*, p. 123.

in reviewing CDs are reduced compared to the control of IDs. Yet, compared to judicial review at Union level – where courts have no jurisdiction on the merits anyway (see the limited grounds for action in Art. 263 TFEU)²² – the standard in the UK seems in fact to still be higher. Pursuant to sched. 8 (3A) CA98 when reviewing CDs the CAT has to apply “the same principles as would be applied by a court on an application for judicial review”.²³ Arguably, this precludes the application of a reduced standard of the principle of proportionality as established by the ECJ in *Alrosa*.

In Germany, the standard of judicial review of CDs remains unclear. Nevertheless, CDs might well be subject to a higher level of judicial control compared to the one applied at Union level: In Germany, traditionally, competition rules are perceived as fully legal and non-political in nature. Therefore, judicial review is generally strong and does not recognize margins of appreciation or discretionary elements beyond judicial control.²⁴ Accepting a wide margin of discretion outside the scope of judicial review in commitment procedures would not fit into this legal tradition.

In sum, while in the light of the principle of separation of powers the competences of courts to control the work of competition authorities has to be limited, the self-restraint of judicial control established by the ECJ in *Alrosa* appears to be excessive. Chances are that national courts in Germany and the UK will not follow this approach but apply a stricter standard, aiming at securing the legal, non-political nature of competition law. To date, however, the situation in the MS remains unclear. In practice, so-far CDs have not been subject to (strict) judicial control by national courts.

The (potential) limitation of judicial control of CDs raises fundamental concerns:²⁵ While the conclusion that undertakings that offer commitments have to live with the consequences is acceptable – provided that they make a free and informed decision – the ‘voluntary nature’ is

²² *Ibid.*, at 90, 91.

²³ See also the OFT, 2004, Enforcement Guidance, at para. 4.26. The CAT may dismiss the application for review or quash the whole or part of the commitments decision to which it relates; and where it quashes the whole or part of that decision, refer the matter back to the OFT with a direction to reconsider and make a new decision in accordance with the ruling of the CAT.

²⁴ *Heike Schweitzer*, The European Competition Law Enforcement System and the Evolution of Judicial Review, p. 118.

²⁵ For a more detailed discussion see *Florian Wagner-von Papp*, CML Rev. (2012), p. 937 et seq.; *Heike Schweitzer*, Verpflichtungszusagen im Gemeinschaftsrecht, p. 646 et seq.; *Firat Cengiz*, Judicial Review And The Rule Of Law In The EU Competition Law Regime After *Alrosa*, European Competition Journal, 7 vol., 1 iss., 2011, p. 135 et seq., 149 et seq.; *Manuel Kellerbauer*, Playground instead of playpen: The Court of Justice of the European Union's *Alrosa* judgement on art. 9 of Regulation 1/2003, European Competition Law Review, 1 iss., 2011, p. 1-8.

no appropriate safeguard against negative externalities of excessive commitments. The economic rational of the undertakings concerned does not necessarily match the public interest in a system of undistorted competition.²⁶ The protection of the interests of third parties remains questionable, when the standard of the principle of proportionality is severely lowered. Even though the interests of third parties have to be taken into account pursuant to the *Alrosa*-decision (para. 41), it is difficult to assess, let alone account for the externalities of (excessive or unsuitable) commitments on competition, especially in situations of factual or legal uncertainties. While procedural economy might justify negative externalities in some special cases, the prevalence of the rule of law is endangered when big parts of competition law are subject to limited (or no) judicial control – as is the case when CDs become the prime enforcement tool. Moreover, when the courts do not clarify important novel legal questions, legal uncertainty rises and the development of legal doctrine is hampered. The deterrent effect and the function of competition law as guiding rules for undertakings in the market are endangered.

As the administrative enforcement system is subject to a dual control mechanism – *ex-post* judicial control and *ex-ante* procedural safeguards – a reduced level of one mechanism might be acceptable as long as it is compensated by a strong design of the other. Therefore, the question arises in how far the safeguards established in the commitment procedures in Germany and the UK compensate for the – in case of the MS potentially – reduced level of judicial control.

²⁶ *Heike Schweitzer*, *Verpflichtungszusagen im Gemeinschaftsrecht*, p. 647. In order to avoid long and costly proceedings, high fines or bad reputation undertakings may be willing to accept far-reaching commitments. The interests of the undertakings concerned may become aligned with the potentially biased interests of the Commission, even if the authority seeks remedies that are themselves anticompetitive. Therefore, to the detriment of the interests of third parties and the public interest in a system of undistorted competition, the Commission might be a less reliable agent for their interests in the commitment procedure compared to the infringement procedure, *Florian Wagner-von Papp*, *CML Rev.* (2012), p. 951.

C. Commitment Procedures in Germany and the UK

This section compares the design of the commitment procedure in Germany and the UK. The aim of this inquiry is to uncover similarities and differences, and to find out why potential differences exist. The analysis further discusses advantages and disadvantages of the legal frameworks with a view to substituting the (potentially) limited standard of (*ex post*) judicial control of CDs. In how far are sufficient safeguards in place to ensure the application of the rule of law in competition law enforcement; and to protect the rights of the undertakings concerned, third parties and the public interest in the protection of a system of undistorted competition? Moreover, the question arises to what extent (*ex ante*) procedural requirements adequately restrict the ability of competition authorities to make ‘instrumental’²⁷ use of competition law.

Before analysing in detail the different designs of the most important elements of the commitment procedure – namely the Scope of Application (II.), the Negotiation Process (III.), the Preliminary Assessment of the Competition Concerns (IV.), the Content of the Commitments (V.), the Involvement of Third Parties (VI.), the Implementation and Enforcement of the Decision (VII.), and the Reopening of the Procedure (VIII.) – this section starts by conceptualising the relationship of the instrument of CDs with informal understandings on the one hand, and the formal infringement procedure on the other hand, in order to device in more general terms what to expect from the commitment procedure (I.).

I. What to Expect from the Commitment Procedure – Conceptualizing the Relationship to Informal Understandings and Infringement Procedures

Competition authorities have basically three options to terminate competition law proceedings, and to change the conduct, or even the structure of the undertakings concerned: Reaching an informal understanding, making commitments offered by the undertakings concerned binding, or issuing a unilateral ID (1.). With a view to the parameters of (a) procedural efficiency and (b) the accuracy of the standard of competition law intervention, conceptually out of the three enforcement tools CDs should be the most balanced instrument (2.).

²⁷ For a definition see *infra* C.I.2.

1. The Coexistence of Enforcement Tools in Practice

While the coexistence of the commitment and the infringement procedure is uncontested, it is questionable in how far IUs were replaced by the commitment procedure. The language of the DG Competition's Antitrust Manual of Procedures and one of its more recent policy briefs suggest that IUs are not practised under Regulations 1/2003.²⁸ Arguably, the procedural specifications of the instrument of CDs must not be undermined by an informal 'settlement procedure'. On the other hand, there is no statutory rule that indicates that the commitment procedure replaces other forms of informal competition law enforcement. Accordingly, some commentators perceive these informal settlements as a legitimate alternative to the commitment procedure.²⁹ In practice the Commission still engages in IUs.³⁰ The same is true for the NCAs in Germany³¹ and the UK³². Hence, in practice IUs and the commitment procedure coexist.

²⁸ DG Competition, 2012, Antitrust Manual of Proceedings, Internal DG Competition working documents on the procedures for the application of Articles 101 and 102 TFEU, at mod. 16 paras. 6: "[...] 'informal settlements' (such as practised before Regulation 1/2003 came into force) [...]"; DG Competition, March 2014, Competition policy brief, To commit or not to commit? Deciding between prohibition and commitments, p. 2: "They [Commitment Decisions] have replaced the practice of informally closing cases based on voluntary, non-binding commitments which did not provide for any kind of legal certainty and did not impose binding obligations on the companies concerned". See also *John Temple Lang*, 'Commitment Decisions And Settlements With Antitrust Authorities And Private Parties Under European Antitrust Law', in Barry E. Hawk (ed.), *International Antitrust Law & Policy, Annual Proceedings of the Fordham Corporate Law Institute 2005 (2006)*, p. 265, 66: „Both of these kinds of settlements [informal arrangements and conditions imposed in formal Commission decisions] in future will be rare, and may be obsolete. It seems less likely that the Commission would now accept informal settlements, except perhaps in small unimportant cases, since a formal procedure is now available.“

²⁹ *Thomas Tobias Henning*, *Settlements im Europäischen Kartellverfahren*, p. 354 et seq., argues e.g. with the discretion of the Commission to take up a case, which is supposed to include *a maiore ad minus* the right of the Commission not to take up a case because of an informal deal with an undertaking. See also *Richard Whish*, 'Commitment Decisions Under Article 9 of the Modernisation Regulation: Some Unanswered Questions', in Martin Johansson, Nils Wahl, and Ulf Bernitz (eds.), *Liber Amicorum in Honour of Sven Norberg, A European for all seasons (Brussels 2006)*, p. 571; *Suzanne Rab, Daphne Monnoyeur, and Anjali Sukhtankar*, *Commitments in EU Competition Cases: Article 9 of Regulation 1/2003, its application and the challenges ahead*, *Journal of European Competition Law & Practice*, 1 vol., 3 iss., 2010, p. 173; *Wouter P. J. Wils*, *Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003*, *World Competition*, 29 vol., 3 iss., 2006, p. 364.

³⁰ For a list of informal settlements in EU competition cases after 1 May 2004 see *Suzanne Rab, Daphne Monnoyeur, and Anjali Sukhtankar*, *JECLAP (2010)*, p. 174.

³¹ See e.g. Bundeskartellamt, 22 June 2009, Activity Report 2007/2008, BT-Druck. 16/13500, at p. 117 et seq. In fact, the president of the Bundeskartellamt, Andreas Mundt, seems to use the German word for CD ("Verpflichtungszusagen") synonym for formal and informal understandings, see *Andreas Mundt*, *Alternative Instrumente der Kartellbehörden*, 2011, p. 9, where he talks about 30 CDs ("Verpflichtungszusagen"), while according to the activity report only 17 were actually formal decisions.

³² OFT, 05/01/2011, press release PN 02/11 – Bar Council of Northern Ireland modifies its rules to address OFT concerns; OFT, 16/08/2012, press release PN 71/12 – OFT welcomes action by NHS trusts to ensure compliance with competition law.

The courts have not yet decided on the admissibility or inadmissibility of IUs in the light of the existence of formal commitment procedures. However, in the UK the CAT has touched upon the issue in a couple of its decisions and discussed the problem of the subversion of the commitment procedure.³³ In *IMS v. Ofcom/Red Bee Media Ltd./BBC*³⁴ the CAT did not expressly legalise IUs but it pointed to a way of circumventing CDs.

The decision generally deals with the (preliminary) question whether the case closure decision by the Office of Communications (Ofcom), which is concerned with a contract between the television broadcaster BBC and the access services³⁵ provider Red Bee Media Ltd. (BBCB³⁶), is an appealable decision falling within Sec. 46 (3) CA98. A decision to close a case without concluding whether or not competition law was infringed is not appealable. Ofcom issued a case closure decision after BBCB and BBC reduced the length of the exclusivity term of the contract from 10 years 5 month to 7 years 5 month. The appellant, Independent Media Support Ltd (IMS), argued that the decision in fact amounts to a non-infringement decision over which the CAT has jurisdiction (see para. 11). IMS inter alia raised the argument that the formal commitment process, especially the procedural rights that protect third parties (e.g. right to be heard), are undermined when the Ofcom accepts informal assurances and then closes the case (para. 52). IMS referred to negotiations between Ofcom and BBCB/BBC regarding the length of the exclusivity term of the contract. BBCB and BBC refused to offer commitments in order to avoid publicity surrounding a public consultation (para. 64) – which in fact puts into perspective the often-raised argument that commitment decisions are beneficial for the undertakings concerned because they can avoid reputational damages³⁷ – but discussed with Ofcom the possible effects of a voluntary reduction of the duration of the contract. It was controversial between the parties whether there was an actual

³³ In CAT, 08/04/2005, Case 1017/2/1/03 – Pernod-Ricard SA & Campbell Distillers Ltd. v. OFT/Bacardi-Martini Ltd., at para. 7, this question was left open but the CAT emphasised the advantages of the commitment procedure, “We would simply say, as neutrally as possible, as far as the future is concerned that from the point of view of the effectiveness of the United Kingdom competition regime, binding commitments have advantages from the point of view of enforcement over voluntary assurances, and may well prove to be a weapon in the OFT’s armoury that needs further development. We have not, of course, addressed the problem of whether there remains scope for accepting voluntary commitments after the introduction of section 31A – that is also a matter that we leave open.”

³⁴ CAT, 31/10/2007, Case 1087/2/3/07 – *IMS v. Ofcom/Red Bee Media Ltd./BBC*, at paras. 51 et seq.

³⁵ These are services such as subtitling, signing, audio description etc.

³⁶ Red Bee Media Ltd. was formerly a wholly owned subsidiary of BBC called BBC Broadcast.

³⁷ See e.g. *Thomas Tobias Henning*, Settlements im Europäischen Kartellverfahren, p. 355; *Evi Mattioli*, Commitments and settlements in the future UK competition regime, *European Competition Law Review*, 34 vol., 3 iss., 2013, p. 162.

understanding reached that a reduction of the exclusivity term would lead to the closure of the case.

Ultimately, the CAT did not follow IMS's reasoning (para. 57). The CAT held that there was no evidence of a tacit deal between Ofcom and the parties or evidence that would suggest that the commitment procedure was invoked informally (para. 50). On the subversion of the formal commitment process the CAT held (para. 53):

“[...] [T]he regulator cannot oblige parties to an agreement to offer commitments where, as in this case, the parties make it clear they do not want to go down that route. Nor can Ofcom refuse to address a change in circumstances brought about by the action of the parties part way through an investigation on the grounds that the change could have been handled by the formal offer of commitments. In the light of this, the Tribunal does not regard the current case as undermining the commitments procedure as alleged by IMS.”

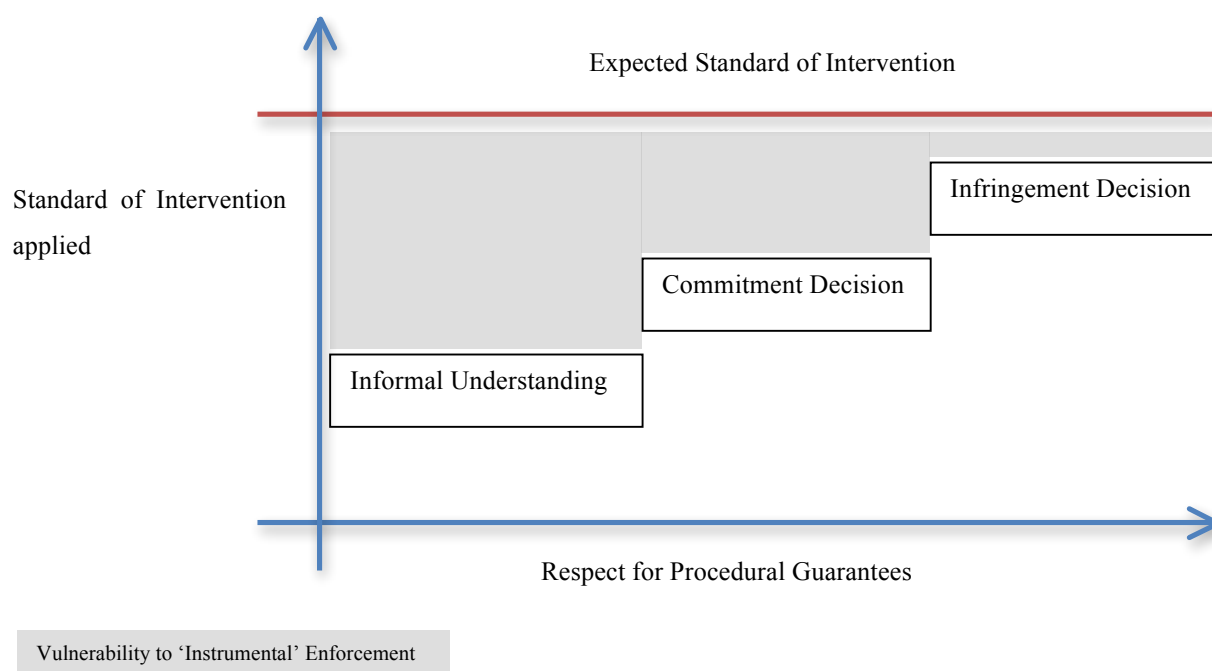
Consequently, according to the CAT, when undertakings (due to informal negotiations with the competition authorities or regulators) find out what the required changes of the conduct in question are, they can avoid the formal commitment procedure by voluntarily adapting their behaviour. Hence, also the CAT supports the coexistence of IUs, commitment procedures, and infringement procedures.

2. What to Expect from the Commitment Procedure?

Given the coexistence of these three enforcement options, and in order to define (abstract) parameters for the procedural design of CDs, a concept of what to expect from the distinctive instruments will be devised. This concept is based on the observation that the instruments differ in terms of respect for procedural guarantees, whereby the amount of procedural safeguards rises respectively from IUs, to CDs, to IDs. Arguably, these procedural differences reflect the distinct functions (or purposes) of the enforcement tools.³⁸

³⁸ Often CDs are only related to IDs, while IUs are left aside, see e.g. *Wouter P. J. Wils*, The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles, *World Competition*, 31 vol., 3 iss., 2008, p. 343 et seq.; *Piero Cavicchi*, The European commission's discretion as to the adoption of Article 9 commitment decisions: Lessons from Alrosa, Discussion Paper Europa-Kolleg Hamburg, Institute for European Integration, 3 iss., 2011, p. 10 et seq.

(1) Accuracy of the Standard of Intervention



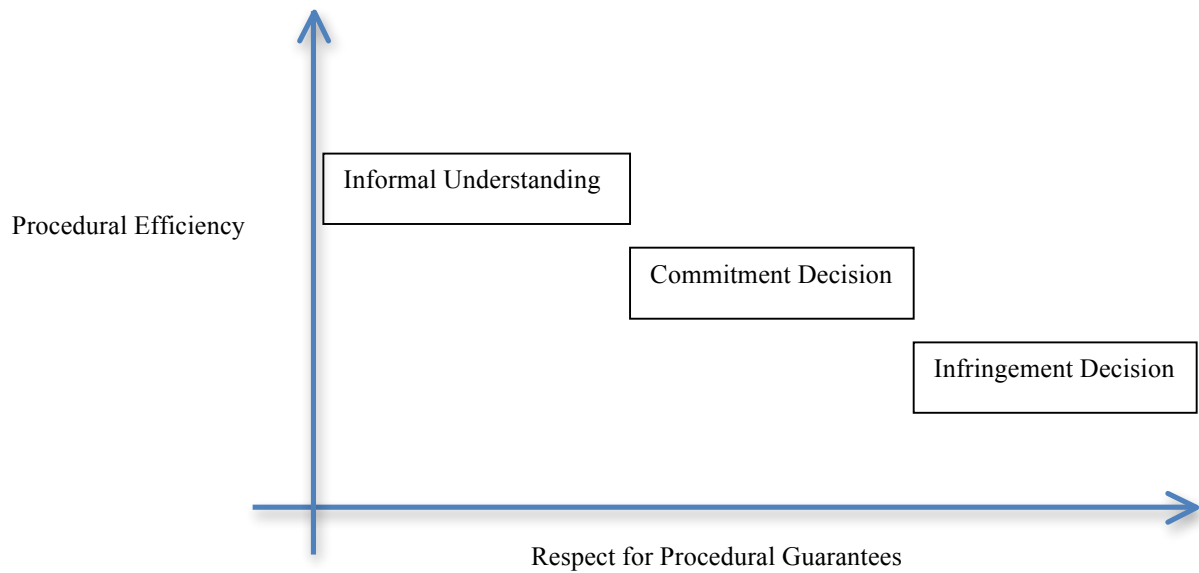
‘Instrumental’ use of competition law can be defined as a divergence of the expected standard of intervention (i.e. the expected theory of harm and the expected remedy³⁹ applied in a certain case, given the established competition law doctrine and precedents) from the actual standard of intervention applied by competition authorities.⁴⁰ Arguably, the ability to make instrumental use of competition law is inversely related to the respect for procedural guarantees, which in turn depends on the procedural instrument at hand.⁴¹ When comparing the three main enforcement instruments of the Commission and NCAs, the figure illustrates that in the broad spectrum of stricter and less strict procedural designs, and hence in terms of vulnerability to ‘instrumental enforcement’ (marked in grey in the figure), the commitment procedure should be positioned between IUs and formal IDs.

³⁹ The term ‘commitment’ and the term ‘remedy’ are used synonymously. Hence, the term ‘remedy’ is used not only for measures adopted by authorities in reaction to an infringement of competition law but also for commitments made binding that address competition concerns without a formal finding of an infringement of the law.

⁴⁰ Pablo Ibáñez Colomo, ‘On the Application of Competition Law as Regulation: Elements for a Theory’, in P. Eeckhout, T. Tridimas, and A. Thies (eds.), *Yearbook of European Law* (29 vol., Oxford 2010), p. 277.

⁴¹ The figure is an adaption of the one devised by *ibid.*, at 287.

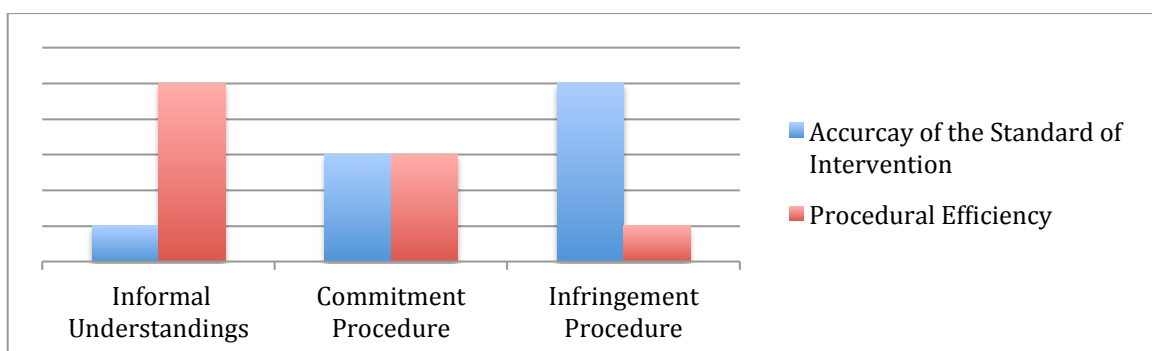
(2) Procedural Efficiency



At the same time, under the assumption that the level of procedural efficiency (measured by the time and costs of the procedure) is inversely related to the respect for procedural guarantees, the commitment procedure should again be located between IUs and the formal infringement procedure.

(3) Balancing the Aim of Procedural Efficiency and the Accuracy of the Standard of Intervention

Considerations of procedural efficiency may, to a certain extent, justify the risk of inaccurate standards of intervention. As can be drawn from above, conceptually the commitment procedure should be the most balanced procedure of the three instruments compared here.



With this simplified model in mind, it is possible to devise a concept of what to expect from the different procedures:

Starting with the one extreme, conceptually IUs are non-binding arrangements that cannot be enforced, and can be reached without complying with any specific procedural requirements. In other words, changes in circumstances brought about by the undertakings concerned are taken into account by the competition authority without any formal framework. The failure to comply with these agreements cannot be sanctioned but the competition authority can reopen the proceedings. While the standard of legal certainty, transparency and accountability of the procedure is very low, which increases the risk of ‘instrumental’ enforcement, the procedure is comparatively quick and flexible.

On the other extreme, formal unilateral infringement decisions serve to bring an infringement of competition law to an end by imposing binding behavioural or structural remedies on the undertakings concerned. The infringement procedure is strictly formalised with a view to the rights of the undertakings concerned and third parties,⁴² and there are strict requirements e.g. with a view to the content of the decision.⁴³ Different to IUs, the risk of ‘instrumental’ enforcement via the infringement procedures is relatively low due to the strict procedural requirements and safeguards, whereas on the other hand the procedure is rather inflexible and costly.

The design of the commitment procedure should be between these two extremes in terms of procedural efficiency and preventing ‘instrumental’ enforcement practices. Compared to IUs, the more formalised commitment procedure should provide for more legal certainty for the undertakings involved,⁴⁴ as well as for the competition authorities.⁴⁵ Furthermore, it should grant more rights to third parties and improve transparency.⁴⁶ On the other hand, compared to the infringement procedure, the instrument should be quicker, more flexible, and more responsive to the ideas of the undertakings involved.⁴⁷ In exchange for the consensual

⁴² E.g. by informing the parties on the procedure, by granting the right to case files, or by ensuring the right to be heard.

⁴³ I.e. the prioritisation of behavioural remedies, and a strict application of the principle of proportionality.

⁴⁴ E.g. by ensuring that the procedure can only be reopened in exceptional circumstances.

⁴⁵ E.g. by providing that undertakings can be sanctioned in the case of a breach of the commitments.

⁴⁶ E.g. by providing that commitments have to be published, and by giving third parties the possibility to comment on the commitments. More generally for potential advantages compared to ‘informal settlements’ see e.g. *Suzanne Rab, Daphne Monnoyeur, and Anjali Sukhtankar*, JECLAP (2010), p. 173.

character, and the increased level of procedural efficiency, the protection of the interests of the undertakings concerned may be limited.⁴⁸ At the same time, the applicability of the instrument should be limited to cases where no other considerations (such as the aims of deterrence or the development of legal doctrine) outweigh the aim of procedural efficiency.

It is against this conceptual background that the different procedural designs in Germany and the UK will be compared and potential advantages and disadvantages discussed.

II. Scope of Application

With a view to the first important aspect of the commitment procedure – the scope of application – a significant degree of procedural diversity can be found: Whereas in Germany only few limitations exist (1.), in the UK the legislator and the Office of Fair Trading (OFT) took a much stricter approach (2.). This difference can be explained by the importance attached to the aim of deterrence in the UK (3.). In the light of the limited standard of judicial review, and with a view to the concept commitment procedures devised above, the stricter approach in the UK appears to be preferable (4).

1. The broad Scope of Application of the German Commitment Procedure

The German Government apparently wanted to follow the approach of Regulation 1/2003. With reference to recital 13 of Regulation 1/2003⁴⁹ it established that CDs are unsuited in cases where the authority aims at imposing a fine.⁵⁰ However, the Commission and the ECJ seem to interpret this restriction rather narrowly, and the tool of commitment decisions has been used in cases in which the imposition of fines was not at all improbable.⁵¹ The

⁴⁷ E.g. by providing that the instrument does not require an in-depth inquiry into the facts, and the finding of an infringement of competition law; that the remedies should be developed by the undertakings rather than the authority; that remedies should be well suited to be implemented quickly; or that the remedies must be clearly apt solve the competition concerns at hand.

⁴⁸ E.g. with a view to the content of the commitments.

⁴⁹ Recital 13 Regulation 1/2003 suggests that CDs are not to be used in cases where alternatively the authority considers issuing a fines decision: “[C]ommitment decisions are not appropriate in cases where the Commission intends to impose a fine“. See also Commission, 2011, OJ 2011/C 308/06 – Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, at para. 116: „Commitment decisions are not appropriate in cases where the Commission considers that the nature of the infringement calls for the imposition of a fine. Consequently, the Commission does not apply the Article 9 procedure to secret cartels that fall under the Notice on immunity from fines and reduction of fines in cartel cases“. See further DG Competition, 2012, Antitrust Manual of Proceedings, at mod. 16 para 47, 48.

⁵⁰ Federal Government, 12 August 2004, BT-Drs. 15/3640 – Government Draft on the Seventh Amendment to the Act Against Restraints of Competition, at p. 34.

⁵¹ See e.g. Commission, 18 March 2009, Commitment Decision COMP/39.402 – RWE gas foreclosure; see also *Heike Schweitzer*, *Verpflichtungszusagen im Gemeinschaftsrecht*, p. 638. Similarly, the ECJ, 29 June 2010,

exemption of so-called ‘hard core cartel conduct’⁵² seems to be the only binding restriction of the scope of application of CDs, which can be found at EU level,⁵³ and correspondingly in Germany.

2. The Stricter Approach in the UK

On the contrary, when introducing the instrument of CDs into the national competition law enforcement regime of the UK,⁵⁴ the legislator obligated the OFT to publish “guidance as to the circumstances in which it may be appropriate to accept commitments” (Sec. 31D (1) CA98).⁵⁵ The legislator further established that the authorities “must have regard to the guidance” (Sec. 31D (8) CA98). As the CAT clarified, binding legal effects do not result from the guidance itself – as “guidance published under section 31D remains guidance, rather than binding rules” – but this ‘soft law’ instrument nevertheless constitutes a rule-exception-ratio, since the guidance has to be “generally followed by the regulatory authorities unless there are compelling reasons to the contrary.”⁵⁶

Case C-441/07 P, ECR 2010 I-5949 – Alrosa, at para. 48 argued that “the closure of the infringement proceedings brought against those undertakings allows them to avoid a finding of an infringement of competition law and a possible fine.”

⁵² For a definition of “hard core cartel conduct” see ICN Working Group on Cartels, 2005, *Defining Hard Core Cartel Conduct: Effective Institutions, Effective Penalties*, at p. 10.

⁵³ The Commission will only consider issuing a CD if and when “the case is not one where a fine would be appropriate (this therefore excludes commitment decisions in hardcore cartel cases)”, see Commission, 17/09/2004, MEMO/04/217, *Commitment decisions (Article 9 of Council Regulation 1/2003 providing for a modernised framework for antitrust scrutiny of company behaviour)*. In addition, first approaches of self-restraint can be found at Union level: The DG Competition issued soft law instruments that further clarify and restrict the scope of application of the commitment procedure, e.g. the recent “Competition policy brief” (March 2014, *To commit or not to commit? Deciding between prohibition and commitments*) or the ‘Antitrust Manual of Proceedings’. In the policy brief it was e.g. stressed that IDs primarily are used to punish past behaviour, to set legal precedents, and in cases were the only possible remedy at hand is to cease the anti-competitive behaviour and to comply with the law in the future (p. 2), whereas CDs are used to adjust future behaviour of undertakings and to benefit from procedural efficiency e.g. in fast-moving markets (p. 4). However, the two instruments of the DG Competition are, according to the waiver published in the beginning of the documents (p. 1 of the policy brief and p. 2 of the Antitrust Manual of Proceedings), only non-binding internal guidance to the staff, or aim at providing background to policy discussion without binding the Commission in any way. On the other hand, the notice on best practices of the Commission, 2011, OJ 2011/C 308/06 – *Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU*, has a more binding character but does not contain any further requirements on the scope of application of the commitment procedure.

⁵⁴ Sec. 31A-31E and sched. 6A CA98, see *The Competition Act 1998 and Other Enactments (Amendment)*, Regulations 2004 No. 1261, at paras. 18, 52.

⁵⁵ See for the corresponding document published by the competition authority: OFT, 2004, *Enforcement Guidance*. Another example for a MS that published a guideline including requirements for the scope of application of the commitment procedure is France: *Autorité de la concurrence*, 2009, *Notice on Competition Commitments*.

⁵⁶ CAT, 29 November 2004, Case 1026/2/3/04 – *Wanadoo UK PLC v. Office of Communications*, at p. 35. Even though the CAT does not explicitly say so, it appears to assume that this legal obligation to generally

While not all of the requirements of the OFT's Enforcement Guidance refer to the scope of application of CDs,⁵⁷ three major additional limitations can be found compared to German procedure: (a.) the competition concerns have to be 'readily identifiable', (b.) not only 'hardcore cartels' but also 'cases involving a serious abuse of a dominant position' are exempted, and (c.) the aim of deterrence must not be undermined.

a) '*Readily Identifiable*' Competition Concerns

With a view to the first requirement that the competition concerns have to be 'readily identifiable' any further explanation is missing. In practice, the OFT and the Regulators simply refer to other chapters of the decision or provide a very short summary of the complaints identified elsewhere, and state that based on these findings the competition concerns are 'readily identifiable'.⁵⁸ Hence, two potential interpretations or effects of the requirement come to mind: first, it narrows the scope of application of commitment decisions to those cases in which the competition concerns are straightforward, and excludes e.g. cases where novel legal issues arise or cases of a high level of uncertainty. Second, it establishes the obligation to engage in a profound analysis of the competition parameters and the possible infringements before considering the acceptance of commitments. Thus, the negotiation of commitments based on an unclear factual or legal basis is impermissible.

follow the guidance arises out of external factors, which are not further specified. Regarding not legally binding instruments, such as notices and guidelines, issued by the EU Commission ('soft law') it has been observed that the Union courts impute legal effects to these instruments only by enforcing superior principles of law (legal certainty, protection of legitimate expectations, equal treatment; i.e. 'hard law' principles). In this way these legal devices have binding effect on the issuing authority insofar as they produce legitimate expectations for individuals and impose limitations on the authorities' discretion, unless deviation from the guidelines can be justified with a view to the underlying superior legal principles. See on this *Oana Andreea Ștefan*, *European Competition Soft Law in European Courts: A Matter of Hard Principles?*, *European Law Journal*, 14 vol., 6 iss., 2008, p. 766, 67, 69. Applying this to the standard established by the CAT would suggest that "compelling reasons to the contrary" are in fact only superior principles of law as well.

⁵⁷ E.g. The two positive requirements, demanding that the competition concerns have to be fully addressed and that it must be possible to implement the commitments effectively and quickly (see Enforcement Guidance, at paras. 4.3, A. 14), seem to be less an issue of the scope of application than of the content of the commitments. The same is true for the negative requirement, according to which commitments must not be accepted in circumstances where compliance with and the effectiveness of any binding commitments would be difficult to discern (Enforcement Guidance, at paras. 4.5, A. 16), which is rather linked to the question of the implementation of commitments.

⁵⁸ For references to other chapters of the decision see OFT, 24 May 2005, Commitment Decision, No. CA98/03/2005 – TV Eye Limited, at para. 44; OFT, 1 March 2006, CA98/02/2006, CE/2479/03 – London-wide newspaper distribution, at para. 34; Ofgem, October 2005, Commitment Decision – SP Manweb, at para. 7.2, fn. 16. For short summaries of the competition concerns see OFT, December 2011, Commitment Decision, OFT1395, CE/9388/10 – Private Motor Insurance at para. 5.6; Ofgem, 24 May 2012, Commitment Decision, 76/12 – North West Ltd (connection charges), at para. 4.6.

b) *'Serious Abuse of a Dominant Position'*

Besides the restriction of the scope of application of CDs in Art. 101 TFEU-cases,⁵⁹ the OFT's Enforcement Guidance also restricts the use of CDs in Art. 102 TFEU-cases "involving serious abuses of a dominant position". In these cases commitments will be accepted only "in very exceptional circumstances".⁶⁰ It has to be assessed case-by-case whether commitments are appropriate taking the following factors into account:⁶¹ The nature of the product (including goods, services, and property rights), the structure of the market, the market share(s) of the undertakings(s) involved, entry conditions, the effect on competitors and third parties and the damage caused (directly or indirectly) to consumers. Predatory prices will generally be regarded as a "serious abuse".

c) *Deterrence*

The OFT's Enforcement Guidance establishes that commitments will not be considered in cases where not to complete the investigations and issue an infringement decision would undermine deterrence.⁶² No comparable requirement exists in Germany and the aim of deterrence is generally not an issue discussed in the context of CDs adopted by the German NCA.

Again, no clear parameters exist to assess in how far deterrence is sufficiently ensured. Looking at the practice of the NCAs and the regulators, so far no cases have been published in which this requirement was *not* met. At the same time, the argumentation patterns of the authorities for how the aim of deterrence is taken into account when opting for the commitment procedure appear very general, or even evasive.⁶³ It is difficult to infer clear

⁵⁹ The five forms of secret cartels mentioned in the Enforcement Guidance (price-fixing, bid-rigging (collusive tendering), establishing output restrictions or quotas, sharing markets, dividing markets), correspond with the so-called 'hardcore cartel conduct'.

⁶⁰ OFT, 2004, Enforcement Guidance, at paras. 4.4, A. 15. With regard to 'hardcore cartel conduct' the situation at the EU level seems to be even stricter than in the UK, as the Commission did not only establish a rule-exception-ratio but excluded 'hardcore cartel cases' per se from commitment decisions.

⁶¹ See *ibid.* at p. 12 fn. 16, p. 34 fn. 6.

⁶² *Ibid.* at paras. 4.5, A. 16.

⁶³ In the context of *general deterrence* it is frequently emphasised that the acceptance of commitments does not justify any expectations to that effect that commitments in similar cases will be accepted as well, or that no further enforcement action will be taken in the specific sector, see e.g. OFT, 24 May 2005, Commitment Decision, No. CA98/03/2005 – TV Eye Limited, at para. 51; OFT, 1 March 2006, CA98/02/2006, CE/2479/03 – London-wide newspaper distribution, at para. 40; Ofgem, 24 May 2012, Commitment Decision, 76/12 – North West Ltd (connection charges), at para. 4.11. It has also been argued that CDs can "assist in promoting compliance with competition law by indicating the sorts of considerations" that undertakings engaged in similar conduct have to take into account when assessing whether such conduct infringes competition law (OFT, December 2011, Commitment Decision, OFT1395, CE/9388/10 – Private

parameters used to assess in how far deterrence is sufficiently ensured in a particular case. Nevertheless, compared to the way the aim of deterrence is dealt with in Germany, it must be said that the requirement in the UK leads at least to a more transparent approach.⁶⁴

The CAT also emphasised the requirement of the guideline according to which it is inappropriate to discuss commitments at all in cases of a serious infringements or where deterrence would be undermined.⁶⁵ While the tribunal recognized that it is desirable to have a “mechanism through which settlements can be arrived at in appropriate cases”, it underlined the benefits of infringement proceedings.⁶⁶ According to the CAT, the success of the CA98 depends to a large extent on its deterrent effect and the public censure, which is why there is a public interest in infringement proceedings and, if necessary, the imposition of a penalty. Further, the CAT underlined that it is important to “enhance the visibility” of the CA98 and to deepen the knowledge and understanding of the business community of what is prohibited or not prohibited.⁶⁷ The CAT stressed the importance of the administrative decision to discuss commitments at all, as such a step implies, or could be seen as to imply, “that the case may not be so serious as to warrant a decision of infringement, or that it may be appropriate to resolve the matter without a decision, or that the interests of deterrence, transparency, third parties or consumers may not reasonably require a decision to be taken”.⁶⁸ Therefore, the tribunal held that the more important the issues that arise and the more important the sector of

Motor Insurance, at para. 5.9. See also Ofgem, October 2005, Commitment Decision – SP Manweb, at para. 7.4). The latter appears to be, however, a rather odd line of reasoning, since CDs do not state whether or not there was in fact a breach of competition law. Another line of reasoning has been that the deterrent effect of CDs must be assessed by looking at the enforcement measures of the authorities in a specific sector at large, and evaluate how the commitment decisions accord with these other measures (see e.g. Ofgem, 24 May 2012, Commitment Decision, 76/12 – North West Ltd (connection charges), at para. 4.11; Ofgem, October 2005, Commitment Decision – SP Manweb, at para. 7.3). In terms of *specific deterrence* the OFT has argued that it is not precluded from investigating into the concerned practice in future in certain cases, where the requirements for the reopening of the proceedings are met (OFT, December 2011, Commitment Decision, OFT1395, CE/9388/10 – Private Motor Insurance, at para. 5.8).

⁶⁴ At Union level, only non binding soft law instruments deal with the issue of deterrence: See the DG Competition, 2012, Antitrust Manual of Proceedings, according to which the “advantages and disadvantages of a commitment decision have to be weighed carefully in each individual case” (mod. 16 para. 5) when considering if commitment decisions are appropriate, and which mentions that CDs may have a “more limited deterrent effect”. See also the DG Competition, March 2014, To commit or not to commit? Deciding between prohibition and commitments, at pp. 2, 4.

⁶⁵ CAT, 29 November 2004, Case 1026/2/3/04 – Wanadoo UK PLC v. Office of Communications, at para. 129.

⁶⁶ *Ibid.*, at para. 124.

⁶⁷ *Ibid.*, at para. 124.

⁶⁸ *Ibid.*, at para. 128.

economy, the more desirable is an infringement proceeding. The authorities have to balance these considerations taking into account the available resources.⁶⁹

3. Explaining the Differences – The Ratio of the OFT’s Enforcement Guidance

The obligation to publish guidance on the scope of application of the commitment procedure is, according to the UK-government, supposed to address the tension between the aim of “administrative efficiency” and the aim of “maintaining the deterrent effect of competition legislation”.⁷⁰ It is worth noting that the government emphasised this potential conflict at an early stage during the process of drafting the regulation on CDs, and even provided for a legal instrument (in form of the OFT’s obligation to publish guidance) to address this conflict, despite the fact that the expected impact of the new instrument on competition law enforcement in the UK was very low.⁷¹ This corresponds with the (false) initial expectation at Union level that CDs would be used only exceptionally.⁷² At the same time, this illustrates the importance attached to the aim of deterrence of competition law in the UK.⁷³

There is no further explanation given by the UK-government for why and in what form there is a tension between ‘administrative efficiency’ and the aim of ‘maintaining the deterrent effect of competition legislation’. In fact, one might wonder whether ‘administrative efficiency’ really countervails ‘deterrence’ or, on the contrary, rather contributes to it: If

⁶⁹ Ibid., at para. 126. But also in cases in which smaller companies are suspected of having infringed competition law, according to the CAT, an infringement decision might be desirable. Another aspect that, according to the CAT, should be taken into account when deciding whether or not to make commitments binding, are the developments under Regulation 1/2003, as the interest of complainants under Article 27 (1) of Regulation 1/2003 and Recital 8 to Regulation 773/2004 and the interests of other third parties including consumers (see para. 125).

⁷⁰ Department of Trade and Industry, 2003, *Modernisation - a consultation on the Government’s proposals for giving effect to Regulation 1/2003 EC and for re-alignment of the Competition Act 1998*, at pp. 37, 38: “We need to decide when commitments are an appropriate solution to a case. Should these be accepted in the same circumstances as the Commission’s system i.e. in cases where no fine would be envisaged? Should they be adopted in circumstances where the OFT proposes to find an infringement but accepts assurances in the interests of administrative efficiency? The Government believes that, in the interest of maintaining an effective competition regime, there is a balance to be struck between administrative efficiency and maintaining the deterrent effect of our competition legislation. The Government therefore believes there should be clear parameters governing when commitments may be accepted.”

⁷¹ For a corresponding assessment of the OFT see e.g. Department of Trade and Industry, 2003, *Regulatory Impact Assessment Giving Effect to Council Regulation 1/2003*, recital 2.16: “However, binding commitments will only be accepted in certain types of cases and the OFT expects only a small minority of investigations to be terminated by acceptance of binding commitments. This means that the savings to business and to the OFT associated with this area of the policy are likely to be minimal and the impact therefore negligible. It is not therefore discussed further.”

⁷² *John Temple Lang, Commitment Decisions And Settlements*, p. 270.

⁷³ Also, the OFT recently commissioned a study on deterrence: OFT, 2011, *The impact of competition interventions on compliance and deterrence*.

deterrence increases with the increase in the difference between the expected rewards of anticompetitive behaviour on the one hand, and the expected costs divided by the probability the illegal activity will be detected and sanctioned on the other hand,⁷⁴ and if ‘administrative efficiency’ increases the probability that the illegal activity will be detected and sanctioned, then ‘administrative efficiency’ increases ‘deterrence’. Accordingly, in a more recent comment, the UK-government emphasized the need to run more cases in order to increase deterrence.⁷⁵ Hence, there must be another reason for this perceived conflict of aims. One potential explanation might be that in the context of CDs ‘administrative efficiency’ is defined as ‘cost reduction’ rather than ‘contribution to the detection and sanctioning of cartels’. One could take the view that while the faster and more flexible commitment procedure relieves the workload of competition authorities, it does not contribute to deterrence as it lacks any punitive character. As undertakings voluntarily offer commitments, and as no breach of competition law is found in the commitment procedure, arguably a CDs is not a ‘sanction’ in the narrower sense. At the same time, without the finding of an infringement, arguably one cannot talk about the detection of illegal conduct. On the other hand, it is questionable in how far undertakings act ‘voluntarily’ when confronted with a vague theory of harm and the threat of a high fine (infra C.III). At the same time, commitments may well exceed what could be imposed unilaterally on the undertaking via an ID, and may therefore be a much higher burden for the undertaking involved (supra B). Hence, it does not seem unlikely that the commitment procedure contributes to the deterrent effect of competition law enforcement.

Nevertheless, since the inquiries into the facts by the competition authority, as well as the judicial review are restricted in the commitment procedure, the decisions are of limited value when it comes to the guiding character of the law. Hence, as the CAT pointed out as well (supra C.II.2.c), an overuse of the instrument of CDs might endanger the function of

⁷⁴ *John M. Connor and Robert H. Lande, Cartels as Rational Business Strategy: Crime Pays, Cardozo Law Review*, 34 vol., 2012, p. 429.

⁷⁵ Department for Business, Innovation and Skills, 2012, *Growth, Competition and the Competition Regime, Government Response to Consultation*, at para. 6.17: “The Government remains concerned that too few cases are taken forward. Notwithstanding the importance of prioritisation and a focus on impact when selecting cases to take forward, a regime in which the cost and burden of establishing cases is such that relatively few decisions are made will lead to less deterrence and a diluted economic impact than one in which more cases could be run.”

competition law as norms guiding the behaviour of undertakings in the market, and deterring anticompetitive conduct.⁷⁶

4. Discussion

In the light of limited *ex-post* judicial review of CDs and the resulting threat of negative externalities, the decrease in legal certainty, and the reduction of the deterrent effect of competition law, the UK's approach to further limit the scope of application of the commitment procedure *ex-ante* seems to be worthwhile. At the same time, the stricter approach corresponds more closely to the concept devised above, according to which CDs should balance the aim of procedural economy and other aims such as the accuracy of the standard of intervention of competition law. The efficiency gains of the commitment procedure might not be sufficient to outweigh the negative effects of the instrument in cases where the level of uncertainty does not allow for devising quick and accurate theories of harm (and corresponding remedies) without further in-depth investigations; where the seriousness of the infringement calls for a comprehensive investigation; or where the aim of deterrence cannot be met by consensual proceedings.

III. Negotiation of Commitments

The procedural frameworks at national level concerning the negotiation of commitments are characterised by a significant degree of diversity as well: While the German commitment procedure seems to lack strict requirements (1.), in the UK the CAT established high standards for the initiation of the negotiations and the information base of the undertakings concerned (2.). With a view to the reduced standard of judicial control and the concept of CDs as an instrument that balances the aim of procedural economy with the aim to apply optimal remedies, strict procedural requirements governing the negotiation process seem to be preferable (3.).

⁷⁶ *Philippe Choné, Saïd Suoam, and Arnold Vialfont*, On the optimal use of commitment decisions under European competition law, *International Review of Law and Economics*, 37 vol., 2014, argue that in Art. 102 TFEU-cases the commitment procedure weakens or potentially even eliminates deterrence (p. 170). However, the paper is based on some questionable assumptions (e.g. that the procedure starts when the Commission informs the undertakings concerned in form of a written preliminary assessment (p. 170, on the contrary see *infra* C.III), or that the competition authority is able to credibly announce its enforcement policy *ex ante* (p. 177)), and doesn't take into account important features of the commitment procedure practice, e.g. that commitments may go beyond what could realistically be imposed unilaterally on the undertakings (p. 177).

1. The Rather Informal Design of Commitment Negotiations in Germany

In Germany, before issuing a CD the BK has to open proceedings and inform the undertakings concerned about its preliminary competition concerns (Sec. 32b (1) ARC). However, there are no explicit rules governing the initiation and the exact conditions of the negotiations of commitments.

In practice, some cases suggest that the German NCA takes a very proactive role in devising remedies and does not leave the design of the commitments to the undertakings involved. For example, in one case – which will be discussed in more detail below (infra D.I.2.a)bb)) – before issuing CDs, a document was published by the BK, which not only assessed the legal and factual questions surrounding the contracts in question, but also suggested different models of how to design the contracts to bring them in line with the competition rules.⁷⁷ Furthermore, after negotiating with the undertakings, it seems to have been the authority itself rather than the undertakings that suggested and formulated the commitments. The BK sent a letter to the undertakings concerned in which it set out the commitments that were necessary in the eyes of the authority in order to end the proceedings.⁷⁸ Arguably, a stricter design of the negotiation process might have considerably changed the much-criticised outcome of the procedure.

Furthermore, due to a lack of a written form requirement, it appears that in practice (in some cases) CDs are based only on oral negotiations.⁷⁹ However, the right of the undertakings concerned to access the case files of the BK,⁸⁰ might be an important substitute for a (prior) written preliminary assessment.

2. The More Formalised Approach of the CAT

In the UK, the CAT established (in form of an obiter dictum) stricter requirements.⁸¹ The tribunal held that the prospective defendant, rather than the regulatory authority, should take initiative in exploring the possibility of offering binding commitments, and that the

⁷⁷ Bundeskartellamt, 25 January 2005, B 8-113/03, Kartellrechtliche Beurteilungsgrundsätze zu langfristigen Gasverträgen.

⁷⁸ See e.g. Bundeskartellamt, 13 September 2005, press release – Öffnung der langfristigen Gasverträge wird kommen.

⁷⁹ Bundeskartellamt, 2. December 2008, Commitment Decision B10-36/08 – Süwag Energie AG (Gas Prices), at para. 4.

⁸⁰ This right follows from general administrative law (Sec. 29 VwVfG).

⁸¹ CAT, 29 November 2004, Case 1026/2/3/04 – Wanadoo UK PLC v. Office of Communications, at 122 et seq.

discussions should be based on a written summary of the authority's competition concerns, and the main facts on which the concerns are based.⁸²

The case dealt with the pricing policies employed by the BT Group plc (BT) when providing residential broadband services, and an alleged infringement of Sec. 18 CA98 and/or Art. 102 TFEU in form of a margin squeeze.⁸³ Ofcom entered into (unsuccessful) oral negotiations with BT to explore the possibility of a CD, and therefore revealed to BT that it would issue a statement of objections unless appropriate commitments were offered. On the first issue, the initiation of the discussion of commitments, the CAT opposed the Ofcom's view that the draft guideline leaves it entirely open whether a regulator might ask an undertaking to offer commitments or not.⁸⁴ At the same time, the tribunal held that it is at the discretion of the authority whether or not to consider accepting commitments that may be offered.⁸⁵ Once the authority decided that it is appropriate to discuss commitments, according to the CAT, it can be inferred from the draft guideline (para. 4.18) that the discussions should be based on a written summary of the authority's competition concerns and the main facts on which the concerns are based. Supposedly, this is not only necessary with a view to the rights of the

⁸² The Tribunal took account of the fact that the OFT, April 2004, 407a, Draft Guideline on Enforcement was a working paper, and that the final version was not published yet. However, the CAT held that the draft had a "persuasive force pending the issuance of the final version" and should be considered as the published guidance, especially as the OFT could otherwise be "regarded as in breach of its statutory duty under section 31D of the [Competition] Act [1998]" (para. 116). At the same time, the CAT refused to express any view on the particular facts of the current case (para. 133).

⁸³ The Director General of Telecommunications ("Director", predecessor of Ofcom) initially conducted an investigation into BT's pricing practices in the period to June 2002 and found that BT had not abused a dominant position during that period. That decision was subject to an appeal to the CAT by the complainant *Freeserve.com PLC* ("Freeserve", now *Wanadoo UK PLC* ("Wanadoo")). The appeal was upheld and the Director undertook to reconsider the issue. He took a further decision in relation to the conduct in the period up to June 2002 that BT was not operating a margin squeeze. An appeal by Freeserve against this decision has been adjourned pending Ofcom's decision in the current investigation. At the same time, as reconsidering this original decision into BT's pricing in the period up to June 2002, the Director also decided to investigate BT's residential pricing for a subsequent period. Ofcom assumed the functions of the Director in respect of the investigation following its creation in 2003. The investigation covered BT's conduct in the period from 1 June 2002 to 31 December 2004. Ofcom has concluded that the evidence is insufficient to support a finding that BT abused a dominant position during the period investigated (Ofcom, 2 November 2010, Decision CW/00613/04/03 – Investigation into BT's residential broadband pricing). On the 16 December 2010 the Tribunal made an order granting permission to the appellant to withdraw the appeal (CAT, 16 December 2010, Case 1026/2/3/04 – Wanadoo UK PLC v. Office of Communications. For a summary of the facts see CAT, 29 November 2004, Case 1026/2/3/04 – Wanadoo UK PLC v. Office of Communications, at para. 3-74; Ofcom, 2 November 2010, Decision CW/00613/04/03, at paras. 1.1-1.27).

⁸⁴ CAT, 29 November 2004, Case 1026/2/3/04 – Wanadoo UK PLC v. Office of Communications, at para 127 ("[E]specially at paragraphs 4.16-4.19 [of the draft guideline], it is the prospective defendant undertaking which will propose the offer of binding commitments to the regulatory authority."). See also *ibid.*, at paras. 76, 77. The Ofcom stressed the importance of entering into discussion with the party that might offer commitments, as according to the draft guideline the commitments have to be well defined. However, it is not clear why the regulatory authority should be the one to initiate these discussions.

⁸⁵ *Ibid.*, at para 123. See for more details on the criteria to exercise this discretion *supra* C.II.2.c).

prospective defendant, to ensure that all relevant considerations are taken into account, but also efficient in the light of para. 2 of sched. 6a CA98, according to which the authorities have to give public notice at a latter stage anyway.⁸⁶

An issue that has not been discussed by the CAT and that remains unclear also under the OFT's Enforcement Guidance is the question in how far access to case files has to be warranted to the undertakings concerned.⁸⁷

3. Discussion

With a view to the output of the procedure and the functioning of competition law, it might be argued that the possibility to negotiate with the undertakings concerned at an early stage and in an informal manner is an important tool – especially in cases of high uncertainty and fast developing markets – to quickly clarify the facts of the case, and to find efficient solutions for the competition concerns at hand. It has even been argued that authorities should always think about (whether there are) possible remedies, before deciding on enforcing and applying competition law. In this logic remedies influence liability standards, and in cases where no remedy comes to mind one should abstain from enforcing the law.⁸⁸ Therefore, arguably, it might be inefficient to first devise a comprehensive (written) summary of the competition concerns before discussing potential solutions; it would thus follow that a less formal framework appears to be preferable.

However, while it seems widely accepted that enforcers should think about remedies at an early stage of the procedure, the idea that the finding of an infringement and the design of the remedy coincide, or that the latter should be considered before the prior, is subject to controversy.⁸⁹ Moreover, while some might argue that authorities should not enforce the law

⁸⁶ *Ibid.*, at para. 130.

⁸⁷ This has been clarified only for interim measures and directions, see OFT, 2004, Enforcement Guidance, at paras. 2.4, 3.13, 3.14. The guideline of the French competition authority is much more explicit, see Autorité de la concurrence, 2009, Notice on Competition Commitments, at paras. 27-30, pointing out especially the right of access of the applicant and the undertaking concerned to the preliminary assessment and third parties comments.

⁸⁸ With a view to US antitrust remedies and using the metaphor of a tiger *Thomas o. Barnett*, Section 2 Remedies: What to Do After Catching the Tiger by the Tail, Presentation at the American Bar Association Conference on Monopolization Remedies Charlottesville, Virginia, 2008, p. 3: “In sum, it is critical to think hard about what you are going to do with the tiger before you grab its tail. If you cannot do something constructive, you should consider not grabbing it in the first place. And in any event, it is not the best time to determine what to do with the tiger while holding on to its tail.”

⁸⁹ *Per Hellstrom, Frank Maier-Rigaud, and Friedrich Wenzel Bulst*, Remedies in European Antitrust Law, Antitrust Law Journal, 76 vol., 2009-2010, p. 49: “One must not succumb to an ‘if you can't fix it easily, it ain't broken’ fallacy. Not trying to fix something is only an option when it is not broken.”

despite the finding of an infringement, or that finding a remedy might help to identify the infringement,⁹⁰ no one argues that one should over-enforce, which is apply remedies absent of an infringement of competition law or that exceed the competition concerns at hand. Yet, when negotiating commitments informally, without any procedural restrictions, chances are that neither the competition authority nor the undertakings involved are interested in clarifying the facts or solving the competition concerns. While the authorities might pursue policy aims that exceed the protection of a system of undistorted competition (e.g. market liberalisation), the undertakings involved focus on avoiding costly and lengthy proceedings, the finding of an infringement of competition law, and the corresponding bad reputation and danger of private damages claims. Furthermore, there is a danger that competition authorities approach the undertakings concerned and negotiate – based on a vague theory of harm and without any detailed information on the factual background – far-reaching commitments that potentially aim at policy goals very different from the protection of undistorted competition.⁹¹ In this scenario, the preliminary assessment of the case no longer serves to identify the relevant competition issues of the case but to justify rather discretionary remedies.⁹²

Hence, procedural safeguards are needed to align the aims of the competition authorities and the undertakings involved with the aims of competition law, i.e. the protection of the competitive process.⁹³ Following the concept that CDs should balance the objective of procedural economy and the objective of applying accurate standards of competition law enforcement, it can be argued that – different from IUs – there should be strict rules governing the negotiation process.

⁹⁰ *Thomas o. Barnett*, (2008), Section 2 Remedies, p. 2.

⁹¹ *Heike Schweitzer*, *Verpflichtungszusagen im Gemeinschaftsrecht*, p. 647.

⁹² These concerns have been expressed with a view to the practice of the Commission, see only *Christopher J. Cook*, *Commitment Decisions: The Law and Practice under Article 9*, *World Competition*, 29 vol., 2 iss., 2006, p. 215, 16. For critical comments towards this practice see e.g. *Heike Schweitzer*, *Commitment decisions under Art. 9 of Regulation 1/2003*, p. 570; *Yves Bottemann and Agapi Patsa*, *Towards a more sustainable use of commitment decisions in Article 102 TFEU cases*, *Journal of Antitrust Enforcement*, 1 vol., 2 iss., 2013, p. 370.

⁹³ For a similar conclusion see *Damien Gerard*, 'Negotiated remedies in the modernization era: the limits of effectiveness', in Philip Lowe and Mel Marquis (eds.), *European Competition Law Annual 2013: Effective and Legitimate Enforcement* (Oxford 2014 (forthcoming)), p. 14. It is often criticised that the 'process of competition' is an ambiguous term. By 'process of competition' I refer to competition as a "discovery process", that is a "process which enables individuals to use more knowledge than they have and to find out whether their plans are successful", see *Ernst-Joachim Mestmäcker*, *A Legal Theory Without Law*, Posner v. Hayek on Economic Analysis of Law, available at SSRN: <http://ssrn.com/abstract=1168422> (accessed 26 July 2014), 2008, p. 29.

A similar argument can be made with a view to the aim of substituting full *ex-post* judicial review by applying *ex-ante* procedural safeguards: to justify the reduced requirements regarding judicial control (and especially of the principle of proportionality) but also the rights of defence, it is frequently argued that the undertakings ‘voluntarily’ offer the commitments that are made binding on them by the competition authority.⁹⁴ In fact, it seems acceptable that the parties that offer commitments have to bear the consequences – provided that they take an informed and free decision. This, however, presupposes that the undertakings are well informed about the competition concerns they are supposed to address. Only when the undertakings know precisely what the accusations are can they make an informed and reasonable decision as to the commitments they are willing to offer. Hence, a too limited approach with respect to the information that needs to be provided to the undertakings involved renders void the justification of the restriction of procedural rights as well as of the judicial control of CDs.

Consequently, as a general rule, it should be prevented that competition authorities initiate – or even force upon undertakings – the discussion of commitments, and negotiate remedies without the opening of a (formal) procedure, without issuing a (written) preliminary assessment of the case, and without warranting sufficient access to the case files.⁹⁵

IV. Preliminary Assessment

Apart from the concerns discussed above, surrounding the negotiations of commitments and the problem that the preliminary assessment might be tailored in a way to justify (inaccurate) commitments that the authority and the undertakings have informally agreed on, the question arises of how detailed this document must actually be. While in Germany no clear standard exists, the OFT established at least an abstract parameter (1.), which seems to correspond more closely to the concept devised above (2.).

⁹⁴ See e.g. ECJ, 29 June 2010, Case C-441/07 P, ECR 2010 I-5949 – Alrosa, at para. 48: „Undertakings which offer commitments on the basis of Article 9 of Regulation No 1/2003 consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the regulation after a thorough examination.“

⁹⁵ Accordingly, practitioners demand that in practice the offer of commitments should be based on a detailed preliminary assessment of the case and not only on a brief oral presentation, Tobias Klose, 2014, Die Zusagenpraxis der Kommission nach Art. 9 VO Nr. 1/2003, Studienvereinigung Kartellrecht, Internationales Forum EU-Kartellrecht, Brüssel, at slide 10.

1. The Content of Preliminary Assessments – Different Standards in Germany and the UK

In Germany no further clarifying requirements as to the exact content of the preliminary assessment can be found. In fact, the exact level of scrutiny and the required depth of the investigation of the NCA are subject to controversy. While some argue that the facts of the case have to be completely identified and only the legal assessment may be subject to a limited assessment,⁹⁶ others contend that both the facts and the legal assessment are subject to a limited inquiry only.⁹⁷

In contrast, by establishing that the competition concerns must be “readily identifiable” (see already supra II.2.a) before adopting commitments may be considered,⁹⁸ the OFT seems to have set stricter requirements: The preliminary assessment has to allow for a clear and unambiguous evaluation of the competition concerns, which suggests that the factual and legal assessment have to meet a certain minimum degree of scrutiny.

2. Discussion

With a view to the required level of investigation and reasoning in the preliminary assessment (again) a conflict of aims arises. The aim of a time- and cost-efficient procedure indicates that the corresponding efforts should be minimized. On the contrary, the objective to protect procedural rights of the undertakings concerned and of third parties, as well as the public interest in a transparent, rule-based and judicable competition law enforcement indicate that the level of scrutiny applied should be maximised. The preliminary assessment is supposed to be the basis for the undertakings concerned to design the commitments they offer. Furthermore, as the concerns stated in the preliminary assessment are the basis for assessing the proportionality of the commitments, judicial control is equally dependent on a thoroughly drafted document. Hence, procedural safeguards should ensure a minimum level of diligence of competition authorities when issuing a preliminary assessment of the case.

On a more abstract level, this conflict relates to the legal nature of CDs. The more the instrument is perceived as a tool of public law enforcement rather than a settling mechanism, the more due process rules and administrative transparency have to be emphasised, and the

⁹⁶ *Albrecht Bach*, '§ 32 b GWB', in Ulrich Immenga and Ernst-Joachim Mestmäcker (eds.), *Wettbewerbsrecht, GWB, Kommentar zum Deutschen Kartellrecht* (4 edn., 2 vol. 2007), at paras. 10, 11.

⁹⁷ *Eckard Reh binder*, '§ 32 b GWB', in Ulrich Loewenheim, Karl M. Meessen, and Alexander Riesen kampff (eds.), *Kartellrecht, Kommentar* (2 edn., München 2009), at para. 6.

⁹⁸ See the OFT, 2004, *Enforcement Guidance*, at paras. 4.3, A. 14.

more important it will be to obligate the competition authorities to carefully define their theories of harm before entering into negotiations of commitments.⁹⁹ Following the concept that (in terms of strictness) the procedural requirements of the commitment procedure should be between the two extremes of IUs and the IDs, it can be argued that at least some minimum standards should apply to the drafting of the preliminary assessment. These might enhance legal certainty and contribute to safeguard the rule of law.

V. Content of Commitments

While there are no further requirements concerning the content of IUs, the remedies available in IDs are limited by the application of the principle of proportionality and the prioritisation of behavioural over structural remedies.¹⁰⁰ Conceptually, the requirements concerning the content of CDs should be somewhere in between, balancing the aim of procedural economy and the application of an accurate standard of intervention of competition law (supra C.I.2). The question arises whether the procedural frameworks at national level strike the right balance in this regard.

1. Prioritising Procedural Economy?

In Germany, no further procedural parameters concerning the content of commitments that limit potential under- or over-enforcement of competition law exist. The question whether it is sufficient for commitments to change the facts of the case only to the extent that it falls outside the enforcement priorities of the BK¹⁰¹ (potential Type-II errors (under-enforcement)), or on the contrary whether the competition concerns have to be fully removed, is as much subject to controversy,¹⁰² as the question in how far behavioural remedies should be prioritised over structural remedies (potential Type-I errors (over-enforcement)).¹⁰³

In the UK no particular safeguards concerning the content of commitments dealing with potential over-enforcement via CDs can be found either. The OFT's guideline mentions that

⁹⁹ *Heike Schweitzer*, Commitment decisions under Art. 9 of Regulation 1/2003, p. 570.

¹⁰⁰ See e.g. Art. 7 (1) Regulation 1/2003, which expressly says that “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”.

¹⁰¹ This question remains open at Union level also after the *Alrosa*-judgement of the ECJ.

¹⁰² *Joachim Bornkamm*, § 32b GWB, at para. 7 seems to take the view that it is enough to address the enforcement priorities of the NCA, while *Albrecht Bach*, § 32 b GWB, at para. 14 and *Eckard Rehbinder*, § 32 b GWB, at para. 6 take the view that this does not suffice.

¹⁰³ According to *Albrecht Bach*, § 32 b GWB, at para. 15 behavioural should be prioritised, whereas e.g. *Eckard Rehbinder*, § 32 b GWB, at para. 6 argues that structural measures are more acceptable in CDs compared to IDs.

commitments may be structural or behavioural but falls short of establishing any priority (para. 4.6.). One of the few explicit restrictions established by the OFT's Enforcement Guidance is that commitments are generally adopted for a specified period only (para. 4.8). Furthermore, there is a clear rule to be found in the guidance, according to which it is only likely for the authority to consider the acceptance of commitments where the competition concerns are "fully" addressed.¹⁰⁴ This requirement excludes the possibility to make commitments binding that are limited to address the enforcement priorities of the authority.

2. Discussion

As mentioned above, (potentially) the principle of proportionality applies to CDs with a reduced standard only (supra B). Additionally, taking into account the procedural requirements concerning the content of commitments in Germany and (to a certain extent) as well in the UK, the aim of procedural economy seems to outweigh the concerns of applying inaccurate standards of competition law. Further restrictions, such as the prioritisation of behavioural over structural remedies, are missing. Arguably, this design conflicts with the concept that the commitment procedure should strive to balance procedural economy with the aim of adopting optimal remedies, and the objective to substitute for comprehensive judicial control.

VI. Third Parties

The reduced standard of the proportionality test applied by the ECJ potentially leads to negative externalities of CDs (supra B). Therefore, the court emphasised the need to take into account the "interests of third parties" when adopting CDs. However, due to the fact that CDs are based on a preliminary assessment of the case only, and are therefore often characterised by a high level of uncertainty, it is difficult to assess and account for externalities of commitments offered by undertakings. Hence, the question arises whether the commitment procedure provides for sufficient safeguards.

In the UK – similar to the situation at Union level (Art. 27 (4) Regulation 1/2003) – the commitment procedure involves a so-called 'market test' (1.), which gives third parties the opportunity to comment on the commitments offered. On the contrary, in Germany the commitment procedure is less open for third party comments (2.). These procedural differences reflect the conflict between the potential control functions of third parties on the

¹⁰⁴ OFT, 2004, Enforcement Guidance, at paras. 4.3, A. 14.

one hand, and the danger of abusive comments on the other hand, and might be explained by different legal cultures and perceptions of the nature of competition law (3.).

1. The Requirement of a ‘Market Test’ in the UK

In the UK (in practice) all ‘interested’ parties have the possibility to comment on the proposed commitments.¹⁰⁵ It is, however, not entirely clear what kind of procedural status participants of the market test obtain. Accordingly, it remains open to what extent third parties have a right to access files or to receive a non-confidential version of the preliminary assessment. As third parties generally seem to be limited to the information supplied to them by the summary of the authorities, the question arises of how detailed this summary has to be.¹⁰⁶ On the other hand, there is a certain risk of abusive comments, as third parties follow commercial interests that are not necessarily in line with the public interest in protecting the competitive process. Therefore, the involvement of third parties has to be controlled and restricted. Hence, there is a balance to be struck.

In this context, the CAT was confronted with the issue of the timing of the involvement of third parties, and the question to what extent the negotiations between the NCA and the undertaking concerned should be confidential:

In *Wanadoo UK PLC v. Office of Communications* the complainant (Wanadoo) argued that it should have been more involved in the process. The regulator (Ofcom) should have provided a summary of the reasons why, according to its provisional view, the undertaking concerned (BT) had infringed competition law and which exceptional circumstances allowed the exploration of commitments.¹⁰⁷ According to Wanadoo, the mere fact that it would have been

¹⁰⁵ It is mandatory for the competition authority to give third parties the opportunity to comment on commitments before making them binding (paras. 2, 3 sched. 6a CA98). According to the OFT’s Enforcement Guidance public consultation is necessary where the OFT proposes to accept commitments; where, following a first consultation period, the OFT intends to accept commitments with any material modification; before accepting variations of commitments; before releasing a person or persons from any binding commitments (paras. 4.21-4.23). The notice of the proposed commitment has to be brought “to the attention of those likely to be affected” by the matter in question (para. 8 schedule 6a CA98). Even though the wording suggests that only a limited group of third parties, who demonstrate that they are affected by the case, will have the opportunity to make representation, in practice the authorities seems to take a more liberal approach. They generally invite all interested parties to comment on the proposed commitments. See e.g. Ofgem, 23 November 2011, 158/11 – Notice of intention to accept binding commitments from Electricity North West Limited, at p. 1: “This document sets out why we are minded to accept the commitments and invites responses from interested third parties on this proposed course of action.”

¹⁰⁶ The OFT, 2004, Enforcement Guidance, at paras. 4.21-4.23 require to give a summary of the key issues, the proposed commitments, and to explain how the commitments meet the OFT’s competition concerns.

¹⁰⁷ CAT, 29 November 2004, Case 1026/2/3/04 – *Wanadoo UK PLC v. Office of Communications*, at paras. 87, 88.

consulted on commitments after the negotiations would not have been a sufficient substitute. Ofcom would have already formed an opinion as to whether the commitments are appropriate, and Wanadoo would therefore have faced an “uphill battle to persuade Ofcom”.¹⁰⁸ Without an early involvement of Wanadoo, the transparency and balance of the proceedings would be reduced, and there would be a danger of an asymmetry of information, which might prevent an operation at arm’s-length.¹⁰⁹

On the contrary, Ofcom took the view that there is no inappropriate inequality, even without an involvement of the complainant at a very early stage, as a complainant will always have the right to make representations if commitments are proposed.¹¹⁰ Ofcom claims that there is no obligation to produce a summary of its competition concerns for the benefit of third parties, as a summary is produced for the party under investigation only – given that (unlike in this case) there is enough time to produce such a *written* summary at all.¹¹¹ According to Ofcom it should also be taken into account that in the case the parties cannot agree on commitments, it might be inappropriate to reveal that they were ever discussed.¹¹² Similarly, BT argued that the asymmetry of information should not be exaggerated. The undertaking contended that there were good reasons for Ofcom not to make a public announcement before the statement of objections (‘rule 14 notice’) has been made available to the addressee, e.g. that the addressee needs the opportunity to prepare a response to the announcement.¹¹³

Finally, the CAT opted for a compromise. It recognised that negotiations may need to be confidential at an initial stage, “if only to permit a defendant undertaking to approach the regulatory authority on a ‘without prejudice’ basis”. At the same time, the tribunal found that there is some asymmetry between the position of the prospective defendant and the complainant. The CAT acknowledged that the complainant is protected insofar as he has the right to respond to the public notice (issued under para. 2 sched. 6A CA98), and because he

¹⁰⁸ Ibid., at para. 89. Wanadoo argued that the draft guideline provides for a four-step-procedure, according to which first the alleged infringer states that it wishes to offer commitments; second the competition authority publishes a summary of the competition concerns and gives third parties an opportunity to comment; third the alleged infringer offers commitments and the authority considers them, taking into account the comments of third parties; and finally, fourth, the authority enters into negotiations with the alleged infringer (paras. 90, 91).

¹⁰⁹ Especially if regulators decisions may be price sensitive they should, according to Wanadoo, be publicly announced as soon as possible. Ibid., at paras. 93-95.

¹¹⁰ Ibid., at para. 79.

¹¹¹ Ibid., at para. 80.

¹¹² Ibid., at para. 81.

¹¹³ Ibid., at paras. 100, 101.

can appeal any decision of the authority before the Tribunal (by way of review under Sec. 47 (1) c and para. 3A sched. 8 CA98).¹¹⁴ Nevertheless, the CAT took the view that the authority should bear in mind the position of the complainant “in the course of any negotiations”.¹¹⁵ The CAT suggested “in particular exceptional circumstances some kind of consultation with a complainant before the stage of the notice under Schedule 6A is reached”, especially when the complainant has detailed knowledge of the market or may be closely affected by the outcome.¹¹⁶

2. The Less Extensive Involvement of Third Parties in German Commitment Procedures

Different from the situation in the UK, there is no legal requirement in Germany establishing a ‘market test’ or obligating the NCA to include third parties in the commitment procedure. Pursuant to Sec. 56 (2) ARC it is at the discretion of the Bundeskartellamt to give specific affected economic stakeholders the possibility to make representation. The provision aims at facilitating the evaluation of the case by the authority and does not aim at guaranteeing a right to be heard of third parties.¹¹⁷ Only parties to the proceeding (‘Beteiligte’), which are (besides the potential addressee of the decision (Sec. 54 (2) no. 2 ARC)) especially parties whose interests are “significantly affected” by the decision, and who make a request to the authority to be admitted to the procedure (Sec. 54 (2) no. 3 ARC),¹¹⁸ must be provided with the opportunity to make comments (Sec. 56 (1) ARC). Only this specification of the constitutional right to be heard (Art. 103 (1) GG) establishes the obligation to provide information on the facts of the case, the evaluation of these facts by the authority, as well as access to case files.¹¹⁹

¹¹⁴ Ibid., at para. 131. Here the CAT explicitly left open the question of the relationship between Sec. 47 (1) c and para. 3A Schedule 8 CA98 but indicated that this will have to be clarified.

¹¹⁵ Ibid., at para. 132.

¹¹⁶ Ibid., at para. 132. The Cat bases this suggestion i.a. on the wording of Art. 27 (1) Regulation 1/2003, according to which the complainant has to be “associated closely with the proceedings”. However, as it is actually Art. 27 (4) Regulation 1/2003, which deals with commitment decisions, the argument appears to be a little misplaced.

¹¹⁷ *Carsten Becker*, ‘§ 56 GWB’, in Ulrich Loewenheim, Karl M. Meessen, and Alexander Riesenkauff (eds.), *Kartellrecht, Kommentar* (2 edn., München 2009), at para. 13. Furthermore, the Bundeskartellamt can, in order to obtain information necessary to carry out its tasks entrusted to it by the ARC, demand certain information from undertakings pursuant to Sec. 59 ARC.

¹¹⁸ Ibid., at para. 1.

¹¹⁹ The status of being party to the proceeding (pursuant to Sec. 54 (2), (3) ARC) is generally also prerequisite for the right to initiate judicial control of the decision (Sec. 63 (2) ARC).

3. Discussion

Since the level of inquiry into the facts of the preliminary assessment is limited in the commitment procedure, and as competition authorities (at least according to the ECJ's *Alrosa* judgement) are not obligated to make a full proportionality assessment of the commitments (supra B), third parties' comments can be seen as an important control mechanism with a view to the wide margin of discretion of NCAs and the increased risk of negative externalities. Again, a significant degree of procedural diversity exists concerning the requirements for the consultation and involvement of third parties. While in the UK a 'market test' is an integral part of the commitment procedure, in Germany the involvement of third parties in the commitment procedure is more restricted. The comparatively less prominent participation of third parties in the German commitment procedure might be explained by the traditionally high importance of the non-political, legal nature of competition law.¹²⁰ While the involvement of third parties might be important to protect procedural rights and reduce the risk of negative externalities of CDs, there is a certain danger that (economic or political) interests of third parties influence competition law enforcement, and even increase the risk of anticompetitive commitments.¹²¹ The interests of third parties do not necessarily represent the public interest in a system of undistorted competition, and the right to comment might even be abused to harm competitors. In consequence, while the 'market test' is an important tool to counter the threat of negative externalities of CDs, extensive safeguards are needed (e.g. with a view to the timing of the consultation) to avoid a 'politicization' of competition law and the influence of individual commercial interests.

VII. Implementation and Enforcement

CDs are – unlike IUs – binding and enforceable decisions.¹²² At the same time, the fact that the companies under investigation participate in the design of the commitments arguably

¹²⁰ See on the understanding of German competition law as a non-political, legal regime e.g. *Heike Schweitzer*, *The European Competition Law Enforcement System and the Evolution of Judicial Review*, p. 110, 18.

¹²¹ Therefore, as "interests" of third parties pursuant to Sec. 54 (2) no. 3 ARC only legal or economical interests (and not e.g. environmental interests) are recognized, see *Hans-Helmut Schneider*, '§ 54 GWB', in Hermann-Josef Bunte (ed.), *Langen/Bunte Kartellrecht, Kommentar* (12 edn., 1 vol., Köln 2014), at para. 27.

¹²² CDs of the Commission can be enforced by the authority itself (by imposition of a fine pursuant to Art. 23 (2) lit. c or periodic penalty payments pursuant to Art. 24 (1) lit. c Regulation 1/2003) or by NCAs and national courts (Art. 4 para. 3 TEU). In the UK CDs are enforceable by the OFT as directions (see *Enforcement Guidance*, at para. 4.28), which is by application to the court for an order requiring compliance with the decision within a specific time (*Enforcement Guidance*, at para. 2.9). In Germany non-compliance with the CDs can be sanctioned as an administrative offence by the imposition of a fine (Sec. 81 (2) no. 2 lit. a, (4) ARC).

increases voluntary compliance and therefore facilitates efficient implementation compared to IDs.¹²³ Nevertheless, there is a danger of a discrepancy between the commitments agreed to on paper and the implementation in practice. More generally, the question arises what role the possibility of an effective implementation plays when deciding whether or not to opt for IUs, the commitment or the infringement procedure. In how far is the implementation and enforceability a criterion for deciding on the enforcement tool?¹²⁴ The procedural frameworks in the MS differ significantly in this regard.

1. Different Frameworks in Germany and the UK

In Germany, no particular requirements with regard to the implementation and enforcement of CDs can be found. Accordingly, in practice most of the decisions do not explicitly deal with the implementation, enforceability, or monitoring of compliance.¹²⁵ On the contrary, the OFT made the possibility to implement commitments efficiently and (if necessary) quickly a mandatory requirement of the commitment procedure. It excluded cases in which compliance with and the effectiveness of the commitments would be difficult to discern.¹²⁶ From the outset the issue of implementation and monitoring of compliance has to be taken into account. In practice, monitoring of compliance is either left to the affected competitors,¹²⁷ or to the undertakings concerned themselves (in form of reporting obligations or the obligation to provide information on compliance on request of the competition authority).¹²⁸ Monitoring trustees are not used in the UK practice.¹²⁹

¹²³ DG Competition, March 2014, To commit or not to commit? Deciding between prohibition and commitments, p. 3.

¹²⁴ This question has to be distinguished from the issue discussed above (supra C.III.3), which is in how far the aspired remedy may influence the competition concerns.

¹²⁵ One of the exceptions is the decision of the Bundeskartellamt, 17 September 2009, Commitment Decision B 2 – 90/01-1 – Marketing of Timber, Thüringen, which obligates the undertaking concerned to report on the implementation of the commitments and provide certain information to the authority (pp. 7, 8).

¹²⁶ OFT, 2004, Enforcement Guidance, at 4.3, 4.5 and A14, A16.

¹²⁷ OFT, 24 May 2005, Commitment Decision, No. CA98/03/2005 – TV Eye Limited, at para. 50; OFT, 1 March 2006, CA98/02/2006, CE/2479/03 – London-wide newspaper distribution, at paras. 104, 105; OFT, 31 January 2014, Commitment Decision, OFT1514dec – Hotel online booking, at para. 6.17; Ofgem, October 2005, Commitment Decision – SP Manweb, at para. 7.6.

¹²⁸ OFT, 1 March 2006, CA98/02/2006, CE/2479/03 – London-wide newspaper distribution, at para. 30; OFT, 31 January 2014, Commitment Decision, OFT1514dec – Hotel online booking, at para. 6.16; Ofgem, October 2005, Commitment Decision – SP Manweb, at para. 7.6.

¹²⁹ On the contrary, it appears that appointing monitoring trustees is becoming common practice of the Commission, see DG Competition, 2012, Antitrust Manual of Proceedings, at paras. 82 et seq.; *Yves Bottemann and Agapi Patsa*, JAE (2013), p. 371, 72.

2. Discussion

Conceptually, the aim of CDs is to balance the loss of procedural safeguards with considerations of procedural economy. Therefore, the OFT's approach to make the adoption of CDs dependent on the feasibility of the commitments seems promising. Nevertheless, when adopting CDs, safeguards are needed to ensure that the commitments agreed to on paper are indeed implemented in practice. At the MS level monitoring is either not dealt with at all (Germany) or left to the undertakings concerned by way of reporting obligations (UK). Hence, there remains room for stricter procedural designs (e.g. the use of monitoring trustees). In order to strengthen the procedural economy of CDs, it has been argued that competition authorities should be empowered to reopen proceeding when, contrary to the initial conviction, commitments cannot be implemented as effectively as planned.¹³⁰ This leads to the topic of the next section, which is the reopening of commitment procedures.

VIII. Reopening of the Procedure

Different from IUs, CDs are binding decisions and the commitment procedure cannot simply be reopened at any time. On the other hand, different from the infringement procedure, the commitment procedure provides for special provisions governing the reopening of the procedure in particular circumstances. The question arises, in how far these provisions are exhaustive, and whether the authorities and the undertakings concerned may consensually alter or substitute the existing commitments outside the scope of these provisions (1.) This question is closely linked to the 'legal nature' of CDs, i.e. the 'ideal conception' of the instrument (2.).

1. Reopening the Procedure Consensually?

In the UK, the OFT's Enforcement Guidance (para. 4.9, A.20) allow for the reopening of the proceedings in similar cases as Art. 9 (2) Regulation 1/2003, namely cases of a material change of facts, the failure to comply with the commitments, or if the undertakings provided incomplete, incorrect, or misleading information. The wording of the Enforcement Guidance ("unless") suggests that the OFT will reopen the proceedings only in the three cases mentioned.¹³¹ At the same time, the authority may "for the purpose of addressing its current

¹³⁰ *Yves Bottemann and Agapi Patsa*, JAE (2013), p. 373.

¹³¹ Another related aspect clarified by the OFT's Enforcement Guidance is the scope of the binding effects of commitment decisions. According to the guidance (para. 4.10) the OFT is not prevented from taking action in relation to competition concerns which are not addressed by the commitments, e.g. where different aspects of an agreement or conduct raise different competition concerns.

competition concerns” substitute the original commitments by new commitments or accept a variation of the old commitments.¹³² Additionally, the authority may release binding commitments where it is requested to do so by the persons who offered the commitments, or where the competition concerns identified no longer arise.¹³³ In the case of releasing or renegotiating commitments third parties have to be consulted.¹³⁴

Similarly, in Germany it is well recognized that the catalogue of Art. 32b (2) ARC, which establishes similar requirements for the reopening of the procedure as in the UK, can generally not be extended to the disadvantage of the undertakings involved and is therefore exhaustive. On the other hand, it is widely recognized that the commitment procedure can be reopened, even outside the scope of Art. 32b (2) ARC, to the benefit of the undertaking or with the undertaking’s consent.¹³⁵ Arguably, this can already be inferred from the wording of Art. 32b (1) ARC, according to which CDs preclude the Bundeskartellamt from taking certain measures against the undertakings concerned (the authority will not use its powers under Art. 30 (3), 32, 32a ARC) but not from acting to the benefit or with the consent of the undertaking.¹³⁶

2. Discussion

Again, with a view to the reopening of the commitment procedure, there is a balance to be struck between rule of law values (e.g. legal certainty) on the one hand, and other aims (e.g. the flexibility of the procedure) on the other hand. In the UK and Germany commitments may be renegotiated, substituted, or released consensually, or to the benefit of the undertakings concerned, even outside the explicit provisions governing the reopening of the procedure. While a public law interpretation of CDs might suggest that the binding decision can only be changed under the conditions provided for by the law, the design of the reopening of the commitment procedure in the MS, according to which consensual alteration are basically

¹³² OFT, 2004, Enforcement Guidance, at paras. 4.11, 4.12 and paras. A.18, A.19; see also Sec. 31A (3) CA98. If the current competition concerns are different than the ones addressed by the original commitments the OFT will take into account the criteria established to assess whether or not it is appropriate to accept binding commitments (*ibid.*, at paras. 4.3-4.5).

¹³³ *Ibid.*, at para. 4.13.

¹³⁴ *Ibid.*, at para. 4.23.

¹³⁵ *Joachim Bornkamm*, § 32b GWB, at para. 28; *Rainer Bechtold and Wolfgang Bosch*, '§ 32b GWB', in Stefan Bechtold (ed.), *Kartellgesetz, Gesetz gegen Wettbewerbsbeschränkungen* (7 edn., München 2013), at paras. 9 f.

¹³⁶ On the contrary, pursuant to Art. 9 (1) Regulation 1/2003, a CD generally concludes that “there are no longer grounds for action by the Commission“.

possible at any time, shows that they are perceived rather as contracts, or some kind of 'governance tools'. While this interpretation enhances flexibility, the decision to reopen the procedure and to renegotiate commitments might affect not only the consenting undertakings concerned but also third parties. Therefore, procedural safeguards are necessary (e.g. ensuring the right to be heard of third parties) in order to account for potential externalities of the decision.

IX. Summary and Discussion

Commitment Procedure		
	Germany	UK
Scope of Application	Exclusion of 'hardcore cartels' (only)	Exclusion of 'hardcore cartels' and additional requirements: 'Readily identifiable competition concerns', no 'serious abuse of a dominant position', deterrence
Negotiation of Commitments	<ul style="list-style-type: none"> - No rules concerning the initiation of the negotiations - No requirement of a prior written summary of the competition concerns - Right to access case files follows from general administrative law 	<ul style="list-style-type: none"> - Prospective defendant (rather than the regulatory authority) should take initiative in exploring the possibility of offering binding commitments - The negotiations should be based on a written summary of the authority's competition concerns - Right to access case files not clarified
Preliminary Assessment	No clear/explicit standard	Competition concerns must be 'readily identifiable'
Content of Commitments	<ul style="list-style-type: none"> - (Potentially) reduced standard of proportionality and no prioritisation of behavioural remedies - Unclear in how far competition concerns have to be removed 	<ul style="list-style-type: none"> - (Potentially) reduced standard of proportionality and no prioritisation of behavioural remedies - Competition concerns have to be 'fully' addressed
Third Parties	Consultation (only) of specific affected economic stakeholders	'Market Test' (open for all 'interested parties')
Implementation and Enforcement	No specific requirements	Efficient and quick implementation is a mandatory requirement / Compliance with and effectiveness of the commitments must not be difficult to discern
Reopening of the Procedure	Listed cases for reopening are exhaustive but consensual reopening permissible at any time	Listed cases for reopening are exhaustive but variation/substitution of commitments is permissible and the abolishment of binding effects of commitments possible

The inquiry confirmed the finding of the Commission (*supra* A) that – despite a certain level of convergence – in Germany and the UK a significant degree of diversity exists with a view to the commitment procedure. The remaining differences can be explained by the importance attached to different aims and values in the national legal orders. Conceptually, the legal framework of CDs should balance the aim of procedural economy with other important aims, such as the prevention of ‘instrumental’ competition law enforcement by the authorities. In the light of a reduced standard of judicial control it has been argued that rather strict procedural designs are preferable.

At this abstract level, a counter argument could be that a stricter procedural design jeopardizes the benefits of the instrument, especially procedural economy and flexibility. For example, it has been argued that the commitment procedure is especially well-suited for contexts where regulators and firms are confronted with considerable uncertainty and for volatile market environments.¹³⁷ In this context, the commitment procedure is perceived as a “policy-learning device”¹³⁸ that makes the undertakings concerned, which are potentially most knowledgeable about the market and the issue at hand, primarily responsible for proposing and adjusting remedies.¹³⁹ At first glance, this interpretation seems to conflict with the view taken above that the stricter approach in the OFT’s Enforcement Guidance towards the scope of application of the commitment procedure is worthwhile, which is especially the exclusion of cases characterised by a high level of uncertainty (*supra* II.4).

Yet, setting higher standards as to the applicability of CDs to cases characterised by uncertainty might not even contradict the aim of ‘joint learning’. With a view to *factual* uncertainty, no conflict arises as long as one agrees that a ‘trial and error’ approach – where

¹³⁷ *Yane Svetiev*, *Settling or Learning Through Commitment Decisions?* (forthcoming), p. 27. The importance of this role of CDs supposedly results from the transformation of EU competition law – most importantly the so-called “more economic approach” (MEA) and the shift from a rather “form-based” to a more “effects-based” approach. The consequences of the perceived transformation of competition law and policy, which are often labelled as “more regulatory and forward-looking”, “focusing on effects and context”, “greater use of economic analysis”, and related to an increasing “volatility of market environments”, and the “multiplicity of policy objectives”, are found to be a higher amount of uncertainty. *Ibid.*, at 6 et seq., 11.: “[...] once the form based policy is abandoned, novel tools of implementation must be understood through this prism [...]”. On the contrary, *Heike Schweitzer*, *Zur Bedeutung des „More Economic Approach“ für die Unionsgerichte*, speech as part of an expert forum at the ECJ, 2012, p. 16, argued that the frequent use of CDs might as well be seen as a way to circumvent rather than implementing the more demanding requirement of the MEA. The use of the commitment procedure to quickly terminate proceedings without establishing a fully developed theory of harm based on an in-depth inquiry into the facts might actually contradict the aim of the MEA, which is to focus on conduct only that (potentially) has detrimental effects on the process of competition, and accordingly the increased requirements to prove an infringement of competition law.

¹³⁸ *Yane Svetiev*, *Settling or Learning Through Commitment Decisions?*, p. 1.

¹³⁹ *Ibid.*, at 3, 15.

the initial attempt to solve the competition concerns is not based on an informed and reasonable decision – would be undesirable.¹⁴⁰ Setting limits as to the amount of uncertainty CDs may be based on does not mean that it should be impossible to include review clauses or fixed timeframes for reassessing the effectiveness of commitments. Learning and adjustment does not have to be exempted from the commitment procedure. Moreover, formalising the procedure might in fact facilitate ‘collaborative learning’. For example, compared to a situation where undertakings are forced to negotiate commitments based on very limited information and a vague theory of harm, creating more formal rules for the negotiation process that enhance transparency, might facilitate the proper identification of the competition concerns and the joint development of appropriate solutions. Hence, the seemingly hostile perceptions of the commitment procedure might – at least to a certain extent – be reconcilable. On the other hand, excluding cases of *legal* uncertainty is justified by institutional reasons. The development of legal doctrine is the task of the courts rather than market participants and competition authorities.

While so far the different procedural designs were compared in order to identify the kind of *ex-ante* safeguards that are best suited to mitigate limited *ex-post* judicial control, the next section takes a closer look at the CD-policies applied by the NCAs. How much self-restraint of competition authorities can be found in practice?

¹⁴⁰ *Ibid.*, at 25.

D. Commitment Decision Policies in Germany and the UK

In the light of the combination of a reduced level of judicial control and limited procedural restraints, concerns have been raised as to the wide margin of policy discretion of the Commission, and the lack of self-restraint when adopting CDs.¹⁴¹ In fact, from entering into force of Regulation 1/2003 in May 2004 to date a significant shift in the Commission's enforcement policy can be identified, in the course of which the instrument of CDs has become the most frequently used tool outside the area of cartels.¹⁴²

Procedural efficiency is often mentioned as an important driver for this trend.¹⁴³ The potential to resolve competition concerns quickly is, arguably, one of the key advantages of the commitment procedure. However, comparing the time frame between the opening of the proceeding and the adoption of a decision it can be seen that much depends on the legal basis of the CDs: looking at the total of adopted decisions, infringement procedures took in fact 17 % longer than commitment procedures; conversely, in Art. 102 TFEU-cases (where CDs are used frequently) commitment procedures were 15 % slower than infringement procedures.¹⁴⁴ This is to say that the aspect of procedural efficiency of CDs is not as 'self-evident' as it might seem.¹⁴⁵ Hence, there might be additional driving forces behind the trend towards more 'consensual competition law'.

Another striking fact in relation to the Commission's practice is that while to date all remedies under Art. 7 Regulation 1/2003 have been of behavioural nature, under Art. 9 Regulation 1/2003 also structural remedies have been adopted.¹⁴⁶ In this context it is further interesting to note that a major focus of the CD-practice was on the energy sector,¹⁴⁷ an area

¹⁴¹ *Heike Schweitzer*, (2012), *Commitment Decisions in the EU and in the Member States*, p. 5 et seq.

¹⁴² Commission, 9 July 2014, *Ten Years of Antitrust Enforcement under Regulation 1/2003*, at para. 185. Looking at the total numbers, including cartel cases which fall outside of the scope of application of CDs, IDs remain the most important enforcement tool with 78 decisions compared to 33 CDs since May 2004 (para. 184); *Mario Mariniello*, *Commitments or Prohibition? The EU Antitrust Dilemma*, Bruegel Policy Brief, 01 iss., January 2014, p. 6.

¹⁴³ Commission, 9 July 2014, *Ten Years of Antitrust Enforcement under Regulation 1/2003*, at paras. 187, 189.

¹⁴⁴ *Mario Mariniello*, (January 2014), p. 4, 5.

¹⁴⁵ On the contrary, *Niamh Dunne*, *Commitment Decisions in EU Competition Law*, *Journal of Competition Law and Economics*, 2014, finds that the commitment procedure is "self-evidently" quicker and cheaper (p. 7) and that the procedural economy advantages are "indisputable" (p. 35). It could be argued that one should take as a starting point for measuring the length of the procedure not the opening of the procedure but an earlier stage, e.g. the first complaint, and as the end point not the adoption of the decision but the implementation of the decision and the effects on the market. Nevertheless, the comparison of the infringement and the commitment procedure shows that the procedural efficiency of CDs may change from case to case and is not as self-evident as often suggested.

¹⁴⁶ Commission, 9 July 2014, *Ten Years of Antitrust Enforcement under Regulation 1/2003*, at para. 188.

¹⁴⁷ One third (11 out of 33) of the Commission's CDs have been passed in the energy sector, *ibid.*, at para. 186.

that was recently subject to a sector inquiry of the Commission and (legislative) liberalisation efforts.¹⁴⁸ Moreover, many of the CDs that applied structural remedies were passed in the energy sector.¹⁴⁹

The practice of the Commission is subject to concerns and criticism: Some commentators that analysed the practice of the Commission identified a paradigm shift towards more ‘regulatory’ antitrust enforcement.¹⁵⁰ It has been observed that the Commission tends to make far-reaching commitments binding, which potentially exceed the objectives of protecting and restoring the competitive process so as to implement certain visions of the Commission concerning the structuring and functioning of markets.¹⁵¹ Another strategy that has been identified is to use CDs as a substitute for granting conditional exemptions under the former notification system in order to pursue own competition policy objectives.¹⁵² Again, chances are that the policy pursued exceeds the mandate to protect the process of undistorted competition.¹⁵³ In sum, there seems to be a danger that CDs are not only used to benefit from procedural economy, but to pursue policies that could not be implemented via traditional enforcement tools.

¹⁴⁸ Commission, 10 January 2007, Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report). Generally on the liberalisation of the energy sector see only http://ec.europa.eu/competition/sectors/energy/overview_en.html (last accessed 22 July 2014).

¹⁴⁹ Commission, 9 July 2014, Ten Years of Antitrust Enforcement under Regulation 1/2003, fn. 268 mentions CDs were structural remedies were applied and most of them were passed in the energy sector.

¹⁵⁰ *Damien Gerard*, Negotiated remedies in the modernization era: the limits of effectiveness, p. 3, 18 et seq.; *Niamh Dunne*, JCLE (2014), p. 13 et seq.

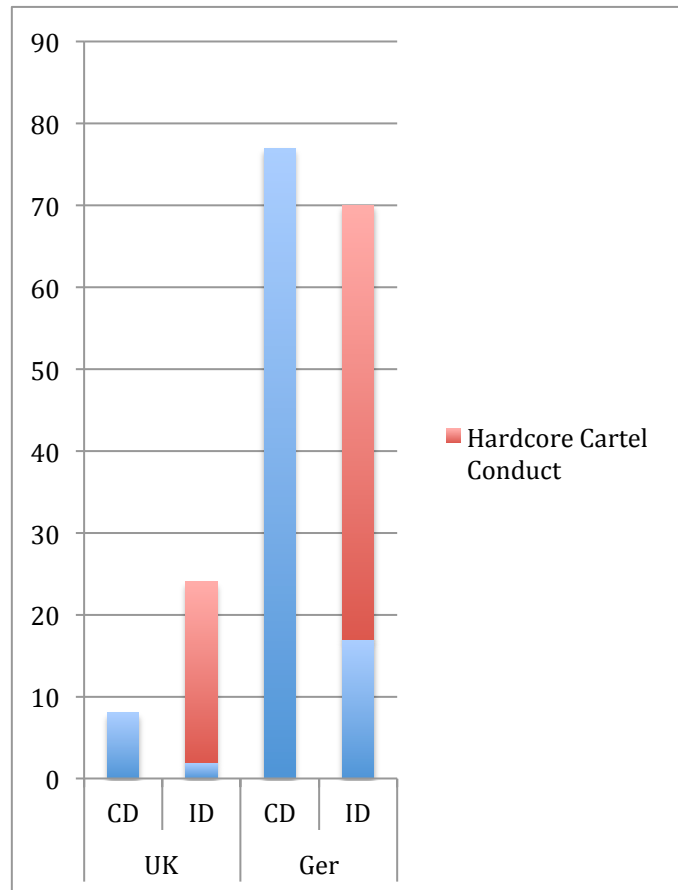
¹⁵¹ *Hubertus von Rosenberg*, Unbundling through the Back Door... the case of network divestiture as a remedy in the energy sector, *European Competition Law Review*, 5 iss., 2009; *Malgorzata Sadowska and Bert Willems*, Power Markets Shaped by Antitrust, *European Competition Journal*, 9 vol., 1 iss., 2013; *Florian Wagner-von Papp*, *CML Rev.* (2012), p. 960 et seq.

¹⁵² *Heike Schweitzer*, Verpflichtungszusagen im Gemeinschaftsrecht, p. 648; *Heike Schweitzer*, (2012), Commitment Decisions in the EU and in the Member States, p. 15.

¹⁵³ In this context, *George Stephanov Georgiev*, Contagious Efficiency: The Growing Reliance on U.S.-Style Antitrust Settlements in EU Law, *Utah Law Review*, 4 iss., 2007, p. 1033 talks about a “loophole in the EU antitrust system”. On the contrary, while the DG Competition stresses in its internal Antitrust Manual of Procedures that the misuse of commitment decisions by undertakings as a “notification through the back door” has to be avoided (DG Competition, 2012, Antitrust Manual of Proceedings, mod. 16 para. 16), there is no equivalent concern raised against a potential misuse by the Commission itself, using the instrument as a competition policy tool. See also *Nicolas Petit*, 17 June 2011, Chillin'Competition, The Perverse Effects of the Court's Ruling in *Tele2 Polska*, who argues that due to internal incentive structures of the Commission case officers rather translate cases which are found to have no merits “into some sort of observable decisional output” via CDs than dropping the case, as they are not able to pass a decision that there is no infringement.

While it would go beyond the scope of this study to analyse the Commission’s CD-practice more closely, it is against the background of these concerns that the practice in Germany and the UK will be explored in detail.

Looking at the overall numbers in the MS, it can already be seen that CDs have become an important enforcement tool at national level, accounting for 23 % of all envisaged decisions by NCAs between May 2004 and December 2013.¹⁵⁴ Moreover, looking in detail at the numbers in Germany and the UK reveals that CDs have become the prime tool of competition law enforcement outside (and in Germany even overall) the area of hardcore cartel conduct. At national level as well CDs have been used most often in the energy sector.¹⁵⁵



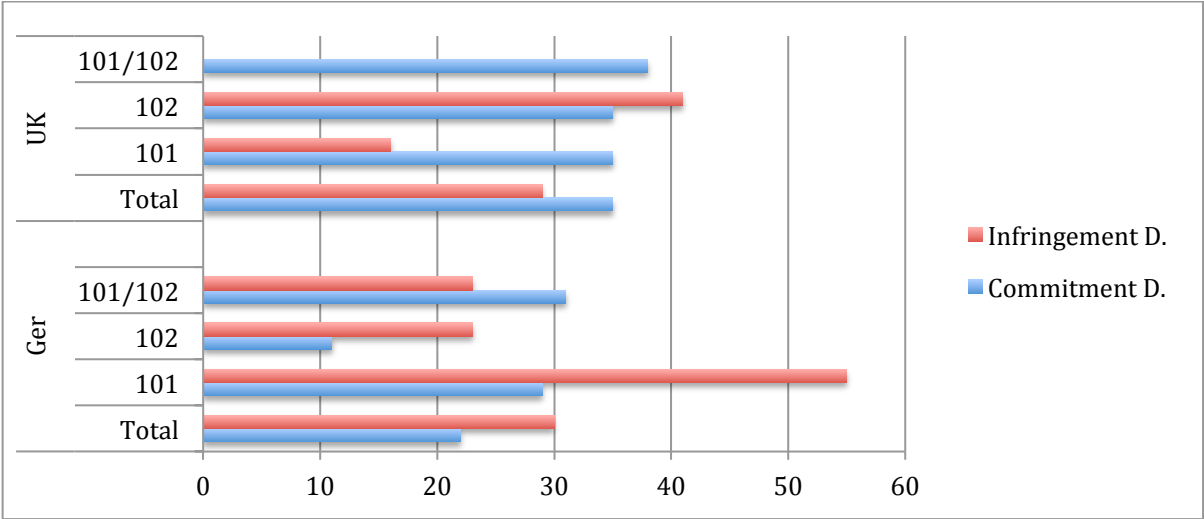
Comparing the approximate length of commitment and infringement procedures in Germany and the UK shows that the element of procedural efficiency is important but should not be overstated. Again, much depends on the provision in question:¹⁵⁶ Looking at the total numbers in Germany IDs took approx. 30 months while CDs took only 22 months. In the UK on the other hand, IDs took approx. 29 months, while CDs took 35 months; thus CDs took even more time than IDs. In cases of Art. 81 EC/Art. 101 TFEU/national equivalents in Germany CDs were faster, while in the UK IDs were quicker. In cases of Art. 82 EC/Art. 102

¹⁵⁴ Commission, 9 July 2014, Ten Years of Antitrust Enforcement under Regulation 1/2003, at para. 196.

¹⁵⁵ Ibid., at para. 196. This is true also for the UK (2 out of 7) and Germany (62 out of 77). In Germany this is especially striking as at the same time only a small number of the IDs that were issued were passed in the energy sector (4 out of 53).

¹⁵⁶ The numbers are only a rough estimate comparing the first reported date of the procedure (e.g. first complaint) with the issuance of the final decision. Sometimes no exact dates but e.g. only the month the procedure started have been reported. Furthermore, the duration of one month has been defined as approximately 29,6 days. Hardcore cartel conduct has been excluded, which is why especially in the UK the comparison groups are very small.

TFEU/national equivalents on the other hand, in Germany and in the UK CDs were faster (opposite to the findings at Union level). In Germany cases that were based on both legal foundations CDs were slower (while in the UK no ID was based on both foundations). Again, the message here is that the procedural efficiency of CDs might not be as obvious as one might think, and therefore, also at national level, might not be the only driving force behind the trend towards a more ‘consensual competition law’.



Against this background this section analyses the practice of the NCAs in Germany (II.) and the UK (III.) in order to answer the following questions: What kind of strategies do the NCAs apply when using CDs? In the light of the criticism of the Commission’s CDs practice, is there more self-restraint to be found at national level, which limits the use of CDs to pursue the major aim of procedural economy while at the same time avoiding ‘instrumental’ competition law enforcement? The ‘experiments’ of various competition authorities with different enforcement strategies within the federal enforcement regime of the EU facilitates reciprocal learning, and the following comparative study is supposed to help improving the use of ‘consensual’ competition law enforcement in Europe.

I. Enforcement Strategies of the Bundeskartellamt

In Germany two main strategies can be distinguished when it comes to the use of CDs: First, using the commitment procedure to quickly implement findings of IDs and corresponding decisions of the courts (1.). Following this strategy, in terms of content, CDs correspond to IDs. On the contrary, the second strategy is to make use of the distinct characteristics of the commitment procedure in order to achieve results that might not be attained in the same way by IDs (2.).

1. Following Infringement Decisions

One strategy of the BK that can be identified is to use IDs and corresponding (full) judicial review as model cases for subsequently adopted CDs:

In several cases, concerning the foreclosure of gas markets by way of long-term supply contracts between gas transmission companies and distributors, the BK used an infringement procedure against the *E.ON Ruhrgas AG* and corresponding judicial control of the Higher Regional Court (Oberlandesgericht (OLG)) *Düsseldorf*, which upheld the ID,¹⁵⁷ as an exemplary legal proceeding (“*Musterverfahren*”¹⁵⁸). The findings of this proceeding were used and implemented later in similar cases via CDs.¹⁵⁹

In other cases, concerning an alleged abuse of a dominant position of municipal grid companies by charging excessive concession fees, the ID and corresponding court proceedings did not predate the CDs, but the latter were subject to the condition that the courts (e.g. when dealing with a similar ID) do not set aside the legal analysis of the BK.¹⁶⁰ Finally, the court confirmed the legal assessment of the BK.¹⁶¹

In both cases the BK combined the benefits of the commitment and the infringement procedure – full inquiry into the facts and full judicial control of controversial legal questions on the one hand, and cooperation with the undertakings concerned and evasion of costly and time consuming procedures, on the other hand. In these cases the content or at least the overall aim of the decisions created by the different enforcement tools were similar.

2. Utilising Distinct Features of the Commitment Procedure

On the contrary, in several cases CDs issued by the BK deviate from IDs issued in similar cases or at least show some distinct characteristics that seem to be related to the nature of the enforcement tool. More precisely, the BK seems to have used this more consensual

¹⁵⁷ OLG Düsseldorf, 04 October 2007, NJOZ 2008, 891 = WuWE DE-R 219 – E.ON Ruhrgas AG.

¹⁵⁸ Bundeskartellamt, 22 June 2009, Activity Report 2007/2008, pp. 113 et seq.

¹⁵⁹ Bundeskartellamt, 8 October 2007, Commitment Decision B8-113-03-3 – Verbundnetz Gas AG; Bundeskartellamt, 10 October 2007, Commitment Decision B8-113-03-10 – E.ON Avacon AG; Bundeskartellamt, 06 February 2008, Commitment Decision B8-113-03-12 – Erdgasversorgungsgesellschaft Thüringen-Sachsen; Bundeskartellamt, 18 February 2008, Commitment Decision B8-113-03-9 – EWE AG; Bundeskartellamt, 07 August 2008, Commitment Decision B8-113-03-2 – RWE AG and RWE Energy AG. The decision of the OLG *Düsseldorf* was, however, criticised for not finding that the ID was disproportionate and therefore also the CDs might in fact be problematic, despite alignment with the infringement procedure (for further discussion see *infra* D.I.2.a).

¹⁶⁰ Bundeskartellamt, 03 June 2009, Commitment Decision B10-71/08 – GGEW, at para. 7; Bundeskartellamt, 17 September 2009, Commitment Decision B10-74/08 – Stadtwerke Torgau GmbH, at para. 14.

¹⁶¹ See Bundeskartellamt, 29 May 2013, Activity Report 2011/2012, BT-Druck. 17/13675, pp. 102, 103.

enforcement tool in order to (a.) shape market structures, (b.) prevent future harm, (c.) implement sector inquiries and substitute regulation, (d.) coordinate ‘shared regulatory space’, (e.) substitute conditional exemptions, (f.) experiment in fast developing markets, or (g.) in order to complement merger procedures.

a) Shaping Market Structures

One distinct characteristic of the CDs practice of the BK seems to be that the tool is frequently used to change the structure of markets. Moreover, in some cases the commitment procedure deviated from the remedies applied via IDs in that it was used to undertake interventions into the market that exceed the aim of bringing an alleged infringement of competition law to an end. The following three examples illustrate this strategy.

aa) Example: Excessive Prices for Heating Current

A first example is presented by a number of CDs in the electricity sector, which dealt with excessive pricing practices of undertakings supplying heating current for night storage heaters and heat pumps. The authority conducted an analysis of the prices based on the ‘Comparable Market Concept’ (‘Vergleichsmarktkonzept’), comparing the prices of the undertakings with those of comparable undertakings in different geographic markets.¹⁶² According to the BK, the undertakings abused their dominant positions, which were *inter alia* based on entry barriers to the market:¹⁶³

In its sector inquiry the BK identified the following different types of entry barriers: Most importantly, due to the lack of regulation or a dominant industry standard, network operators applied differing load profiles, which made it very difficult or even impossible for alternative providers to offer standardised supply of heating current to end-consumers. Furthermore, the network operators were not bound by any transparency obligations regarding their load profiles. Secondly, a major entry barrier resulted from the manifold and non-transparent range of products, which made it impossible for alternative providers to calculate and design competing products. Thirdly, many incumbents engaged in below-cost pricing. Fourthly, many municipal incumbents were able to demand excessive concession fees from independent suppliers as well as their own heating current providers, as they could compensate higher costs with the increased returns on concession fees.

¹⁶² Bundeskartellamt, September 2010, Sector Inquiry (Heating Current), "Sektorenuntersuchung Heizstrom, Marktüberblick und Verfahren", pp. 12 et seq.

¹⁶³ Ibid., pp. 7 et seq.

In September 2009 the BK initiated proceedings against 19 heating current providers, 18 of which have been closed in reaction to commitments of the undertakings concerned (13 formal CDs pursuant to § 32b ARC, 1 informal commitment, and 4 case closures),¹⁶⁴ and one of which was subject to an ID.¹⁶⁵ The different outcomes of the infringement procedure, on the one hand, and the commitments, on the other hand, are striking: While the ID was limited to addressing the competition concerns at hand, the CDs adopted additional measures that aimed at the *ex ante* opening of the market:

Both types of decisions adopted certain financial obligations. The ID obligated the undertaking to refund the excessive payments (including interests) to consumers.¹⁶⁶ The CDs correspond to this in that they made different commitments of the undertakings concerned binding, which led to a relief of the financial burden of consumers (e.g. refunds to customers or deferral or renunciation of price increases, which would have been appropriate with a view to increased costs). Additionally, the CDs include so-called “no-repeat-game”-clauses, which ensure that the undertakings will not compensate for these financial reliefs by future countermeasures (e.g. price increases). At the same time, the undertakings agreed to charge their customers only a certain, comparably low rate for heating current.

In addition to these financial measures, the undertakings “made a significant contribution to remove entry barriers to the markets for heating current.”¹⁶⁷ The undertakings committed to various far-reaching measures, particularly to increase transparency (e.g. to publish their tariffs on the internet) and to apply a specific standardized procedure to develop load profiles (which also have to be published online).¹⁶⁸ It was the declared aim of the authority, when making the commitments binding, to not only address the alleged price abuses but, moreover, to reduce entry barriers to the markets by applying ‘quasi-structural’ remedies (i.e. behavioural remedies with structural effects).¹⁶⁹ The president of the BK further pointed out that this would probably not have been achieved with conventional orders to bring the infringement to an end.¹⁷⁰ Hence, this is a clear case where the authority took the (potential)

¹⁶⁴ For a list of all the cases closed in reaction to commitments undertakings see *ibid.*, annex pp. 1-3.

¹⁶⁵ Bundeskartellamt, 19 March 2012, Decision B10-16/09 – ENTEGA Privatkunden GmbH & Co. KG.

¹⁶⁶ *Ibid.*, paras. 2 et seq.

¹⁶⁷ Bundeskartellamt, September 2010, Sector Inquiry (Heating Current), p. 16 (translated from German to English). The same language can be found in the individual CDs, see e.g. Bundeskartellamt, 29 October 2010, Commitment Decision B10-22/09 – RWE Vertrieb AG, para. 27.

¹⁶⁸ Bundeskartellamt, September 2010, Sector Inquiry (Heating Current), p. 16.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Andreas Mundt*, (2011), *Alternative Instrumente der Kartellbehörden* p. 10.

infringement of competition law as an opportunity to undertake additional market corrections via CDs that exceed the mere aim of bringing the infringement to an end.

bb) Example: Foreclosure of Gas Markets via Long-Term Supply Contracts

A second example for the importance of designing the market structure as a basis for CDs are the cases already mentioned above, concerning the foreclosure of gas markets by way of long-term supply contracts between gas transmission companies and distributors (supra D.I.1). While these were proceedings where the CDs actually followed an ID and a corresponding decision of the court, they nevertheless show a tendency towards designing the market and the commercial relations between market participants rather than being limited to bringing an infringement of competition law to an end. This is why the corresponding decision of the OLG *Düsseldorf* has been criticised heavily.¹⁷¹

In these cases the BK was concerned about the combination of long-term purchase obligations and the high proportion of actual annual demand covered in gas supply contracts, and argued that these potentially infringe Art. 81, 82 EC (Art. 101, 102 TFEU) and Sec. 1 ARC. In consequence, the undertakings committed to close contracts (concerning a minimum total demand of 250 GWh/year) that covered more than 50-80 % of the prospective total annual demand for a maximum term of four years, and contracts covering more than 80 % of the total annual demand for a maximum term of two years. President Mundt emphasised the importance of the industry-wide solution as an essential impulse for the opening of the gas markets.¹⁷² Hence, apart from the solution of the competition concerns in the individual cases, the overall structure of the industry seems to have played an important role.

It was criticised – also with a view to the decision of the OLG *Düsseldorf* – that the remedies are not limited to the prohibition of certain long-term contracts to address the foreclosure of the market, but additionally specify the permissible design of future agreements, in order to facilitate entry of third parties into the market.¹⁷³ A further criticism has been made that the remedies prohibit the combination of contracts with different durations and different proportions of actual annual demand covered. Thus, if a contract covering 20 % of the demand with a term of four years has been closed, the companies are not allowed to close

¹⁷¹ *Thomas Dreher*, Die Beschränkung der Vertragsabschlussfreiheit durch kartellbehördliche Verfügung, Behördliche Wettbewerbsbeteiligungsverbote für Energielieferverträge?, *Neue Juristische Wochenschrift*, 2008, p. 1557.

¹⁷² *Andreas Mundt*, (2011), *Alternative Instrumente der Kartellbehörden* p. 9.

¹⁷³ *Thomas Dreher*, *NJW* (2008), p. 1557.

another contract in year three or four with a term of two years covering 65 % of the demand.¹⁷⁴ Supposedly, this prevents the remedies from being circumvented. It has, however, been argued that while the authority is allowed to prevent the remedies from being circumvented, it is not allowed to generally prohibit exclusivity contracts, or make specific limits regarding the combination of the term of the contract and the demand covered compulsory for undertakings, irrespective of the existence of a market foreclosure.¹⁷⁵ In sum, it was criticised that the decisions are not limited to defining and addressing the distortion of competition, but instead are used to design the competitive process itself.¹⁷⁶

Following this line of argument (against the view of the OLG *Düsseldorf*), the remedies of the ID – and therefore also the commitments – exceed what is necessary to re-establish compliance with the rules infringed. As has been argued above (*supra* C.III.1), a stricter design of the negotiation process might have led to a very different outcome.

In this context it is further remarkable, that the BK in its report on the evaluation of the decisions came to the conclusion that it was not necessary to extend the duration of the commitments, as the market conditions generally improved – also due to new regulatory instruments – and because the authority did not expect these developments to revert without further binding commitments.¹⁷⁷ Once again, there seems to be a strong focus on the design of efficient markets, and the protection of future market conditions.

cc) Example: Marketing of Media Rights

A third possible example for the way CDs are used by the BK to shape efficient markets (instead of being confined to eliminating infringements of competition law by preserving the market structure) is a decision of the BK adopted in January 2012. The CD was issued to terminate a procedure concerning the central marketing of media rights by the League Association (“Die Liga – Fußballverband e.V.”) in respect of matches in the first (“Bundesliga”) and second (“2. Bundesliga”) national football division.¹⁷⁸ Potentially, this

¹⁷⁴ Ibid.

¹⁷⁵ Ibid., at 1560, 61.

¹⁷⁶ Ibid., at 1558.

¹⁷⁷ Bundeskartellamt, 15 June 2010, Bericht über die Evaluierung der Beschlüsse zu langfristigen Gaslieferverträgen, at p. 6 et seq.

¹⁷⁸ Bundeskartellamt, 12 January 2012, Commitment Decision B 6-114/10 – Bundesliga. The licensed clubs and companies in the first and second national football divisions (the clubs) are the members of the League Association, which is the sole shareholder in “Deutsche Fußball Liga GmbH” (DFL), which conducts the operational business of the League Association. The League Association is a registered association and ordinary member of the German Football Association (Deutscher Fußballbund (DFB)). The clubs are not direct members of the DFB. According to the DFB's articles of incorporation, the League Association is

central marketing of media rights infringes Art. 101 TFEU and Sec. 1 ARC by restricting competition between the clubs, between the clubs and the League Association and also by restricting the economic freedom of third parties such as customers of media rights.¹⁷⁹ However, the BK found that the central marketing of media rights enables qualitative improvements of the product, measured in terms of preferences of the consumers, such as the preference of reports on the football division as a whole and not only on games of a certain club. It could therefore not be ruled out that the prerequisites for the exemptions pursuant to Art. 101 (3) TFEU and Sec. 2 ARC are met.¹⁸⁰ Moreover, the BK found it was not necessary to make use of its powers under Sec. 32, 32a ARC as long the media rights are distributed in a marketing model, which makes the efficiencies accessible to the consumers.¹⁸¹ It therefore made commitments binding according to which the media rights have to be sold in packages and according to a specific marketing model.¹⁸²

It remains questionable whether similar remedies could have been applied in this case by using the infringement procedure. Arguably, the decision is not designed to bring an infringement of competition law effectively to an end but rather to implement a certain vision of efficient market structures.

With a view to the theory of harm, it is highly controversial in how far the central marketing of media rights infringes competition law: Some commentators find the infringement of competition law by the joint selling of media rather obvious.¹⁸³ Others, however, raise serious doubts regarding the infringement, as the clubs are necessarily forced to cooperate to market the media rights.¹⁸⁴ In every single game there are at least two clubs involved and many more

entitled to organise league football competitions leased by the DFB and to exploit them exclusively in its own name (see paras. 1-4 of the CD).

¹⁷⁹ Ibid. at paras. 25 et seq.

¹⁸⁰ Ibid. at para. 25.

¹⁸¹ Ibid. at para. 89.

¹⁸² Ibid. at para. 109, as well as the annex.

¹⁸³ See e.g. *Thomas Körber*, Die erstmalige Anwendung der Verpflichtungszusage gemäß Art. 9 VO1/2003 und die Zukunft der Zentralvermarktung von Medienrechten an der Fußballbundesliga, *Wettbewerb in Recht und Praxis*, 4 iss., 2005, p. 465.

¹⁸⁴ See (regarding CDs of the Commission, 23 July 2003, Commitment Decision, COMP/C.2/37.398 – Joint Selling of the commercial rights of the UEFA Champions League; Commission, 19 January 2005, Commitment Decision, COMP/37.214 – Bundesliga; Commission, 22 March 2006, Commitment Decision, COMP/C.2/38.173 – Joint selling of the media rights of the FA Premier League on which the BK based its decision) *Hans-Joachim Hellmann and Stefan Bruder*, Kartellrechtliche Grundsätze der zentralen Vermarktung von Sportveranstaltungen - Die aktuelle Entscheidungen der Kommission zur Bundesliga und FA Premier League, *Europäische Zeitschrift für Wirtschaftsrecht*, 2006, p. 361, 62.

with a view to the league as a whole. Hence, the commitments were based on a contentious theory of harm.

Additionally, regarding the remedies made binding in the CDs, it has been argued that they rather aimed at introducing competition into a market that has a clear tendency towards a monopoly ('premium content bottleneck') than addressing anti-competitive conduct of the undertakings.¹⁸⁵ Arguably, the obligation to sell media rights in packages is neither an appropriate means to tackle the restriction of output, nor the problem of price fixing, which both are potential horizontal effects of the joint selling of the media rights.¹⁸⁶ Alternatively, the authority could have dealt with these problems e.g. by requiring the associations to expand their output or to prohibit excessive prices. It is questionable whether these remedies would have been available in the infringement procedure, as it would be disproportionate to create rivalry by means of competition law instead of tackling the concrete anti-competitive conduct while accepting the features of the market – even if it is the tendency towards a monopoly.¹⁸⁷

In sum, these CDs concerning the marketing of media rights are another example for the way controversial competition concerns can still trigger far-reaching commitments that substantially change the structure and the functioning of markets in a way that might not be possible via unilateral IDs,¹⁸⁸ and without providing clear precedents.

b) Preventing Future Harm

Another distinct feature of the CDs practice of the BK is the frequently pursued aim to avoid future infringements of competition law. It is a balancing act to identify the tipping point between permissible and impermissible remedies: they must aim at restoring the competitive process, and prevent the circumvention of corresponding prohibitions,¹⁸⁹ rather than designing

¹⁸⁵ This criticism has been raised again with a view to CDs of the Commissions (Fn. 184) by *Pablo Ibáñez Colomo*, *On the Application of Competition Law as Regulation: Elements for a Theory*, p. 290, 91.

¹⁸⁶ *Ibid.*

¹⁸⁷ On the contrary, others argue that the central marketing of media rights should be totally banned. See e.g. *Thomas Körber*, *WRP* (2005), p. 465 et seq.

¹⁸⁸ *John Temple Lang*, 'Commitment Decisions Under Regulation 1/2003', in Charles Gheur and Nicolas Petit (eds.), *Alternative Enforcement Techniques in EC Competition Law – Settlements, commitments and other novel instruments* (Brussels 2009), p. 122.

¹⁸⁹ Undertaking cannot only be prohibited to continue the infringement but also to conduct similar practices in the future, CFI, 6 October 1994, Case T-83/91, ECR 1994 II-755 – *Tetra Pak*, at para. 220. However, the Commission may only prohibit to continue certain conduct in the future or to involve in similar practices, when it has been shown that this behaviour actually infringes competition law. Thus, the courts have set aside the prohibition of all future exclusivity agreements, because this prohibition also included lawful exclusivity agreements (CFI, 8 June 1995, Case T-7/93, ECR 1995 II-1533 – *Langnese-Iglo*); they have set aside the prohibition of certain service contracts which themselves did not infringe competition law, also because the Commission did not sufficiently justify the prohibition (CFI, 28 February 2002, Case T-395/94, ECR 2002

the competitive process and preventing potential future harm, without being (remotely) linked to an past- or on-going infringement of competition law.¹⁹⁰ The more remedies focus on potential future infringements, the more proactive competition law becomes, and the more it departs from the traditional retrospective approach to pursue the “re-establishment of compliance with the rules infringed”¹⁹¹.

One example, were the BK might have overstepped the dividing line, are the cases discussed above concerning the foreclosure of gas markets via long-term supply contracts (supra a)bb)). The approach of the BK, to make a certain contractual design obligatory instead of prohibiting the specific contracts in question, aimed at preventing the remedies from being circumvented in the future by different contractual designs. However, it has been criticised that these obligations went too far in that they were not limited to defining and addressing the distortion of competition but instead were used to design the competitive process itself.¹⁹²

Another example, where the prevention of future harm was a central aim, and were the BK’s president Mundt emphasised the “protecting character for the future”¹⁹³ of the commitments that were made binding, were cases concerning the pricing practice of several gas suppliers. In 2008 the authority examined whether the gas prices charged by the undertakings concerned differed considerably from those of comparable undertakings in other geographic markets. The undertakings were suspected of charging excessive prices in 2007 and 2008 in the markets for the supply of household and commercial customers with heating gas.¹⁹⁴ In formal

II-875 – Atlantic Container Line, at paras. 410 et seq.); and they have set aside the prohibition of the exchange of statistical data, as the Commission only found that this exchange *might possibly* be used for anticompetitive purposes (CFI, 14 May 1998, Case T-310/94, ECR 1998 II-1043 – Gruber + Weber, at paras. 177, 178).

¹⁹⁰ While fines generally aim at deterring future competition law infringements (by the undertaking concerned but also other firms) the application of remedies primarily aims at restoring the competitive process, *Per Hellstrom, Frank Maier-Rigaud, and Friedrich Wenzel Bulst*, (2009-2010), ALJ, p. 45.

¹⁹¹ ECJ, 6 April 1995, Joined Cases C-241/91 P and C-242/91 P, ECR 1995 I-743 – RTE and ITP (Magill), at para. 93.

¹⁹² *Thomas Dreher*, NJW (2008), p. 1558; see also supra D.II.1.b)aa)(2).

¹⁹³ *Andreas Mundt*, (2011), *Alternative Instrumente der Kartellbehörden* p. 9, 10.

¹⁹⁴ The proceedings concerning 2007 were based on § 19 ARC (prohibition of the abuse of a dominant position) and the proceedings concerning 2008 were based on the new § 29 ARC, which was applied for the first time and which makes it easier for competition authorities to prosecute excessive pricing in the electricity and gas markets. See Bundeskartellamt, 01 October 2011, Activity Report 2008, short version (English), pp. 25 et seq.; Bundeskartellamt, 22 June 2009, Activity Report 2007/2008, pp. 114, 115. Out of the 33 cases under investigation, 17 were closed after “informal commitments” were accepted, 14 were closed pursuant to Sec. 32b ARC, and 2 were dropped without adopting a formal decision (see Sec. 62 (2) ARC), *ibid.*, pp. 117 et seq. The following cases were closed pursuant to § 32b ARC with a view to excessive pricing: Bundeskartellamt, 01 December 2008, Commitment Decision B10-38/08 – Bad-Honnef AG; Bundeskartellamt, 01 December 2008, Commitment Decision B10-41/08 – Thüga AG; Bundeskartellamt, 01 December 2008, Commitment Decision B10-21/08 – RheinEnergie AG; Bundeskartellamt, 01 December

commitment procedures the undertakings concerned committed to bonus payments to their customers, to the reduction of prices, to the deferral of price increases, and abstained from passing on the increase in gas purchasing costs as well as refrained from compensating for the price cuts with subsequent price measures (“no-repeat-game-clauses”).¹⁹⁵

The BK explained the willingness of the undertakings to compromise and offer these far-reaching commitments inter alia with the authority’s (supposedly) extended powers, such as the power to adopt positive operative provisions in its decisions (“positive Tenorierung”¹⁹⁶), which the authority is able to use in order to negotiate (even more) far-reaching commitments.¹⁹⁷ Using alternative enforcement scenarios as a tool to negotiate commitments does not appear illegitimate per se. Yet, this is only true as long as these alternative scenarios are in fact covered by the powers of the authority (which might be difficult to assess given the limited information provided in the preliminary assessment of the case). Contrary to the view of the BK, according to which the powers of the authority have been extended by the introduction of the instrument of “positive Tenorierung”, it has e.g. been argued that as before, the authority may adopt positive obligations only in cases where there is just one possible conduct that can bring the infringement to an end.¹⁹⁸ Arguably, otherwise it would be

2008, Commitment Decision B10-34/08 – Stadtwerke Düsseldorf AG; Bundeskartellamt, 01 December 2008, Commitment Decision B10-25/08 – MITGAS Mitteldeutsche Gasversorgung GmbH; Bundeskartellamt, 2. December 2008, Commitment Decision B10-36/08 – Süwag Energie AG (Gas Prices); Bundeskartellamt, 01 December 2008, Commitment Decision B10/51/08 – Energie SaarLorLux; Bundeskartellamt, 01 December 2008, Commitment Decision B10-22/08 – Stadtwerke Karlsruhe GmbH; Bundeskartellamt, 01 December 2008, Commitment Decision B10-43/08 – EVL Energieversorgung Limburg GmbH; Bundeskartellamt, 01 December 2008, Commitment Decision B10-18/08 – Harz Energie GmbH; Bundeskartellamt, 01 December 2008, Commitment Decision B10-47/08 – Energieversorgung Gera GmbH; Bundeskartellamt, 01 December 2008, Commitment Decision B10-33/08 – Stadtwerke Homburg GmbH; Bundeskartellamt, 01 December 2008, Commitment Decision B10-55/08 – Gas-Versorgungsbetriebe Cottbus GmbH.

¹⁹⁵ Interestingly, in its activity report the BK mentions an informal proceeding, in which the undertaking concerned further committed to far-reaching positive transparency obligations, such as publishing a map of gas grids in Berlin to facilitate market entry of third parties, Bundeskartellamt, 22 June 2009, Activity Report 2007/2008, p.118.

¹⁹⁶ While the power to adopt positive obligations to do certain acts or provide certain services (“positive Tenorierung”) was introduced to German competition law only in 2005 in reaction to Art. 5 Regulation 1/2003, the Commission used such remedies already before, *Volker Emmerich*, ‘§ 32 GWB’, in Ulrich Immenga and Ernst-Joachim Mestmäcker (eds.), *Wettbewerbsrecht, GWB, Kommentar zum Deutschen Kartellrecht* (4 edn., 2 vol. 2007), at para. 34. However, positive obligations are only permissible to effectively restore the competitive process and limited by the contractual freedom of the undertakings concerned, which is that whenever there is more than only one possible way of bringing the infringement equally effective to an end, it has to be the undertaking rather than the competition authority to make the choice, CFI, 18 September 1992, Case T-24/90, ECR 1992 II-2223 – Automec, at paras. 51, 52.

¹⁹⁷ Bundeskartellamt, 22 June 2009, Activity Report 2007/2008, p.117.

¹⁹⁸ *Thomas Dreher*, NJW (2008), p. 1558.

an inappropriate interference with the freedom of contract of the undertakings concerned.¹⁹⁹ Hence, there is a certain risk that the authority interprets its powers in the infringement procedure extensively and based on this interpretation negotiates even more extensive remedies in the commitment procedure, using positive obligations to prevent potential future harm to the competitive process.

c) Implementing Findings of Sector Inquiries

Another major concern that has been raised with a view to CDs practice in the EU is that the instrument may become a substitute for regulation by implementing policies or specific visions of market structures centrally defined by the Commission by the way of sector inquiries.²⁰⁰ At the same time, similar to the Commission, the BK has the instrument of sector inquiries at its disposal (see Art. 32e ARC which resembles Art. 17 Regulation 1/2003), which may trigger follow-on CDs.

Supposedly, the main objective of sector inquiries is to serve as a substitute for the lack of information provided by the now abolished notification system. However, concerns are raised that they may in fact be used for political or lobbying purposes instead.²⁰¹ There are only very low standards for the initiation of sector inquiries.²⁰² Hence, they might be conducted with less objectivity or precision as normally required for enforcement in individual cases.²⁰³ Moreover, it has been criticised that there is a risk that they become “an exercise in gathering information to support a preconceived conclusion or achieve a pre-determined goal”.²⁰⁴ At the same time, there are little checks on the way sector inquiries are conducted, and no effective judicial control of their findings. Hence, chances are that the combination of sector inquiries and follow-on CDs may be used to circumvent legal restraints and judicial control in order to pursue policy aims different from protecting undistorted competition, i.e. to facilitate ‘instrumental’ competition law enforcement.

¹⁹⁹ Accordingly, it is recognized that the Commission must not impose a positive obligation solely to avoid future infringements of competition law, *Martin Sura*, 'Art. 7 VO 1/2003', in Hermann-Josef Bunte (ed.), *Langen/Bunte Kartellrecht, Kommentar* (12 edn., 2 vol. 2014), at para. 6.

²⁰⁰ *Heike Schweitzer*, (2012), *Commitment Decisions in the EU and in the Member States*, p. 2, 3.

²⁰¹ *Gregory Olsen and Bryony Roy*, *The New World of Proactive EC Antitrust Enforcement? Sector Inquiries by the European Commission*, *Antitrust* 21 vol., 3 iss., 2007, p. 86.

²⁰² Art. 17 Regulation 1/2003 sets only very low standards: “circumstances [must] suggest that competition may be restricted or distorted” but there is no need for prima facie evidence of antitrust infringements.

²⁰³ *Gregory Olsen and Bryony Roy*, *Antitrust* (2007), p. 87.

²⁰⁴ *Ibid.*, at 83, 84. As only the Commission can initiate sector inquiries, they are “solely reflective of the Commission’s interests, priorities, and objectives” (p. 84).

To a certain extent the CD-practice of the BK seems to confirm these concerns. Especially in the energy sector there seems to be a close link between a number of decisions of the BK and the corresponding sector inquiry of the Commission:²⁰⁵ Whether one looks at the decisions concerning market foreclosure through long-term supply contracts,²⁰⁶ intransparent and discriminating access to gas and electricity networks,²⁰⁷ or the restrictions of secondary trading²⁰⁸ – they are all in line with the findings of the Commission’s sector inquiry. At the same time, e.g. as discussed above with a view to long-term supply contracts (supra D.I.2.a)bb)) or excessive prices for heating current (supra D.I.2.a)aa)), many of the CDs of the BK in the energy sector seem to go beyond restoring the competitive process but aim at designing the market structure. Hence, these cases are a clear example for the way the German NCA uses CDs in order to implement findings of the Commission’s sector inquiries and how these decisions might lead to far-reaching, structural remedies outside the realm of judicial control.

²⁰⁵ See also *Heike Schweitzer*, (2012), *Commitment Decisions in the EU and in the Member States*, p. 13; For an overview on the practice see also *Stephan Manuel Nagel David Broomhall, Ulrich Scholz*, *The application of competition law to the energy sector: An overview and comparison of recent practice by the Bundeskartellamt and the EU Commission*, *Concurrences*, 3 iss., 2013.

²⁰⁶ For the corresponding findings of the Commission see Commission, 10 January 2007, Sector Inquiry (Gas and Electricity), at paras. 20, 22, 31 et seq., 46 et seq. and fn. 11. For an overview on the corresponding decisions of the BK see Bundeskartellamt, 15 June 2010, , at p. 3 et seq.

²⁰⁷ For the corresponding aims of the Commission see Commission, 10 January 2007, Sector Inquiry (Gas and Electricity), at para. 19. For corresponding decisions of the BK see Bundeskartellamt, 03 June 2009, Commitment Decision B10-71/08 – GGEW; Bundeskartellamt, 17 September 2009, Commitment Decision B10-74/08 – Stadtwerke Torgau GmbH; Bundeskartellamt, 22 April 2010, Commitment Decision B10-42/09 – Stadtwerke Völklingen Holding GmbH (concerning excessive licence fees of municipal grid companies) and e.g. Bundeskartellamt, 22 June 2012, Commitment Decision B10-16/11 – Stadt Pulheim et al., at para. 6; Bundeskartellamt, 21 November 2011, Commitment Decision B10-17/11 – Stadt Markkleeberg, at para. 10; Bundeskartellamt, 02 December 2013, Commitment Decision B8-180/11-1 – Gemeinde Cölbe/Stadtwerke Marburg GmbH, at para. 21; (concerning the procurement of easements in gas and electricity markets).

²⁰⁸ For the corresponding concerns of the Commission see Commission, 10 January 2007, Sector Inquiry (Gas and Electricity), at para. 34. For similar concerns in a sector inquiry of the BK see Bundeskartellamt, December 2009, Sector Inquiry (Gas Transmission) B10-7/09, “Kapazitätssituation in den deutschen Gasfernleitungsnetzen”, pp. 26 et seq. For follow-on CDs of the BK see Bundeskartellamt, 29 October 2010, Commitment Decision B10-21-10 – EnBW Vertriebs GmbH; Bundeskartellamt, 05 July 2010, Commitment Decision B10-45-09 – Erdgas Münster GmbH; Bundeskartellamt, 05 July 2010, Commitment Decision B10-44-09 – EWE AG; Bundeskartellamt, 05 July 2010, Commitment Decision B10-47-09 – WINGAS GmbH & Co KG; Bundeskartellamt, 05 July 2010, Commitment Decision B10-10-10 – ENTEGA Vertriebs GmbH & Co KG; Bundeskartellamt, 05 July 2010, Commitment Decision B10-14-10 – Stadtwerke Hannover AG; Bundeskartellamt, 05 July 2010, Commitment Decision B10-48-09 – RWE AG; Bundeskartellamt, 05 July 2010, Commitment Decision B10-20-10 – Köthen Energie GmbH; Bundeskartellamt, 05 July 2010, Commitment Decision B10-19-10 – Stadtwerke Kiel AG; Bundeskartellamt, 05 July 2010, Commitment Decision B10-11-10 – SWM Versorgungs GmbH; Bundeskartellamt, 19 July 2010, Commitment Decision B10-13-10 – Stadtwerke Leipzig GmbH; Bundeskartellamt, 19 July 2010, Commitment Decision B10-18-10 – N-ERGIE AG; Bundeskartellamt, 19 July 2010, Commitment Decision B10-12-10 – RheinEnergie AG; Bundeskartellamt, 06 October 2010, Commitment Decision B10-22-10 – EnBW Gas GmbH; Bundeskartellamt, 06 July 2010, Commitment Decision B10-24-10 – Erdgas Südwest GmbH; Bundeskartellamt, 06 July 2010, Commitment Decision B10-23-10 – EnBW Ostwürttemberg DonauRies AG; Bundeskartellamt, 29 July 2010, Commitment Decision B10-25-20 – Stadtwerke Düsseldorf AG.

Similarly, in some cases the CDs followed the findings of sector inquiries of the BK.²⁰⁹ Hence, the concerns raised above can be transferred, with the only difference that it is the BK and not the Commission that (centrally) defines policy objectives and priorities.

On the other hand, some sector inquiries of the BK rather followed CDs of the BK, in order to assess whether or not the desired effects on the market can be found, and in how far further enforcement action is necessary to achieve certain policy objectives (e.g. market liberalisation).²¹⁰ Hence, sector inquiries might be used to control the effects of a certain CD-policy.

At the same time, it is interesting to see that also in Germany some findings of sector inquiries did not trigger follow-on (CDs) procedures due to the fact that the proposed solutions of the authority were taken into account in the design of new sector specific regulation.²¹¹ This exemplifies the interplay of competition law and regulation: The BK opts for CDs to react to shortcomings of sector specific regulation and to implement the findings of sector inquiries. Chances are that when competition law pursues regulatory objectives it may easily go beyond its legal limits. Moreover, this shows that there is a need to coordinate the enforcement of competition law with other legal regimes and also the work of other authorities, such as the German regulatory authority, the *Bundesnetzagentur* (BN). As will be discussed in the next section, CDs might have an important role to play in this regard.

d) *Coordinating 'Shared Regulatory Space'*

Another strategy of the BK when using CDs seems to be to facilitate the coordination with other administrative agencies, especially the German regulatory authority, the *Bundesnetzagentur* (BN). Interagency coordination has been identified as “one of the central challenges of modern governance”:²¹² When authorities ‘share regulatory space’ coordination is crucial to minimize the costs and maximize the benefits of the evolving interdependencies.²¹³ One example of such a ‘shared regulatory space’, where the BN ensures compliance with regulatory law while the BK ensures compliance with competition law, is the

²⁰⁹ See e.g. the cases concerning the restriction of secondary trading where the CDs of the BK followed its own sector inquiry (as well as the inquiry of the Commission) supra fn. 208.

²¹⁰ A good example in this regard: Bundeskartellamt, September 2010, Sector Inquiry (Heating Current).

²¹¹ See e.g. Bundeskartellamt, 20 July 2011, Activity Report 2009/2010, BT-Druck. 17/6640, p. 119; *Andreas Mundt*, (2011), *Alternative Instrumente der Kartellbehörden* p. 5.

²¹² *Jody Freeman and Jim Rossi*, *Agency Coordination in Shared Regulatory Space*, *Harvard Law Review* 125 vol., 5 iss., March 2012, p. 1134.

²¹³ For a systematisation of different forms of ‘shared regulatory spaces’ and different coordination instruments see *ibid.*, at 1145 et seq., 55 et seq.

marketing of easements (see Sec. 46 (5) EnWG). Both agencies aim at a transparent and non-discriminatory awarding of the corresponding easement rights in order to warrant undistorted competition. To coordinate their enforcement, and especially to facilitate compliance with the different legal requirements for undertakings, the authorities published a common guideline.²¹⁴ Interestingly, the BK was able to make this originally non-binding guideline compulsory for undertakings by way of CDs: The BK made a number of commitments binding concerning easement agreements in gas and electricity markets.²¹⁵ The authority was concerned about the procurement procedure of these rights, in particular that municipalities did not apply transparent and non-discriminatory standards when awarding easement rights to their own undertakings.²¹⁶ In reaction to the competition concerns of the authority, the undertakings (besides other measures²¹⁷) committed to comply with the corresponding guideline of the BK and the BN.²¹⁸ Coordination of different agencies through joint rule making can be beneficial in terms of efficiency, effectiveness and accountability.²¹⁹ In this regard, it is remarkable how the enforcement tool of CDs has been used by the BK to implement common standards with the BN.

e) Substituting Conditional Exemptions

As mentioned above, it has been observed that the Commission has been using CDs in order to pursue own policy objectives by granting conditional exemptions from the competition

²¹⁴ Bundeskartellamt and Bundesnetzagentur, 15 December 2010, Gemeinsamer Leitfaden von Bundeskartellamt und Bundesnetzagentur zur Vergabe von Strom- und Gaskonzessionen und zum Wechsel des Konzessionsnehmers.

²¹⁵ Bundeskartellamt, 18 October 2011, Commitment Decision B10-6/11 – Große Kreisstadt Dinkesbühl; Bundeskartellamt, 21 November 2011, Commitment Decision B10-17/11 – Stadt Markkleeberg; Bundeskartellamt, 22 June 2012, Commitment Decision B10-16/11 – Stadt Pulheim et al.; Bundeskartellamt, 02 December 2013, Commitment Decision B8-180/11-1 – Gemeinde Cölbe/Stadtwerke Marburg GmbH. See also Bundeskartellamt, 29 May 2013, Activity Report 2011/2012, p. 102.

²¹⁶ Bundeskartellamt, 29 May 2013, Activity Report 2011/2012, p. 102. Similar concerns can be found at Union level with a view to vertically integrated undertakings, see Commission, 10 January 2007, Sector Inquiry (Gas and Electricity), at para. 19. For the relationship between the CDs policy of the BK and the Commission see *infra* D.II.2.

²¹⁷ E.g. the obligation to refund excessive concession payments (see e.g. Bundeskartellamt, 22 June 2012, Commitment Decision B10-16/11 – Stadt Pulheim et al., at para. 6), and to repeat the procurement procedures and to abstain from including certain potentially anticompetitive clauses in the concession agreements (see e.g. Bundeskartellamt, 21 November 2011, Commitment Decision B10-17/11 – Stadt Markkleeberg, at para. 10).

²¹⁸ See e.g. Bundeskartellamt, 02 December 2013, Commitment Decision B8-180/11-1 – Gemeinde Cölbe/Stadtwerke Marburg GmbH, at para. 21; see also Bundeskartellamt and Bundesnetzagentur, 15 December 2010, Leitfaden Vergabe von Strom- und Gaskonzessionen.

²¹⁹ *Jody Freeman and Jim Rossi*, HLR (March 2012), p. 181 et seq.

rules (supra A). Accordingly, the question arises in how far a similar CD-policy is pursued by the German NCA.

Besides introducing the instrument of CDs as a tool of competition law enforcement, Regulation 1/2003 led to a fundamental change in the framework for applying Art. 81, 82 EC (Art. 101, 102 TFEU), especially by replacing the centralised notification and authorisation system by an enforcement system based on the direct application of the Articles in their entirety.²²⁰ Before the abolition of the notification system by Regulation 1/2003, the Commission alone was competent to grant (conditional) authorisations under Art. 81 (3) EC (now Art. 101 (3) TFEU).²²¹ For NCAs the situation did not change, since the courts interpret Art. 5 Regulation 1/2003 as precluding NCAs from being able to take a decision stating that there has been no infringement of competition law.

NCAs may only decide that there are no grounds for action on their part on the basis that (according to the information in their possession) the conditions for prohibition are not met.²²² In Germany a decision that there are no grounds for action can be taken pursuant to Sec. 32c ARC, which aims at providing legal certainty to undertakings that are obligated to self-assess their conduct. In how far the latter is suitable to substitute the power to decide that there has been no infringement is subject to controversy.²²³ Neither a decision based on Sec. 32c ARC, nor CDs of the BK are binding for other authorities (especially not NCAs of other MS) or courts.²²⁴ Hence, the question arises why the BK should use CDs instead of decisions pursuant to Sec. 32c ARC to grant ‘conditional exemptions’. There appear to be two main reasons: first, there is no provision explicitly granting the power to the BK to grant a conditional decision under Sec. 32c ARC.²²⁵ Second, the requirements to take a decision under Sec. 32 ARC are stricter compared to Sec. 32b ARC, as the BK has to come to the conclusion that based on the available evidence the requirements for a prohibition are not met.

²²⁰ See Art. 1 (2) Regulation 1/2003. Only in exceptional cases, where the “Community public interest“ requires it, Art. 10 Regulation 1/2003, which has never been used so far, replaces the former authorisation system.

²²¹ See Art. 9 (1) Regulation 17/62.

²²² With a view to Art. 102 TFEU see GC, 3 May 2011, Case C-375/09, ECR 2011 I-3055 – Tele2 Polska.

²²³ Critical towards the view of the Commission that the decision that there are no ground for action suffices e.g. *Nicolas Petit*, 5 October 2011, *Chillin'Competition*, “Canada Dry” Decisions.

²²⁴ *Albrecht Bach*, § 32 b GWB, at paras. 23, 24. A provision similar to Art. 16 Regulation 1/2003 concerning decisions of NCAs, according to which NCAs and national courts are precluded from taking decisions that are “running counter” to CDs of the Commission e.g. by finding an infringement of competition law based on the same facts after the issuance of a CD, is missing.

²²⁵ However, in practice there seem to be cases where the BK first mentions concerns about certain conduct of an undertaking and later, after the undertaking changed this conduct, issues a decision under Sec. 32c ARC. See e.g. *Bundeskartellamt*, 22 June 2009, *Activity Report 2007/2008*, at p. 134.

Looking at the practice of the BK seems to affirm the hypothesis that one strategy of the authority is to use CDs to substitute for the lack of powers to grant conditional non-infringement decisions. A good example is the already mentioned decision of the BK concerning the central marketing of media rights by the League Association in respect of matches in the first and second national football division.²²⁶ In this decision the BK examined in detail the requirements for an exemption according to Art. 101 (3) TFEU and Sec. 2 ARC, although several questions were only raised but not finally answered,²²⁷ and came to the conclusion that the possible efficiencies of the conduct make further interventions of the authority superfluous as long as the participation of the consumers is ensured by an appropriate marketing model.²²⁸ Therefore, the authority and the League Association agreed on a detailed marketing concept for the corresponding media rights from the 2013/2014 season onwards. The commitments were made binding upon the undertaking in exchange for the legal certainty that there will be no competition law proceedings with regard to the centralised marketing system. Furthermore, this seems to be a way for the BK to implement its own competition policy (which is strongly influenced by decisions of the Commission) with a view to the design of the market for the procurement of media rights in respect of matches in the first and second national football division.

Another suitable showcase for the similarities of CDs and conditional exemptions is a decision of the BK concerning a joint venture between the three mobile phone network operators T-Mobile, Vodafone and O2. The BK established that the requirements for an exception under Art. 81 (3) EC (Art. 101 (3) TFEU), Sec. 2 ARC might be met as the cooperation concerns several newly developing markets and facilitates the quick introduction of the new DVB-H technology. The authority emphasised that the decision aims at making sure that the cooperation does not eliminate competition in respect of a substantial part of the products in question and that the commitments are apt to reduce the negative effects on competition to the minimum degree necessary in order to realize the efficiencies.²²⁹ As the development of the technology in the markets concerned is hard to assess, the authority opted for a CD as a quick and flexible instrument to secure the potential efficiency gains of the introduction of the DVB-H standard into the market depended on the fact that there are no other technologies available that provide for a workable alternative and relativize the

²²⁶ Bundeskartellamt, 12 January 2012, Commitment Decision B 6-114/10 – Bundesliga. See *supra* D.I.2.a)cc).

²²⁷ See e.g. *Ibid.* at paras. 72, 90.

²²⁸ *Ibid.* at paras. 54 et seq., 89, 91 et seq.

²²⁹ Bundeskartellamt, 29 October 2007, Commitment Decision B 7 – 17/06 – Mobile Broadcasting, at para. 81.

efficiency gains of the DVB-H standard. Put more critically, it could be argued that the BK supported a certain technology (the DVB-H standard), as it assumed that the technology would prevail in the market anyway,²³⁰ by granting exceptions under competition law in order to quickly achieve certain efficiencies and consumer benefits.

While this decision strongly interferes with the competitive process, it uses the mechanism of reopening the proceeding as a flexible possibility to react to significant changes in the market. As will be discussed in the next section, the decision is therefore also a good example for the 'experimental' way the instrument is used in the area of newly evolving and fast developing markets.

f) Experimenting in Fast Developing Markets

It has been argued that the commitment procedure may be perceived "as a mechanism of adjustment through joint learning", which is especially well suited for volatile markets (such as high technology sectors), as it facilitates the quick and flexible solution of competition concerns and offers the possibility to adapt negotiated remedies to changes in the market.²³¹

The decision mentioned above concerning the joint venture between the three mobile phone network operators T-Mobile, Vodafone and O2 (supra D.I.2.e) can be read as an example of such a strategy. In this decision the BK was concerned with negative effects of the joint venture, such as the creation of technical market entry barriers and tying of the DVB-H standard to other mobile radio services.²³² At the same time, the authority recognised potential efficiencies of the enterprise, such as facilitating the quick introduction of the new DVB-H technology, and thus decided to make commitments binding to address the remaining concerns without hampering the potential benefits of the project.²³³ The BK specified the

²³⁰ The BK clearly states that there are signs that the DVB-H standard would prevail in the market, *ibid.*, at p. 19.

²³¹ *Yane Svetiev*, *Settling or Learning Through Commitment Decisions?*, p. 3, 13 et seq.

²³² First, the BK assumed that there might be several detrimental effects with a view to the newly emerging retail market for mobile broadcasting. The high investment in the joint venture might affect the strategy towards other technologies (especially UMTS) and might create incentives to tie other technologies to the DVB-H standard. Further, the collectivization of costs of the supply of mobile TV potentially reduces the scope left to the individual undertakings to set prices. Additionally, the cooperation regarding the content restricts the possibility of a differentiation of content in the retail market. (Bundeskartellamt, 29 October 2007, Commitment Decision B 7 – 17/06 – Mobile Broadcasting, at pp. 18, 19). With a view to the market for mobile data services, the BK was concerned that TV and video supply via the mobile network might be tied to the DVB-H standard and only offered complementary in the future. (*ibid.*, at p. 19). Finally, concerning the market for end devices, the cooperation might set incentives to incorporate the DVB-H only into mobile telephones but not other devices (e.g. MP3 players or notebooks) in order to foreclose the market and to exclude other standards (like the DMB standard) from end devices. (*ibid.*, at p. 19).

²³³ The undertakings committed not to tie the acquisition of TV-/Video-services via mobile networks (e.g. 3G) to the DVB-H standard (*ibid.*, at p. 20); as far as permissible by media law, the customers of the platform may

circumstances under which it will reopen the procedure to facilitate the adaptation of the commitments: as a definition of a ‘material change in circumstances’ (Sec. 32b (2) no. 1 ARC) it included especially the case that other technologies will be ready for the market, which allow for the expansion of mobile networks that can be used for broadcasting.²³⁴ Hence, this decision can be characterised as an example of ‘experimental’ enforcement via CDs, where the BK supported the quick introduction of a technology in a developing and dynamic market, subject to the possibility of reopening the procedure and readjustment of the remedies applied in case of new technological developments.

g) Complementing Merger Control in Joint Venture Cases

Finally, the commitment procedure mentioned before, concerning the joint venture of T-Mobile, Vodafone and O2 to create and operate a mobile television-broadcasting platform,²³⁵ can be seen as an example for the ‘convergence’ of antitrust and merger remedies.²³⁶

The project was already cleared under the merger control procedure in August 2007.²³⁷ It included the joint provision of technical services that are necessary to produce and transmit digitalized TV signals under the DVB-H standard and the joint acquisition of programme content for mobile TV.²³⁸ As the CD was linked to the clearance of a joint venture, which is to say that the cooperation was only planned but not yet implemented, it required a forward-looking assessment of the case. The BK, according to its preliminary assessment, predicted several restraints of competition due to the cooperation and, in reaction, made several

choose freely which programmes they purchase and which programmes they sell to end customers ((ibid., at pp. 21, 22); the “Electronic Service Guide” will only be operated jointly for basic data (title, start and end time, genre, brief description of the show), allowing for competition with a view to additional possibilities of presenting digital data, and will also be accessible via end devices that are not mobile telephones (ibid., at p. 22); DVB-H enabled devices must also be able to contain receivers for other mobile TV standards (e.g. DMB); DVB-H reception must be made possible on devices other than mobile phones as well; there will be no compulsory combination with mobile phone contracts or pre-paid credits; upon request the platform’s specifications for devices must be submitted to the BK (ibid., at pp. 23, 24).

²³⁴ Ibid., at para. 78. The BK further included in the definition of ‘material change in circumstances’ the increase in frequencies available for DVB-H, the amount of costs collectivized and hard-core restrictions within the joint venture.

²³⁵ Ibid.

²³⁶ With a view to the frequent use of structural remedies in the commitment procedure the Commission found that there is a “form of convergence between remedies in antitrust cases and in merger cases”, see Commission, 9 July 2014, Ten Years of Antitrust Enforcement under Regulation 1/2003, at para. 188.

²³⁷ Bundeskartellamt, 29 October 2007, Commitment Decision B 7 – 17/06 – Mobile Broadcasting, at p. 4.

²³⁸ Ibid., at pp. 12 et seq.

commitments binding that were supposed to avoid the establishment of technical market entry barriers and the tying of DVB-H standard to other mobile radio services.²³⁹

While the approach to make (structural) remedies binding based on an *ex ante* assessment of the case generally seems to remain the exception in the infringement procedure, in merger cases this method has to be applied, as the decision has to be based on the market structure and the expected future developments. In this context, the need for a quick and forward-looking assessment of the effects of the planned joint venture and potentially necessary adaptations of the enterprise may be well served by the use of the commitment procedure.

This is especially true in Germany, where joint ventures are subject to both the cartel prohibition and the merger control. This ‘dual control’ may lead to major uncertainties for the joint venture even after completion of the merger control procedure, e.g. as the time limits of the merger procedure are not applicable to the assessment of the cartel prohibition and as a prohibition decision remains possible even afterwards.²⁴⁰ In this regard, CDs may serve to quickly solve remaining concerns with regard to the potential negative effects of the formation of the joint venture and to create legal certainty for the undertakings concerned.

Nevertheless, the more general trend of a ‘convergence’ between antitrust and merger cases, and the application of similar underlying principles has been interpreted as a sign for a more ‘regulatory’ approach towards antitrust enforcement, and criticised on the grounds that the “nature of what is to be remedied is essentially different”.²⁴¹ The fundamental difference between the *ex ante* assessment of merger cases and the *ex post* perspective in antitrust cases, “translates into the different nature of both kinds of proceedings, of the standards applied and of the risks involved.”²⁴²

II. Enforcement Strategies of the OFT, the CMA and the Regulators

Already on first glance one notices the small amount of decisions issued in the UK by the OFT, the Competition and Markets Authority (CMA) that recently replaced the OFT, and the Regulators that hold concurrent competition enforcement powers for their respective

²³⁹ Supra fn. 232, 233.

²⁴⁰ For further discussion see only *Jürgen Lindemann*, 'Anhang zu § 1 GWB, Gemeinschaftsunternehmen', in Ulrich Loewenheim, Karl M. Meessen, and Alexander Riesenkampff (eds.), *Kartellrecht, Kommentar* (2 edn., München 2009), at para. 11.

²⁴¹ *Damien Gerard*, *Negotiated remedies in the modernization era: the limits of effectiveness*, p. 21.

²⁴² *Ibid.*

sectors:²⁴³ only 8 CDs (compared to 77 of the BK, and 33 of the Commission), and only 24 IDs (compared to 70 of the BK, and 78 of the Commission) have been issued since the authorities have the instrument of CDs at hand.²⁴⁴ The small amount of cases limits the range of strategies to be found in the UK when handling CDs. Nevertheless, three types of strategies can be identified (2.). However, before analysing the CD-practice in more detail this section will focus on the effects of the OFT's Enforcement Guidance on the scope of application of the commitment procedure (1).

1. Effects of the OFT's Enforcement Guidance on the Scope of Application of CDs

The binding guidance on the scope of application of the commitment procedure distinguishes the procedural framework in the UK from the procedural design in Germany (and the EU). The question arises in how far this difference impacts the practice of the NCAs. How much are the authorities in the UK actually restrained by the requirements established in the Enforcement Guidance? The difficulty in answering this question is that no information is published on (the number of) cases in which these requirements are *not* met. Furthermore, the small amount of CDs issued is no reliable yardstick as there are generally only few decisions passed in the UK. Moreover, the ratio of CDs compared to IDs is not very different e.g. from Germany (when excluding hardcore cartel conduct): In the UK CDs make up for 80 % and in Germany 82 % of the decisions.

Nevertheless, it can be said that all CDs in the UK explain why it was appropriate to accept commitments.²⁴⁵ Arguably, this enhances the transparency of the procedure, facilitates judicial control of the appropriateness of the application of instrument, and, hence, reduces the danger of an overuse of consensual competition law enforcement. Furthermore, these requirements provide third parties with parameters to exercise control (during the 'market test') on the suitability of the case for CDs, and force the authorities to justify their choice of the enforcement instrument.²⁴⁶ However, much depends on the quality of the reasoning, and

²⁴³ See for the concurrent powers of the Regulators Sec. 54 and sch. 10 CA98.

²⁴⁴ The small number of competition cases run in the UK was identified as a general problem by the Department for Business, Innovation and Skills, 2012, Growth, Competition and the Competition Regime, at para. 6.17.

²⁴⁵ For the OFT, 24 May 2005, Commitment Decision, No. CA98/03/2005 – TV Eye Limited, at paras. 42 et seq.; OFT, 1 March 2006, CA98/02/2006, CE/2479/03 – London-wide newspaper distribution, at paras. 32 et seq.; OFT, December 2011, Commitment Decision, OFT1395, CE/9388/10 – Private Motor Insurance, at paras. 5.3 et seq. Ofgem, 24 May 2012, Commitment Decision, 76/12 – North West Ltd (connection charges), at paras. 4.3 et seq.; OFT, 09 September 2014, Commitment Decision, CMA, CE/9496-11 – Vehicle service, maintenance and repair platforms in the UK, at paras. 4.5 et seq.

²⁴⁶ See e.g. Ofgem, 24 May 2012, Commitment Decision, 76/12 – North West Ltd (connection charges), at paras. 412 et seq. and para. 421.

in fact looking in some more detail at the arguments brought forward by the authorities shows that the effects of the Enforcement Guidance should not be overrated: Often the authorities only repeat the requirements and state that they are met without giving arguments or they simply refer for reasoning to (or summarise) other parts of the decision.²⁴⁷ At the same time, often these issues are also discussed in commitment decisions of the BK or the Commission e.g. in reaction to the market test or as part of the proportionality test.²⁴⁸ One exception,

²⁴⁷ This is true for the requirements that the competition concerns must be “*readily identifiable*” (for references to other chapters of the decision see OFT, 24 May 2005, Commitment Decision, No. CA98/03/2005 – TV Eye Limited, at para. 44; OFT, 1 March 2006, CA98/02/2006, CE/2479/03 – London-wide newspaper distribution, at para. 34; Ofgem, October 2005, Commitment Decision – SP Manweb, at para. 7.2, fn. 16; for short summaries of the competition concerns see OFT, December 2011, Commitment Decision, OFT1395, CE/9388/10 – Private Motor Insurance, at para. 5.6; Ofgem, 24 May 2012, Commitment Decision, 76/12 – North West Ltd (connection charges), at para. 4.6); *fully addressed by the commitments* (OFT, 24 May 2005, Commitment Decision, No. CA98/03/2005 – TV Eye Limited, at para. 45; OFT, 1 March 2006, CA98/02/2006, CE/2479/03 – London-wide newspaper distribution, at para. 35; OFT, December 2011, Commitment Decision, OFT1395, CE/9388/10 – Private Motor Insurance, at para. 5.6; Ofgem, October 2005, Commitment Decision – SP Manweb, at para. 7.5; only in Ofgem, 24 May 2012, Commitment Decision, 76/12 – North West Ltd (connection charges), at para. 4.7-4.9, a short reasoning can be found as to why the authority considers the commitments to be fully addressed); that the proposed commitments must be *capable of being implemented effectively and (if necessary) within a short period of time* (ibid., at para. 4.7 simply states that the requirement is met without any reasoning; OFT, 24 May 2005, Commitment Decision, No. CA98/03/2005 – TV Eye Limited, at para. 46; OFT, 1 March 2006, CA98/02/2006, CE/2479/03 – London-wide newspaper distribution, at para. 36; Ofgem, October 2005, Commitment Decision – SP Manweb, at para. 7.6 refer to the agreed timescale for the implementation; OFT, December 2011, Commitment Decision, OFT1395, CE/9388/10 – Private Motor Insurance, at para. 5.6 additionally underlines in general terms that the offered modification of the product is easy to conduct); that the *conduct must not constitute a “hardcore cartel”* (see only OFT, 24/04/2005, No. CA/98/03/2005 – TV Eye Limited, at para. 48; 12/2011, CE/9388/10 – Private Motor Insurers, at para. 5.7); that the *conduct must not consist of a “serious abuse of a dominant position”* (not discussed at all in OFT, 1 March 2006, CA98/02/2006, CE/2479/03 – London-wide newspaper distribution and Ofgem, October 2005, Commitment Decision – SP Manweb; only stated that the requirement is met in OFT, 24 May 2005, Commitment Decision, No. CA98/03/2005 – TV Eye Limited, at para. 48; in Ofgem, 24 May 2012, Commitment Decision, 76/12 – North West Ltd (connection charges), at para. 4.16 the regulator simply refers to its Notice of intention to accepting binding commitments (Ofgem, 23 November 2011, 158/11 – Notice of intention to accept binding commitments from Electricity North West Limited), to reply to a third party that commented on the proposed commitments, arguing: „This assessment [of the seriousness of abuse] includes consideration of the wider developments in the market. The Notice of intention to accepting binding commitments considered these wider developments.“ However, no further explicit reasoning regarding the seriousness of the abuse can be found in that notice.). The requirement that *compliance with and the effectiveness of any binding commitments would not be difficult to discern*, is discussed in a number of decisions. The authorities mainly argue that the undertakings that suffered from the competition law infringement are in a good position to monitor the compliance with the commitments and they refer to reporting obligations imposed up on the undertakings that offered the commitments (OFT, 24 May 2005, Commitment Decision, No. CA98/03/2005 – TV Eye Limited, at para. 50; OFT, 1 March 2006, CA98/02/2006, CE/2479/03 – London-wide newspaper distribution, at para. 38, 39; Ofgem, October 2005, Commitment Decision – SP Manweb, at para. 7.6. This requirement is not discussed in Ofgem, 24 May 2012, Commitment Decision, 76/12 – North West Ltd (connection charges) and OFT, December 2011, Commitment Decision, OFT1395, CE/9388/10 – Private Motor Insurance).

²⁴⁸ While the identification of the competition concerns is generally part of preliminary assessment, the question whether or not and how these concerns are addressed by the commitments is discussed as part of the proportionality test or in reaction to the market test (See e.g. Commission, 11 October 2007, Commitment Decision COMP/B-1/37.966 – Distrigaz, at paras. 17 et seq., 34 et seq.; Commission, 18 June 2012, Commitment Decision COMP/39.736 – Siemens/Areva, at paras. 31 et seq., para 103; Commission, 12 December 2012, Commitment Decision COMP/AT.39.847 – E-Books, at paras. 4.2, 4.3, 8, 9.2).

however, appears to be the requirement that accepting commitments must not undermine deterrence. This is a requirement that is usually not discussed in CDs of the other authorities and that is dealt with in the UK with a varying degree of scrutiny.²⁴⁹

2. Strategies of the Competition Authorities and the Regulators

Despite the fact that only a very limited amount of decisions has been published in the UK so far, three types of strategies of the NCAs and Regulators in the UK can be identified, all of which seem to correspond to strategies identified in the practice of the BK: The strategy to use CDs to shape market structures (a),²⁵⁰ to substitute conditional exemptions (b),²⁵¹ and to experiment in fast developing markets (c).²⁵²

a) *Shaping Market Structures*

As in Germany, the NCAs in the UK seem to have used CDs to change market structures, sometimes even in an ‘instrumental’ way, by exceeding the aim of re-establishing compliance with infringed competition law and pursuing more far-reaching objectives.

One recent example is the *Western Isles Road Fuels* case, which deals with long-term exclusive supply contracts between suppliers of road fuels and filling stations.²⁵³ In order to address the competition concerns of the CMA with a view to Ch. II CA98 the undertaking concerned not only committed to alter the contracts in question,²⁵⁴ but additionally committed to open up access to its marine terminals for rival wholesalers. As no refineries exist on the isle in question all road fuels are transported through these terminals to the market concerned.²⁵⁵ In this regard the CMA points out that opting for the commitment procedure does not undermine deterrence, since the “quasi-structural”²⁵⁶ commitments that relate to access to the marine terminals are likely to have a deterrent effect as they “go beyond terminating Certas’ [the undertaking concerned] contractual restrictions of filling stations [...

²⁴⁹ Supra C.II.2.c).

²⁵⁰ See supra D.I.2.a).

²⁵¹ See supra D.I.2.e).

²⁵² See supra D.I.2.f).

²⁵³ CMA, 24 June 2014, Commitment Decision MP-SIP/0034/ – Western Isles Road Fuels.

²⁵⁴ The undertakings concerned committed to allow filling station to negotiate prices for each individual transaction, or limiting exclusivity contracts to a period of two years, or giving filling stations the opportunity to terminate contracts with no fixed end-date at any time by giving three months’ notice (p. 16).

²⁵⁵ CMA, 24 June 2014, Commitment Decision MP-SIP/0034/ – Western Isles Road Fuels, at para. 4.1.

²⁵⁶ The CMA uses the term ‘quasi-structural’ without any clear definition. In fact, the obligation to grant access is a behavioural remedy with structural effects.

but] also address the specific market structure”, and the “resultant forward-looking benefits [...] outweigh any potential loss of deterrence from not reaching an infringement decision”.²⁵⁷ This already suggests that the ‘quasi-structural’ commitments go beyond the remedies at hand in the infringement procedure to address the competition concerns of the case. Yet, the CMA (in a footnote) underlined even more clearly that the commitments go beyond the competition concerns of the case, as “access to the marine terminals provide for wholesalers to draw ‘oil products’ including heating oils – not only road fuels, which are the focus of the CMA’s concerns – from the terminals.”²⁵⁸ In sum, the decision seems to aim at altering the market structure via ‘quasi-structural’ commitments, which go beyond addressing the competition concerns of the case and, hence, exceed possible remedies in an alternative infringement procedure.

Another example for a decision where such (behavioural) remedies with structural effects were made binding is the *London wide newspaper distribution* case concerning exclusive distribution agreements between Associated Newspaper Limited (ANL) and the operator of the London underground network, a maintenance company of UK’s rail infrastructure, and several train operating companies.²⁵⁹ The OFT was concerned that ANL may have abused its dominant position on the market for sale and/or distribution of free and/or paid for newspapers in the London area by foreclosing the market to new entry due to the combination of the long duration of these contracts and the 24 hour exclusivity (despite the fact that ANL only distributed newspaper in the morning).²⁶⁰ In reaction, ANL not only committed to waive its exclusive rights relating to the afternoon and evening distribution, but also to make arrangements for third party access to its distribution racks on commercial and non-discriminatory terms.²⁶¹ Different to the *Western Isles Road Fuels* case, during the ‘market test’ the OFT expressly dealt with the danger of making “too interventionist” commitments binding that “may well not be proportionate and could even be interpreted as going beyond the OFT’s powers under the Act in the given circumstances”.²⁶² For this reason the authority refused to demand more far-reaching commitments, which would obligate the undertakings concerned to re-tender their afternoon/evening distribution slots. Hence, in this case – despite

²⁵⁷ CMA, 24 June 2014, Commitment Decision MP-SIP/0034/ – Western Isles Road Fuels, at para. 4.6.

²⁵⁸ Ibid., Fn. 25.

²⁵⁹ OFT, 1 March 2006, CA98/02/2006, CE/2479/03 – London-wide newspaper distribution.

²⁶⁰ Ibid., at paras. 19 et seq.

²⁶¹ Ibid., at paras. 27 et seq.

²⁶² Ibid., at para. 67.

the use of (behavioural) remedies with structural effects ('quasi-structural') – there seems to be (at least) a clear intention of staying within the traditional limits of competition law enforcement.

b) Substituting Conditional Exemptions

As a consequence of the *Tele2 Polska* decision²⁶³ the UK's NCA (similar to the BK) is without the authority to take a decision stating that there has been no infringement of competition law, but can only pass decisions that there are no grounds for action on their part, on the basis that (according to the information in their possession) the conditions for prohibition are not met.²⁶⁴ As in Germany, the question arises whether – despite the possibility to issue a decision that there are no grounds for action – the competition authority in the UK uses CDs to substitute for the power to grant conditional non-infringement decisions as a competition policy tool. A closer look at the practice in the UK seems to affirm this hypothesis.

A clear example is the *Private Motor Insurance* case.²⁶⁵ The OFT was concerned about an information exchange product that enables insurers to access other insurers' pricing information for any risk profile and allows insurers to know in detail what their rivals' future prices will be, to determine detailed structure of their rivals' pricing strategies, and to adjust their own quotation prices. In particular, the fact that the information exchanged included highly individualised, commercially sensitive, non-public, and highly disaggregated pricing details and was exchanged on a frequent and consistent basis, raised concerns with a view to Art. 101 (1) TFEU and Ch. I CA98 (p. 4).

At the same time, the OFT recognised that information exchange may facilitate market entry and benefit consumers – as also the Commission pointed out in its (for other reasons not applicable) insurance block exemption regulation – and it could therefore not be ruled out that the criteria of Art. 101 (3) TFEU and Sec. 9 CA98 were met (p. 29). However, especially with a view to the features of the information exchanged, the OFT was sceptical that the exchange was indispensable for potential pro-competitive purposes.²⁶⁶ Exactly these features of the

²⁶³ GC, 3 May 2011, Case C-375/09, ECR 2011 I-3055 – *Tele2 Polska*.

²⁶⁴ See *supra* D.I.2.e).

²⁶⁵ OFT, December 2011, Commitment Decision, OFT1395, CE/9388/10 – *Private Motor Insurance*.

²⁶⁶ *Ibid.*, at p. 30: "In the OFT's view the frequent sharing of highly disaggregated, individualised and future data in this case is unlikely to be indispensable, especially if they are related to prices. The OFT considers that in this case, the sharing of future individualised data can facilitate a common understanding of the market and

information were subject to the commitments of the undertakings concerned. They were obligated to exchange information only in line with certain principles. According to these principles, no access must be granted to individualised future data, but only to anonymous data based on an average across at least five insurers (p. 36). According to the original definition this included all data that was less than 36 months old. However, during the consultation process not only was evidence presented to the OFT that the information exchange benefits market entrants (p. 44) but furthermore it was shown that most insurers tended to alter their prices on a two to three months basis, and therefore sharing data that was more than six months old was highly unlikely to facilitate a collusive outcome (p. 40). In consequence, in order not to constrain market entrants, the OFT accepted modifications of the commitments in a way that only the sharing of data up to six months old was subject to the special requirements concerning the features of the information exchanged (p. 40, 44).

The decision is a clear example of a CD that resembles a conditional exemption, and shows how the OFT is able to use CDs in a way to fine-tune market conduct of undertakings in a way it considers best suited to meet the criteria for an efficiency justification.²⁶⁷

Another decision that seems to be a good example for how CDs are used to implement certain visions of which behaviour of undertakings minimizes restraints of competition, while maximizing potential efficiencies, is the *hotel online booking*-decision.²⁶⁸ At the same time, this decision can be read as an example for another strategy, which is to use CDs to experiment in fast developing markets.

punishment strategies, by providing the coordinating companies with the ability to signal focal points and single out deviation or new entry.”

²⁶⁷ Another decision that was perceived as an example for a substitute of a conditional exemption was OFT, 24 May 2005, Commitment Decision, No. CA98/03/2005 – TV Eye Limited, see *Heike Schweitzer*, (2012), Commitment Decisions in the EU and in the Member States, p. 15. The decision was concerned with agreements between broadcasters to collectively develop and enforce standard terms and conditions concerning credit arrangements and payment dates and exchanged price sensitive information (para. 52). The OFT accepted that certain efficiencies could be gained through some centralisation (para. 52) and the commitments were supposed to retain these efficiencies without the competition concerns regarding the current arrangement (para. 57).

²⁶⁸ OFT, 31 January 2014, Commitment Decision, OFT1514dec – Hotel online booking, at paras 6.53 et seq.

c) *Experimenting in Fast Developing Markets*

Finally, in the UK as well CDs have been used in contexts of volatile markets as a means to ‘experiment’ with quick solutions for competition concerns that can be readjusted to changes in the market.²⁶⁹

In the *hotel online booking*-case, the OFT was concerned with vertical agreements between different hotel companies and online travel agents (OTAs), which restricted the ability of the latter to offer rooms to consumer for a discounted rate (by minimizing their own margins or commissions). These discounting restrictions might infringe Art. 101 (1) TFEU and Ch. I CA98 by limiting price competition between OTAs, as well as between OTAs and hotels’ own online platforms (intra-brand competition), and by creating barriers to entry of new OTAs.²⁷⁰ At the same time, the OFT acknowledged that these restrictions might lead to the realisation of efficiencies and therefore raised the issue of “how much discounting freedom would be appropriate in the context of the dynamic nature of the market”.²⁷¹ Unrestricted freedom to discount hotel accommodation may e.g. reduce the incentives of hotels to deal with OTAs and thereby damage inter-brand competition and chilling competition in the development of new business models.²⁷² In consequence, the OFT made commitments binding that did not allow for unrestricted discounting but allowed granting of reductions only to ‘closed groups’ (e.g. in the context of membership or loyalty schemes).²⁷³ Hence, as indicated above, the case can be seen as an example for the way CDs may be used to substitute conditional exemptions.

Furthermore, the CD was implemented in an ‘experimental’ manner. The OFT pointed out that “the exact consequences of the introduction of limited price competition through the Final Commitments cannot be anticipated with complete certainty” and also that the result of the negotiations with the parties is not considered to be “the only possible solution to the competition concerns it has identified”.²⁷⁴ Therefore, the OFT emphasised particularly the

²⁶⁹ On CDs as a “as a mechanism of adjustment through joint learning” see *Yane Svetiev, Settling or Learning Through Commitment Decisions?*, p. 3, 13 et seq.

²⁷⁰ OFT, 31 January 2014, Commitment Decision, OFT1514dec – Hotel online booking, at paras. 5.1 et seq.

²⁷¹ *Ibid.*, at para. 652, see also paras. 652 and 654 et seq. According to the OFT the still growing hotel online booking sector is especially characterised by frequent introduction of new technology, the development of new business models and the complex interaction between various players and distribution channels.

²⁷² *Ibid.*, at para. 653. For further potential harmful effects of too much pricing freedom see also paras. 6.54 et seq.

²⁷³ *Ibid.*, at paras. 6.12 et seq.

²⁷⁴ *Ibid.*, at paras. 6.57 and 6.64.

reduction of the duration of the commitments from three to two years, as a reaction to corresponding concerns raised by participants of the market test, as an important step to “be able to consider the impact of the Final Commitments in this evolving sector, and any unintended consequences, within a shorter time horizon.”²⁷⁵ Furthermore, the OFT underlined the role of monitoring and reporting obligations of the parties.²⁷⁶

In sum, apart from the resemblance to a conditional exemption,²⁷⁷ this decision has a clear ‘experimental’ character, in that it quickly implements negotiated remedies in a dynamic market but foresees control mechanisms, and a short time limit for an evaluation of the effects of the chosen measures, as a basis for possible readjustments.

III. Summary and Discussion

Commitment procedures are of major importance for competition law enforcement in Germany and the UK. Procedural economy and flexibility are the main aims of the enforcement tool. Accordingly, one strategy of the German NCA seems to be to use infringement procedures and corresponding court proceedings as a role model for follow-on commitment procedures, which facilitate a quicker and more consensual implementation of remedies across (geographical) markets. This strategy promises a combination of the benefits of both types of procedures. Similarly, ‘experimenting’ in dynamic markets that are often characterized by a high level of uncertainty, and negotiating commitments that are subject to adjustment to changing market environments is another strategy frequently applied in the MS analysed here. This approach demonstrates the suitability of the commitment procedure as a “policy-learning device”,²⁷⁸ especially as it allows to develop consensual solutions with the players active and, arguably, most knowledgeable about the sector. Finally, another interesting approach in this context is to use CDs as a tool to coordinate ‘shared regulatory space’ (e.g. between competition authorities and regulatory agencies). The flexibility of the tool allows for adjustment to practices and policies of other regulators acting in the same ‘regulatory space’, and therefore to minimize the costs and maximize the benefits of the existing interdependencies for the agencies themselves, as well as for the undertakings concerned.

²⁷⁵ Ibid., at paras. 6.37 et seq., 6.58.

²⁷⁶ Ibid., at para. 6.59.

²⁷⁷ Again, this is a case where the authority negotiated prescriptive rather than proscriptive commitments, which don’t simply prohibit discounting restrictions but define exactly how these restrictions have to look like.

²⁷⁸ *Yane Svetiev, Settling or Learning Through Commitment Decisions?*, p. 1.

On the other hand, the study of CDs at national level has shown that the procedural economy of the instrument is not as obvious as one might assume. Moreover, the analysis of the enforcement strategies of the NCAs revealed that efficiency seems to be an important aim but not the only reason for the authorities to opt for CDs. A number of strategies can be identified, where other objectives seem to prevail: in some cases, CDs seem to be issued in order to reshape market structures or prevent future distortion of competition; in other cases, CDs seem to be used to address findings of sector inquiries issued by the Commission or NCAs; another strategy of NCAs seem to be to use CDs as a substitute for the power to grant conditional exemptions; and finally CDs have been used to complement merger proceedings.

The main concern that arises with a view to these strategies is the danger of competition law stretching beyond its legal limits, and of CDs being (mis-)used for ‘instrumental’ competition law enforcement. Some of the cases analysed here suggest that CDs may adopt remedies not available under established competition law doctrine to pursue policy aims different from protecting and re-establishing the competitive process.

In sum, NCAs seem to make ample use of the discretion granted by the commitment procedure. While some of the strategies applied seem to be worthwhile with a view to balancing the aim of procedural economy and the aim of preventing ‘instrumental’ competition law enforcement, other strategies suggest that also in the MS some more self-restraint of the competition authorities is called for.

The (potential) lack of full *ex post* judicial control and the (partial) lack of sufficient self-restraint of NCAs underline the importance of comprehensive *ex ante* procedural safeguards and control mechanisms. Arguably, stricter procedures, or the stricter enforcement of procedural safeguards, would prevent some of the potential detrimental effects of CDs identified above. For example, providing for a requirement that behavioural remedies have to be prioritised over (‘quasi’-)structural remedies might reduce the incentive to make ‘instrumental’ use of CDs to shape (predetermined) market structures. Similarly, the practice to base far-reaching remedies (with structural effects) on a highly controversial theory of harm would not be possible, if CDs could not be used in cases where novel or uncertain legal issues arise. In fact, the OFT’s guidance on the scope of application of CDs, which is a distinctive feature of the UK’s commitment procedure, contains a corresponding requirement. However, the study has shown that the effects of the Enforcement Guidance are limited in practice. Generally, the guidance seems to enhance the transparency of the procedure, to facilitate judicial control, and to enhance the ‘market test’ by forcing the authorities to justify

their choice, and by providing parameters for testing the accuracy of the decision. On the other hand, looking in some more detail at the reasoning of the authorities to justify their decision to opt for the commitment procedure shows that the effects of the guidance should not be overrated.

In sum, the strategies analysed above indicate that a stricter procedure might in fact significantly influence the way the instrument is handled to translate the abstract rules on competition into specific duties for the undertakings concerned, and substitute for the lack of administrative self-restraint and comprehensive judicial control.

E. Conclusion

While the academic discussion surrounding the perceived trend towards more ‘consensual competition law’ in the EU is usually limited to the Commission’s commitment procedures and policies, this work has taken on the task of analysing corresponding developments at national level. The comparative study of commitment procedures and policies in Germany and the UK revealed that a significant degree of diversity exists.

Throughout this analysis, the view was taken that strong procedural safeguards are necessary to prevent CDs that go beyond the traditional legal-limits of competition law. This claim was based, on the one hand, on the fact that judicial review of CDs is limited (potentially also at national level), and, on the other hand, on the concept that (ideally) CDs should balance the aim of procedural economy with the aim of preventing ‘instrumental’ competition law enforcement. Accordingly, it has been argued that stricter (national) procedural frameworks are preferable – e.g. excluding cases from the commitment procedure where novel legal issues arise, establishing clear rules for the negotiation process that safeguard the ‘voluntary’ nature of the commitments, or restricting the content of CDs (e.g. by prioritising behavioural remedies).

Moreover, the analysis of CDs practices of NCAs in Germany and the UK has shown that (at least at national level) procedural economy seems to be an important, but not the only driving force behind the trend towards more ‘consensual competition law’. Various CD enforcement strategies of NCAs have been identified. Some of these approaches reflect the potential of the instrument to offer quick and flexible solutions for competition concerns, to facilitate mutual learning processes of authorities and undertakings, to coordinate ‘shared regulatory spaces’, and to ‘experiment’ with remedies in volatile markets. Other policies – e.g. the use of CDs to shape market structures, to prevent future harm, to substitute conditional exemptions, or to complement merger proceedings – hint at additional reasons for the widespread use of CDs. Some of these strategies raise concerns that the tool might be misused to stretch competition law beyond its legal limits, and pursue policy aims ulterior to the protection of the competitive process. These concerns underline the need for sufficient procedural safeguards, as complements to administrative self-restrained and comprehensive judicial control.

The scope of this study is limited and, hence, leaves ample room for future research:

First of all, the study is confined to analyse 2 out of 28 MS. Hence, a follow-on study could analyse commitment procedures and policies of NCAs in other jurisdictions to broaden the perspective, and test in how far the findings of this thesis can be generalized.

Second, this study focuses on the developments at national level and does not provide for an in-depth analysis of the Commission's commitment procedures and policies. The experiments with different procedural designs and policies at national level, which were illustrated and discussed here, might have much to add to the on-going discussion surrounding the Commission's practice. While some potential improvements may have been hinted at in the course of this inquiry, a more comprehensive follow-up study seems to be promising that analyses in detail what there is to be learned for the Commission from the experiences made at national level.

Third, the practices of the Commission and NCAs in the federal structure of the EU enforcement regime do not exist independently side-by-side but are in many ways linked and interrelated. While some links or similarities have revealed during this study, these relationships have not been analysed systematically. A comprehensive examination of these links and relationships might help to deepen the understanding of the functioning of the commitment procedure, and potential advantages and disadvantages of 'consensual enforcement tools' in the multilevel competition law enforcement system of the EU.

Fourth, the trend towards 'consensual competition law' analysed here could be seen as part of the wider debate surrounding the so-called 'New Modes of Governance' (NMG), which emerged as part of the internal market programme of the EU. As *Micklitz* pointed out, European governance has "yielded new processes of law-making, new regulatory instruments, and new enforcement mechanisms, and it is going to change the substance of the (private) law itself".²⁷⁹ Could it be that the developments discussed here with a view to the instrument of commitment procedures are part of the changes in the overall governance structure in the EU? Could it be that similar concerns arise – e.g. the implementation of policy programmes via 'instrumental' competition law enforcement; excluding political institutions like the parliament from the 'law making process', and the courts from its enforcement and interpretation; and changing the law via bilateral negotiations rather than controversies in an open forum?²⁸⁰ Could it be that similar solutions are called for?²⁸¹

²⁷⁹ *Hans-W Micklitz*, The Visible Hand of European Regulatory Private Law—The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation, *Yearbook of European Law*, 28 vol., 1 iss., 2009, p. 18.

²⁸⁰ With a view to EU governance, Micklitz raised the question of "what remains of law and the rule of law", when they are squashed between economization and politicization and identified three major changes of the concept of law: (1) Legal rules are increasingly becoming policy programmes, (2) law-making is no longer the subject to political controversy in an open forum, (3) law enforcement is moving away from courts to public bodies that seek soft solutions (de-judicialization). *Ibid.*, at 18, 19. See also *Mark Dawson*, 'New Modes of Governance', in A. Södersten D. Paterson (ed.), *Blackwell Companion to European and*

Moreover, a potential counterargument against the position taken in this study could be that a stricter procedural design would jeopardize the benefits of the instrument of CDs, especially procedural economy and flexibility (supra C.IX). However, placing the tool of commitment procedures into the debate surrounding NMG might help to understand the link between CDs and ‘the law’ as a complementary relationship: Possibly, ‘law’ could be perceived not as an external element but a means to improve participation, credibility, and safeguard rights of (excluded) participants, while, on the other hand, CDs may improve ‘the law’ to be less static and more responsive to rapidly changing and complex political and economic realities.²⁸²

Finally, fifth, some commentators that analysed the CDs practice of the Commission identified a paradigm shift towards more ‘regulatory’ antitrust enforcement.²⁸³ Arguably, the strategies of NCAs discovered here can be seen as part of a similar paradigm shift at national level.²⁸⁴ Hence, the question arises in how far the NCAs choices of enforcement tools have consequences for the substance of the law applied.²⁸⁵

In the European tradition, competition law is perceived as a justiciable, rule-based regime that constrains discretionary state intervention and aims at the realisation of the common market, as well as the protection of the undistorted and decentralised interaction of undertakings based on individual economic freedoms. It is characterized by the trust in the contribution of this

International Law (2014 (forthcoming)), p. 6, 7, who gives three parameters for a negative definition of NMG – NMG are in contrast to the traditional method of law making by (1) the creation of relatively uniform legal standards, (2) the dual legitimation of EU law through central political institutions like the Council and the European Parliament, and (3) the hierarchical application of binding rules within the MS. Doesn’t the current CDs practice conflict with these principles?

²⁸¹ Micklitz e.g. argues that there is a problem of democratic legitimacy and therefore the question arises, whether a normative frame is needed in order to ensure basic procedural requirements, such as transparency, accountability and participation, and safeguard their enforceability via individual an/or collective rights.²⁸¹

²⁸² On the complementary relation between law and NMG see *Mark Dawson*, *New Modes of Governance*, p. 9, 10.

²⁸³ *Damien Gerard*, *Negotiated remedies in the modernization era: the limits of effectiveness*, p. 3, 18 et seq.; *Niamh Dunne*, *JCLE* (2014), p. 13 et seq.

²⁸⁴ *Niamh Dunne*, *JCLE* (2014), p. 16 et seq., recently used five parameters – relating to the design of the instrument as such as well as its application – to measure this trend in the Commissions CDs practice, according to which ‘regulatory antitrust’ (1) is administrative-technocratic (rather than adversarial-judicial), (2.) enforces the competition rules *ex ante* (rather than *ex post*), (3) relies frequently on positive obligations (and is therefore prescriptive rather than proscriptive), (4) uses static remedies (instead of relying on the dynamic market process), and (5) aims at achieving a perceived ‘optimal’ market outcome (rather than preventing anticompetitive conduct).

²⁸⁵ The power to change the substance of the law applied via ‘consensual competition law enforcement’ triggers concerns with a view to the legitimacy of the decision, the principle of separation of powers and the values embodied in the rule of law, *ibid.*, at 36 et seq.

organized but decentralized system to the overall good.²⁸⁶ Therefore, the essential question to ask is how to protect this important European heritage while harnessing the potential benefits of a more ‘consensual competition law’.

²⁸⁶ See for the debate on the goals and interpretation of competition rules in historical context *Heike Schweitzer and Kiran Klaus Patel*, 'EU Competition Law in Historical Context, Continuity and Change', in Heike Schweitzer and Kiran Klaus Patel (eds.), *The Historical Foundations of EU Competition Law* (Oxford 2012), at p. 225, 26.

F. Annex

The following tables summarize the CDs and IDs issued in Germany and the UK since the introduction of the commitment procedure (01 May 2004 in the UK and 01 July 2005 in Germany). They are based on the ‘CA98 Public Register – decisions’²⁸⁷ (UK) and the Bundeskartellamt’s online database of decisions²⁸⁸ (Germany). The column ‘Type’ refers to the legal basis of the decision. 101/102 refer to Art. 101/102 TFEU (and the former Art. 81/82 EC), and ‘national equivalent(s)’ refer correspondingly to Ch. I, II CA98 (UK) and Sec. 1 et seq., 19 et seq. ARC (Germany). The column ‘Initiation’ refers to the first reported date of the corresponding procedure (e.g. the complaint). The column ‘Duration’ gives an estimate of the number of days past between the initiation and the issuance of the decision (excluding cases concerning ‘hardcore cartels’, which are outside the scope of application of CDs).²⁸⁹ The column ‘Remedy’ refers to the outcome of the decision and differentiates behavioural, ‘quasi-structural’²⁹⁰, and structural (which were not used) remedies, as well as fines.

²⁸⁷ Available at <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.of.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/?Order=Date> (last accessed 07/09/2014).

²⁸⁸ Available at http://www.bundeskartellamt.de/SiteGlobals/Forms/Suche/Entscheidungssuche_Formular.html?nn=3590938&docId=4116850 (last accessed 07/09/2014).

²⁸⁹ These numbers entail a certain degree of uncertainty e.g. as in some procedures only the month or the year the procedure started was reported.

²⁹⁰ I.e. behavioural remedies that entail the obligation to grant access and therefore have a structural effect. Other behavioural remedies might have structural effects as well, but for the sake of clarity the behavioural remedies have not been further subcategorized.

Commitment Procedures in the UK (sorted by Date of the Decision)

Case	Type	Initiation	Decision	Duration (days)	Remedy
1. TV Eye Ltd (OFT, CA98/03/2005, OFT794), Broadcasting	101 & national equivalent	04.03.03	24.05.05	812	Behavioural
2. SP Manweb (Ofgem), Electricity Distribution	National equivalent to 102	15.10.02	27.10.05	1108	'Quasi-structural'
3. London-wide newspaper Distribution (OFT, CA98/02/2006, CE/2479/03)	101, 102 & national equivalents	14.02.03	01.03.06	1111	Behavioural & 'Quasi-structural'
4. Private Motor Insurers (OFT, CE/9388/10, OFT1395)	101 & national equivalent	15.06.09	15.12.11	913	Behavioural
5. North West Ltd (Ofgem, 76/12), Electricity Distribution	102 & national equivalent	09.01.09	24.05.12	1231	Behavioural
6. Hotel Online Booking (OFT, CE/9320/10, OFT1514dec)	101 & national equivalent	15.04.10	31.01.14	1387	Behavioural
7. Wholesale supply of road fuels to filling stations in Scotland (CMA, MP-SIP/0034/)	National equivalent to 102	01.12.12	24.06.14	570	Behavioural & 'Quasi-structural'
8. Vehicle service, maintenance and repair platforms in the UK (CMA, CE/9496-11)	102 & national equivalent	01.04.2011	09.09.2014	1257	Behavioural

Infringement Procedures in the UK since 01 May 2004 (sorted by Date of the Decision)

Case	Type	Initiation	Decision	Duration (days)	Remedy
1. National Grid, formerly known as Transco (Ofgem, CA98/STG/06, 27/08)	102 & national equivalent	19.10.04	21.02.08	1220	Behavioural & fine
2. Roma-branded mobility scooters: prohibitions on online sales and online price advertising (OFT, CE/9578-12)	National equivalent to 101	15.04.12	05.08.13	477	Behavioural
‘Hardcore Cartel’ - Cases:					
3. Ltd. Et al. (OFT, CE/2464-03, CA98/08/2004, UOP)	National equivalent to 101		08.11.04		Fine
4. Mastic asphalt flat-roofing contracts in Scotland (OFT, CE/1925-02, CA98/01/2005)	National equivalent to 101		15.03.05		Fine
5. Felt and single ply flat-roofing contracts in the North East of England (OFT, CE/1777-02, CA98/02/2005)	National equivalent to 101		16.03.05		Fine
6. Felt and single ply roofing contracts in Western-Central Scotland (OFT, CE/3344-03, CA98/04/2005)	National equivalent to 101		08.08.05		Fine
7. MasterCard UK Members Forum Ltd (OFT; CP/0090/00/S, CA98/05/05)	101 & national equivalent		06.09.05		Finding of an infringement
8. Flat roof and car park surfacing contracts in England and Scotland (OFT, CE/3123-03 and CE/3645-03, CA98/01/2006)	National equivalent to 101		22.02.06		Fine
9. Stock check pads (OFT, CE/3861-04, CA98/03/2006)	National equivalent to 101		31.03.06		Fine
10. Aluminium spacer bars (OFT, CA98/04/2006)	National equivalent to 101		28.06.06		Fine
11. English Welsh and Scottish Railway Limited (ORR)	102 & national equivalent		17.11.06		Fine
12. Schools: exchange of information on future fees (OFT, CE/2890-03, CA98/05/2006)	National equivalent to 101		20.11.06		Fine

13. Cardiff Bus (OFT, CE/5281/04, CA98/01/2008)	National equivalent to 102		18.11.08		Finding of an infringement
14. Bid rigging in the construction industry in England (OFT, CE/4327-04, CA98/02/2009)	National equivalent to 101		21.09.09		Fine
15. Construction Recruitment Forum (OFT, CE/7510-06)	National equivalent to 101		29.11.09		Fine
16. Tobacco (OFT, CE/2596-03, CA98/01/2010)	National equivalent to 101		15.04.10		Fine
17. Loans to large professional services firms (OFT, CE/8950/08, CA98/01/2011)	101 & national equivalent		20.01.11		Fine
18. Abuse of a dominant position by Reckitt Benckiser (OFT, CE/8931/08, CA98/02/2011)	102 & national equivalent		12.04.11		Fine
19. Dairy retail price initiatives (OFT, CE/3094-03, CA98/03/2011)	National equivalent to 101		26.07.11		Fine
20. Airline passenger fuel surcharges for long-haul flights (OFT, CE/7691-06, CA98/01/2012)	101 & national equivalent		19.04.12		Fine
21. OFT, CA98/01/2013, Case CE/9161-09, Distribution of Mercedes-Benz commercial vehicles (OFT, CA98/01/2013, Case CE/9161-09)	National equivalent to 101		27.03.13		Fine
22. Collusive tendering in the supply and installation of certain access control and alarm systems to retirement properties (OFT, CA98/03/2013, Case CE/9248-10)	National equivalent to 101		06.12.13		Fine

Commitment Procedures in Germany (sorted by Economic Sector)

The background colours indicate which proceedings are linked by similar facts, theories of harm, and/or remedies applied.

Case	Economic Sector	Type	Initiation	Decision	Duration (days)	Remedy
1. Deutsche Lufthansa AG (B9-96/09)	Air transport	101, 102, an national equivalents	15.07.08	17.12.12	1616	Behavioural
2. EKO-PUNKT GmbH (B4-32-08-2)	Collection and recovery of packaging	101 & national equivalent	26.05.08	04.07.08	39	Behavioural
3. Duales System Deutschland (DSD) (B4-32-08-1)		101 & national equivalent	26.05.08	18.08.08	84	
4. Gas-Union GmbH (B8-113-03-7)	Energy (gas supply)	101 & national equivalent	01.12.03	29.01.07	645	Behavioural
5. Bayerngas GmbH (B8-113-03-6)		101 & national equivalent	01.12.03	29.01.07	1155	
6. Saar Ferngas AG (B8-113-03-8)		101 & national equivalent	01.12.03	29.01.07	1155	
7. WINGAS GmbH u.a. (B8-113-03-15)		101 & national equivalent	01.12.03	30.01.07	1156	
8. Erdgas-Verkaufs-Gesellschaft mbH (B8-113-03-5)		101 & national equivalent / 102	01.12.03	07.08.07	1345	
9. Gasversorgung Süddeutschland GmbH (B8-113-03-4)		101 & national equivalent	01.12.03	06.09.07	1375	
10. Ferrgas Nordbayern GmbH (B8-113-03-11)		101 & national equivalent	01.12.03	17.09.07	1386	
11. Verbundnetz Gas AG (B8-113-03-3)		101 & national equivalent	01.12.03	08.10.07	1407	
12. E.ON Avacon AG (B8-113-03-10)		101 & national equivalent	01.12.03	10.10.07	1409	
13. Erdgasversorgungsgesellschaft Thüringeb-Sachsen mbH (B8-113-03-12)		101 & national equivalent	01.12.03	06.02.08	1528	

14. EWE AG (B8-113-03-9)								1540	
15. RWE AG and RWE Energy AG (B8-113-03-2)								1711	
16. Thüga AG (B10-41/08)								277	Behavioural
17. Stadtwerke Düsseldorf AG (B10-34/08)								261	
18. Stadtwerke Karlsruhe GmbH (B10-22/08)								275	
19. EVL Energieversorgung Limburg GmbH (B10-43/08)								275	
20. Harz Energie GmbH								277	
21. Energieversorgung Gera GmbH (B10-47/08)								277	
22. Energie SaarLorLux (B10/51/08)								277	
23. Stadtwerke Homburg GmbH								277	
24. MITGAS Mitteldeutsche Gasversorgung GmbH (B10-25/08)								275	
25. RheinEnergie AG (B10-21/08)								261	
26. Bad Honnef AG (B10-38/08)								275	
27. Südweg Energie AG (B10-36/08)								276	
28. Gas-Versorgungsbetriebe Cottbus GmbH (B10-55/08)								318	
29. GGEW (B10-71/08)								195	
30. Stadtwerke Torgau GmbH (B10-74/08)								273	
31. Stadtwerke Völklingen Holding GmbH (B10-42/09)								195	

32. SWM Versorgungs GmbH (B10-11-10)			101 & national equivalent	05.05.10	05.07.10	61	Behavioural	
33. Köthen Energie GmbH (B10-20-10)			101 & national equivalent	18.05.10	05.07.10	48		
34. RWE AG (B10-48/09)			101 & national equivalent	08.01.10	05.07.10	178		
35. ENTEGA Vertrieb GmbH & Co. KG (B10-10-10)			101 & national equivalent	05.05.10	05.07.10	61		
36. Stadtwerke Hannover AG (B10-14-10)			101 & national equivalent	10.05.10	05.07.10	56		
37. Stadtwerke Kiel AG (B10-19-10)			101 & national equivalent	18.05.10	05.07.10	48		
38. WINGAS GmbH & Co. KG (B10-47-09)			101 & national equivalent	08.12.09	05.07.10	209		
39. Erdgas Münster GmbH (B10-45-09)			101 & national equivalent	30.10.09	05.07.10	248		
40. EWE Aktiengesellschaft (B10-44-09)			101 & national equivalent	07.10.09	05.07.10	271		
41. N-ERGIE AG (B10-18-10)		Energy (gas supply)	101 & national equivalent	18.05.10	19.07.10	62		
42. Stadtwerke Leipzig GmbH (B10-13-10)			101 & national equivalent	06.05.10	19.07.10	74		
43. RheinEnergie AG (B10-12-10)			101 & national equivalent	06.05.10	19.08.10	105		
44. EnBW Gas GmbH (B10-22-10)			101 & national equivalent	02.06.10	06.10.10	126		
45. Erdgas Südwest GmbH (B10-24-10)			101 & national equivalent	02.06.10	06.10.10	126		
46. EnBW Ostwürttemberg DonauRies AG (B10-23-10)			101 & national equivalent	02.06.10	06.10.10	126		
47. EnBW Vertrieb GmbH (B10-21-10)			101 & national equivalent	02.06.10	29.10.10	149		
48. Stadtwerke Düsseldorf AG (B10-25-10)			101 & national equivalent	02.06.10	29.10.10	149		
49. E.ON Westfalen-Weser (B10-15/09)		Energy (heating current)	National equivalents to 102	15.09.09	11.10.10	391		Behavioural

50. E.ON Mitte AG (B10-13/09)		National equivalents to 102	15.09.09	11.10.10	391	
51. EWR Aktiengesellschaft (B10-18/09)		National equivalents to 102	15.09.09	29.10.10	409	
52. EWE Energie Aktiengesellschaft (B10-50/09)		National equivalents to 102	15.09.09	29.10.10	409	
53. Pfalzwerke (B10-21-09)		National equivalents to 102	15.09.09	29.10.10	409	
54. Überlandwerk Fulda Aktiengesellschaft (B10-38/09)		National equivalents to 102	15.09.09	29.10.10	409	
55. Envia Mitteldeutsche Energie (B10-17/09)		National equivalents to 102	15.09.09	29.10.10	409	
56. RWE Vertrieb Aktiengesellschaft (B10-22/09)		National equivalents to 102	15.09.09	29.10.10	409	
57. SÜWAG Energie AG (B10-24/09)		National equivalents to 102	15.09.09	29.10.10	409	
58. NEW Energie GmbH und NEW Netz GmbH (B10-29/09)		National equivalents to 102	15.09.09	29.10.10	409	
59. WEMAG AG; B10-26/09		National equivalents to 102	15.09.09	29.10.10	409	
60. E.ON Thüringer Energie (B10-14/09)		National equivalents to 102	15.09.09	11.11.10	422	
61. Städtische Werke Aktiengesellschaft (B10-31/10)		National equivalents to 102	21.12.10	26.09.11	279	
62. Große Kreisstadt Dinkelsbühl (B10-6/11)	Energy (Marketing of easement agreements)	101 & national equivalents to 101 and to 102	14.01.11	18.10.11	277	Behavioural / 'Quasi-structural'
63. Stadt Marktleeburg (B10-17/11)		National equivalents to 101 and to 102	11.03.11	21.11.11	255	
64. Stadt Pulheim et al. (B10-16/11)		National equivalents to 101 and to 102	13.04.11	22.06.12	436	
65. Gemeinde Cölbe/Stadtwerke Marburg GmbH (B8-180/11-1)		National equivalents to 101 and to 102	04.10.11	02.12.13	790	

66. Beendigung einheitlicher Händlerentgelte bei electronic cash-Kartenzahlungen (B4-9/11)	Financial Services	101 & national equivalent	14.01.11	08.04.14	1180	Behavioural
67. Stadt Düsseldorf/Siemens AG (B7-30/07-1)	Fire protection	National equivalents to 101 and to 102	11.04.07	24.05.13	2235	Behavioural & 'Quasi-structural'
68. AOK Nordost (B3-11/13-1)	Health care	National equivalent to 101	16.04.12	24.06.13	434	Behavioural
69. Augenärztesozietät Brandenburg (aägb) (B3-11/13-2)		National equivalent to 101	16.04.12	01.07.13	441	
70. DFL (B6-114 /10)	Marketing of Media Rights (Bundesliga)	101 & national equivalents to 101 and to 102	11.02.11	12.01.12	335	Behavioural
71. DVB-H-Kooperation; T-Mobile, Vodafone, O2 (B7-17-06)	Mobile Broadcasting	101 & national equivalent	15.01.06	29.10.07	652	Behavioural
72. ProSieben/Sat1 and RTL (B7-22/07)	Television	101 & national equivalent	02.02.07	27.12.12	2155	Behavioural
73. Baden-Württemberg (B2-90/01-4)	Timber marketing	101 & national equivalent	10.10.01	09.12.08	2617	Behavioural
74. Nordrhein-Westfalen (B2-90-01-2)		101 & national equivalent	10.10.01	29.01.09	2668	
75. Rheinland-Pfalz (B2-90-01-3)		101 & national equivalent	10.10.01	03.03.09	2701	
76. Freistaat Thüringen (B2-90/01-1)		101 & national equivalent	10.10.01	17.09.09	2899	
77. Stadtwerke Mainz Netze GmbH (B8-159/11)	Water supply	National equivalents to 102	30.12.11	08.05.12	130	Behavioural

Infringement Procedures in Germany since 01 July 2005 (sorted by Date of the Decision)

Case	Economic Sector	Type	Initiation	Decision	Duration (days)	Remedy
1. E.ON Ruhrgas AG (B-8-113/03-1)	Energy (gas supply)	101 and national equivalent, 102	01.12.03	13.01.06	774	Behavioural
2. Soda Club GmbH (B3-39-03)	Filling of Drinks	National equivalent to 102	07.04.05	09.02.06	308	Behavioural
3. Praktiker Baumärkte GmbH (B9-149/04)	Marketing of building supplies	National equivalent to 102	29.11.04	08.05.06	525	Behavioural
4. Nord-KS GmbH + Co. KG (B1-116-04)	Marketing of building supplies	101 and national equivalent	18.05.04	09.08.06	813	Behavioural
5. Deutscher Lotto- und Totoblock (DLTB) und Landeslottogesellschaften (B10-148/05)	Gambling	101, 102 and national equivalents	07.12.05	23.08.06	259	Behavioural
6. GGA u.a. (B4-1006-06)	Glass waste	101 and national equivalent	01.01.99	31.05.07	3072	Behavioural
7. Versicherungsstelle Wiesbaden (Mitversicherungsgemeinschaft) u.a. (B4-31-05)	Insurance (for certified accountants)	101 and national equivalent	15.02.05	10.08.07	906	Behavioural
8. Merck KGaG und VWR International Europe (B3-64/05)	Laboratory chemicals	National equivalents to 101/102, and 101	15.05.08	14.07.09	425	Behavioural
9. GAG Gasversorgung Ahrensburg GmbH (B10-11/09)	Energy (gas, marketing of easements)	National equivalent to 102	26.03.09	16.09.09	174	Behavioural
10. Scandlines GmbH (B9-188/05)	Ferry services	102 and national equivalent	09.03.06	27.01.10	1420	'Quasi-

									structural'
11. Merck KGaA (B3-139/10)	Laboratory chemicals	National equivalent to 102	14.09.09	19.05.11	612				Behavioural
12. BIHA (B3-134/09)	Hearing aids	101, 102 and national equivalents	11.06.10	18.11.11	525				Behavioural
13. ENTEGA Privatkunden GmbH & Co. KG (B10-16/09)	Energy (electricity, heating current)	National equivalent to 102	01.09.09	19.03.12	930				Behavioural
14. BWB Berlin (B8-40/10)	Drinking water	National equivalent to 102	09.03.10	04.06.12	818				Behavioural
15. Brenntag Germany Holding GmbH, CG Chemikalien GmbH & Co. Holding KG, CVH Chemie (B3-19/08)	Marketing special chemicals	101 and national equivalent	15.04.08	12.11.12	1672				Behavioural (Prohibition of joint venture)
16. Kreisstadt Mettmann (B8-101/11)	Marketing of easements	National equivalent to 102	23.05.11	30.11.12	557				Behavioural
17. HRS (B9-66/10)	Hotel online rental	National equivalents to 101/102, and 101	01.01.10	20.12.13	1449				Behavioural
'Hardcore Cartel'-Cases:									
18. B3-129-03	Pharmaceutical wholesale	101 and national equivalent		28.08.06					Fine
19. B7-42-06	Small domestic appliances	National equivalents to 101/102, and 101		25.04.07					Fine
20. B3-6-5	Pharmaceuticals	101 and national equivalent		21.12.07					Fine
21. B1-200/06	Roof tiles	101 and national equivalent		09.02.09					Fine
22. B3-123-08	Contact lenses	101 and national equivalent		25.03.09					Fine

23. B11-20/05	Liquid gas	National equivalent to 101		09.04.09		Fine
24. B3-69/08	Hearing aids	National equivalent to 102		14.10.09		Fine
25. B1-281/04	Ready mixed concrete	National equivalent to 101		15.12.09		Fine
26. B11-18/08	Coffee roasters	National equivalent to 101		18.12.09		Fine
27. B12-11/08	Eyeglass lenses	101 and national equivalent		28.05.10		Fine
28. B11-19/08	Coffee roasters	National equivalent to 101		08.06.10		Fine
29. B11-15/09	Cable-filling compounds	National equivalent to 101		16.06.10		Fine
30. B5-100/09	Navigation systems	101 and national equivalent		18.06.10		Fine
31. B11-26/05	Production of boilers	National equivalent to 101		06.08.10		Fine
32. B12-14/09	Passenger air transport	National equivalent to 101		24.09.10		Fine
33. B12-16/08	Printing chemicals	National equivalent to 101		29.09.10		Fine
34. B12-13/08	Chemicals wholesale	National equivalent to 101		26.11.10		Fine
35. B12-11/09	Fire engines	National equivalent to 101		10.02.11		Fine
36. B12-12/10	Fire engines	National equivalent to 101		27.07.11		Fine
37. B12-15/08	Wood-based materials	National equivalent to 101		15.09.11		Fine
38. B11-26/05	Production of steam boilers	National equivalent to 101		20.10.11		Fine
39. B10-104/11	Heavy fuel	National equivalent to 101		07.11.11		Fine

40. B12-15/09	Production of concrete pipes	National equivalent to 101		28.02.12		Fine
41. B12-13/08	Chemicals wholesale	National equivalent to 101		15.03.12		Fine
42. B12-11/11	Rail production and distribution	National equivalent to 101		15.07.12		Fine
43. B10-102/11	Automatic door systems	National equivalent to 101		20.07.12		Fine
44. B5-20/10	Power-driven hand tools	National equivalent to 101		20.08.12		Fine
45. B7-115/11	Sat finder	National equivalent to 101		28.08.12		Fine
46. B10-101/11	Power transformers	National equivalent to 101		19.09.12		Fine
47. B11-11/08	Production of confectionery	National equivalent to 101		31.01.13		Fine
48. B11-13/06	Production and marketing of flour	101		15.02.13		Fine
49. B11-17/06	Cleaning and cosmetic materials	National equivalent to 101		15.03.13		Fine
50. B12-16/12, B12-19/12	Rail production	National equivalent to 101		15.07.13		Fine
51. B12-14/10	Household dishes	National equivalent to 101		16.10.13		Fine
52. B10-105/11	Production and marketing of beer	National equivalent to 101		31.03.14		Fine

53. B2-58/09	Grocery retail	National equivalent to 102		03.07.14		Finding of a past infringement
--------------	----------------	----------------------------	--	----------	--	--------------------------------

G. List of Abbreviations

AG	Advocate General
ARC	Act Against Restraints of Competition
Art.	Article
BK	Bundeskartellamt
BN	Bundesnetzagentur
CA98	Competition Act 1998
CAT	Competition Appeal Tribunal
CD(s)	Commitment Decision(s)
CJEU	Court of Justice of the European Union
CMA	Competition and Markets Authority
Commission	EU Commission
E.g.	Exempli gratia ('for example')
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECN	European Competition Network
Enforcement Guidance	OFT, 2004, Enforcement, Incorporating the Office of Fair Trading's guidance as to the circumstances in which it may be appropriate to accept commitments
EnWG	Energiewirtschaftsgesetz (Energy Industry Act)
Et al.	Et alii/aliae/alia ('and others')
Et seq.	Et sequens ('and what follows')
EU	European Union
GC	General Court
GG	Grundgesetz (German Basic Law)
I.a.	Inter alia ('among other things')
I.e.	Id est ('that is to say')

ID(s)	Infringement Decision(s)
IU(s)	Informal Understanding(s)
MS	Member State(s)
NCA(s)	National Competition Authority (-ies)
NMG	New Modes of Governance
Ofcom	Office of Communications
Ofgem	Office of Gas and Electricity Markets
OFT	Office of Fair Trading
Regulation 1/2003	Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, p. 1
Regulation 773/2004	Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ 2004 L 123, 27.4.2004, p. 18
Sched.	Schedule
Sec.	Section
TEU /	Treaty on the European Union /
TFEU	Treaty on the Functioning of the European Union, OJ C 326, 26/10/2012 p. 1-39 (consolidated version)
VwVfG	Verwaltungsverfahrensgesetz (Administrative Procedure Act)

H. Bibliography

1. Literature

- Bach, Albrecht, '§ 32 b GWB', in Ulrich Immenga and Ernst-Joachim Mestmäcker (eds.), *Wettbewerbsrecht, GWB, Kommentar zum Deutschen Kartellrecht* (4 edn., 2 vol. 2007).
- Barker, Alex, 'Brussels reaches legal limits on Google antitrust settlement', *Financial Times*, 21 July 2014, available at <http://www.ft.com/cms/s/0/46019982-0e99-11e4-ae0e-00144feabdc0.html> (accessed 29 July 2014).
- Bechtold, Rainer and Bosch, Wolfgang, '§ 32b GWB', in Stefan Bechtold (ed.), *Kartellgesetz, Gesetz gegen Wettbewerbsbeschränkungen* (7 edn., München 2013).
- Becker, Carsten, '§ 56 GWB', in Ulrich Loewenheim, Karl M. Meessen, and Alexander Riesenkampff (eds.), *Kartellrecht, Kommentar* (2 edn., München 2009).
- Bornkamm, Joachim, '§ 32b GWB', in Hermann-Josef Bunte (ed.), *Langen/Bunte Kartellrecht, Kommentar* (12 edn., 1 vol., Cologne 2014).
- Bottemann, Yves and Patsa, Agapi, 'Towards a more sustainable use of commitment decisions in Article 102 TFEU cases', *Journal of Antitrust Enforcement*, 1 vol., 2 iss., 2013, p. 347-74.
- Cavicchi, Piero, 'The European commission's discretion as to the adoption of Article 9 commitment decisions: Lessons from *Alrosa*', *Discussion Paper Europa-Kolleg Hamburg, Institute for European Integration*, 3 iss., 2011, p. 1-15.
- Cengiz, Firat, 'Judicial Review And The Rule Of Law In The EU Competition Law Regime After *Alrosa*', *European Competition Journal*, 7 vol., 1 iss., 2011, p. 128-53.
- Choné, Philippe, Suoam, Saïd, and Vialfont, Arnold, 'On the optimal use of commitment decisions under European competition law', *International Review of Law and Economics*, 37 vol., 2014, p. 169-79.
- Colomo, Pablo Ibáñez, 'On the Application of Competition Law as Regulation: Elements for a Theory', in P. Eeckhout, T. Tridimas, and A. Thies (eds.), *Yearbook of European Law* (29 vol., Oxford 2010), p. 261-306.
- Connor, John M. and Lande, Robert H., 'Cartels as Rational Business Strategy: Crime Pays', *Cardozo Law Review*, 34 vol., 2012, p. 427-90.
- Cook, Christopher J., 'Commitment Decisions: The Law and Practice under Article 9', *World Competition*, 29 vol., 2 iss., 2006, p. 209-28.

- David Broomhall, Stephan Manuel Nagel, Ulrich Scholz, The application of competition law to the energy sector: An overview and comparison of recent practice by the Bundeskartellamt and the EU Commission, *Concurrences*, 3 iss., 2013, p. 1-17.
- Dawson, Mark, 'New Modes of Governance', in A. Södersten D. Paterson (ed.), *Blackwell Companion to European and International Law* (2014 (forthcoming)).
- Dreher, Thomas, Die Beschränkung der Vertragsabschlussfreiheit durch kartellbehördliche Verfügung, Behördliche Wettbewerbsbeteiligungsverbote für Energielieferverträge?, *Neue Juristische Wochenschrift*, 2008, p. 1557-62.
- Dunne, Niamh, Commitment Decisions in EU Competition Law, *Journal of Competition Law and Economics*, 2014, p. 1-46, available at <http://jcle.oxfordjournals.org/content/early/2014/02/22/joclec.nht047.abstract> (accessed 22 September 2014).
- Emmerich, Volker, '§ 32 GWB', in Ulrich Immenga and Ernst-Joachim Mestmäcker (eds.), *Wettbewerbsrecht, GWB, Kommentar zum Deutschen Kartellrecht* (4 edn., 2 vol. 2007).
- Florian Wagner-von Papp, Best and Even Better Practices in Commitment Procedures after *Alrosa*: The Dangers of Abandoning the "Struggle for Competition Law", *Common Market Law Review*, 49 vol., 2012, p. 929-70.
- Freeman, Jody and Rossi, Jim, Agency Coordination in Shared Regulatory Space, *Harvard Law Review* 125 vol., 5 iss., March 2012, p. 1131-211.
- Georgiev, George Stephanov, Contagious Efficiency: The Growing Reliance on U.S.-Style Antitrust Settlements in EU Law, *Utah Law Review*, 4 iss., 2007, p. 971-1037.
- Gerard, Damien, 'Negotiated remedies in the modernization era: the limits of effectiveness', in Philip Lowe and Mel Marquis (eds.), *European Competition Law Annual 2013: Effective and Legitimate Enforcement* (Oxford 2014 (forthcoming)), available at <http://ssrn.com/abstract=2395414> (accessed 15/04/2014).
- Gestel, Rob van, Micklitz, Hans-W., and Maduro, Miguel Poiars, Methodology in the New Legal World, *EUI Working Papers*, 13 vol., 2012, p. 1-23.
- Hellmann, Hans-Joachim and Bruder, Stefan, Kartellrechtliche Grundsätze der zentralen Vermarktung von Sportveranstaltungen - Die aktuelle Entscheidungen der Kommission zur Bundesliga und FA Premier League, *Europäische Zeitschrift für Wirtschaftsrecht*, 2006, p. 359-63.
- Hellstrom, Per, Maier-Rigaud, Frank, and Bulst, Friedrich Wenzel, Remedies in European Antitrust Law, *Antitrust Law Journal*, 76 vol., 2009-2010, p. 43-63.

- Henning, Thomas Tobias, Settlements im Europäischen Kartellverfahren, Eine rechtsvergleichende Untersuchung konsensualer Verfahrensbeendigungsmechanismen unter besonderer Berücksichtigung der Verpflichtungszusageentscheidung, eds. Ernst-Joachim Mestmäcker, Wernhard Möschel, and Martin Hellwig (Wirtschaftsrecht und Wirtschaftspolitik, Baden-Baden, 2010).
- José Carlos Laguna de Paz, Understanding the limits of judicial review in European competition law, *Journal of Antitrust Enforcement*, 2013, p. 1-22.
- Kellerbauer, Manuel, Playground instead of playpen: The Court of Justice of the European Union's Alrosa judgement on art. 9 of Regulation 1/2003, *European Competition Law Review*, 1 iss., 2011, p. 1-8.
- Klose, Tobias, 2014, Die Zusagenpraxis der Kommission nach Art. 9 VO Nr. 1/2003, Studienvereinigung Kartellrecht, Internationales Forum EU-Kartellrecht, Brüssel, available at http://www.studienvereinigung-kartellrecht.de/downloads/forum-kartellrecht/2014_dr-tobias-klose.pdf (accessed 10 May 2014).
- Körper, Thomas, Die erstmalige Anwendung der Verpflichtungszusage gemäß Art. 9 VO1/2003 und die Zukunft der Zentralvermarktung von Medienrechten an der Fußballbundesliga, *Wettbewerb in Recht und Praxis*, 4 iss., 2005, p. 463-67.
- Körper, Torsten, 'Rechtliches Gehör, Verpflichtungszusagen nach Art. 9 VO 1/2003 und die Alrosa-Entscheidung', in Wolfgang Weiß (ed.), *Die Rechtsstellung Betroffener im modernisierten EU-Kartellverfahren*, Vorträge des 1. Speyerer Kartellrechtsforums (Baden-Baden 2010), p. 73-91.
- Lindemann, Jürgen, 'Anhang zu § 1 GWB, Gemeinschaftsunternehmen', in Ulrich Loewenheim, Karl M. Meessen, and Alexander Riesenkampf (eds.), *Kartellrecht, Kommentar* (2 edn., München 2009).
- Mariniello, Mario, Commitments or Prohibition? The EU Antitrust Dilemma, *Bruegel Policy Brief*, 01 iss., January 2014, p. 1-8.
- Mattioli, Evi, Commitments and settlements in the future UK competition regime, *European Competition Law Review*, 34 vol., 3 iss., 2013, p. 160-68.
- Mestmäcker, Ernst-Joachim, A Legal Theory Without Law, *Posner v. Hayek on Economic Analysis of Law*, available at SSRN: <http://ssrn.com/abstract=1168422> (accessed 26 July 2014), 2008, p. 1-62.
- Micklitz, Hans-W, The Visible Hand of European Regulatory Private Law—The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation, *Yearbook of European Law*, 28 vol., 1 iss., 2009, p. 3-59, available at <http://yel.oxfordjournals.org/content/28/1/3.short> (accessed 22 September 2014).

- Monti, Giorgio, Independence, Interdependence and Legitimacy: The EU Commission, National Competition Authorities, and the European Competition Network, EUI Working Papers, 2014, p. 1-19.
- Mundt, Andreas, Alternative Instrumente der Kartellbehörden, 2011, speech, 44. Innsbrucker Symposium des FIW, available at http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Reden/L1/AndreasMundt-AlternativeInstrumentederKartellbeh%C3%B6rden.pdf?__blob=publicationFile&v=6 (accessed 20 February 2014), p. 1-18.
- Olsen, Gregory and Roy, Bryony, The New World of Proactive EC Antitrust Enforcement? Sector Inquiries by the European Commission, *Antitrust* 21 vol., 3 iss., 2007, p. 82-88.
- Petit, Nicolas, 5 October 2011, “Canada Dry” Decisions, *Chillin'Competition*, <http://chillingcompetition.com/2011/10/25/canada-dry-decisions/> (accessed 13 July 2014).
- , 17 June 2011, The Perverse Effects of the Court’s Ruling in Tele2 Polska, *Chillin'Competition*, <http://chillingcompetition.com/2011/06/17/the-perverse-effects-of-the-courts-ruling-in-tele2-polska/> (accessed 13 July 2014).
- Rab, Suzanne, Monnoyeur, Daphne, and Sukhtankar, Anjali, Commitments in EU Competition Cases: Article 9 of Regulation 1/2003, its application and the challenges ahead, *Journal of European Competition Law & Practice*, 1 vol., 3 iss., 2010, p. 171-88.
- Rehbinder, Eckard, '§ 32 b GWB', in Ulrich Loewenheim, Karl M. Meessen, and Alexander Riesenkaempff (eds.), *Kartellrecht, Kommentar* (2 edn., München 2009).
- Rosenberg, Hubertus von, Unbundling through the Back Door... the case of network divestiture as a remedy in the energy sector, *European Competition Law Review*, 5 iss., 2009, p. 237-54.
- Sadowska, Malgorzata and Willems, Bert, Power Markets Shaped by Antitrust, *European Competition Journal*, 9 vol., 1 iss., 2013, p. 131-73.
- Schneider, Hans-Helmut, '§ 54 GWB', in Hermann-Josef Bunte (ed.), *Langen/Bunte Kartellrecht, Kommentar* (12 edn., 1 vol., Köln 2014).
- Schroeder, Werner, 'Art. 288 AEUV', in Rudolf Streinz (ed.), *EUV/AEUV* (München 2012).
- Schweitzer, Heike, 'Commitment decisions under Art. 9 of Regulation 1/2003: The developing EC practice and case law', in Claus-Dieter Ehlermann and Mel Marquis

- (eds.), *European Competition Law Annual 2008: antitrust Settlement under EC competition law* (Oxford 2010), p. 547-79.
- , 'The European Competition Law Enforcement System and the Evolution of Judicial Review', in Claus-Dieter Ehlermann and Mel Marquis (eds.), *European Competition Law Annual: 2009, The Evaluation of Evidence and its Judicial Review in Competition Cases* (Oxford 2011), p. 79-146.
- , 'Verpflichtungszusagen im Gemeinschaftsrecht', in Stefan Bechtold, Joachim Jickeli, and Mathias Rohe (eds.), *Recht, Ordnung und Wettbewerb. Festschrift zum 70. Geburtstag von Wernhard Möschel* (Baden-Baden 2011), p. 637-61.
- , 'Commitment Decisions in the EU and in the Member States: Functions and risks of a new instrument of competition law enforcement in a federal enforcement regime', available at <http://ssrn.com/abstract=2101630> (accessed 01 September 2014), 2012, p. 1-22.
- , 'Zur Bedeutung des „More Economic Approach“ für die Unionsgerichte', speech as part of an expert forum at the ECJ, 2012, p. 1-16.
- Schweitzer, Heike and Patel, Kiran Klaus, 'EU Competition Law in Historical Context, Continuity and Change', in Heike Schweitzer and Kiran Klaus Patel (eds.), *The Historical Foundations of EU Competition Law* (Oxford 2012), p. 207-30.
- Ştefan, Oana Andreea, 'European Competition Soft Law in European Courts: A Matter of Hard Principles?', *European Law Journal*, 14 vol., 6 iss., 2008, p. 753-72.
- Sura, Martin, 'Art. 7 VO 1/2003', in Hermann-Josef Bunte (ed.), *Langen/Bunte Kartellrecht, Kommentar* (12 edn., 2 vol. 2014).
- Svetiev, Yane, 'Settling or Learning Through Commitment Decisions?' (forthcoming).
- Temple Lang, John, 'Commitment Decisions And Settlements With Antitrust Authorities And Private Parties Under European Antitrust Law', in Barry E. Hawk (ed.), *International Antitrust Law & Policy, Annual Proceedings of the Fordham Corporate Law Institute 2005* (2006), p. 265-324.
- , 'Commitment Decisions Under Regulation 1/2003', in Charles Gheur and Nicolas Petit (eds.), *Alternative Enforcement Techniques in EC Competition Law – Settlements, commitments and other novel instruments* (Brussels 2009).
- Thomas o. Barnett, 'Section 2 Remedies: What to Do After Catching the Tiger by the Tail', Presentation at the American Bar Association Conference on Monopolization Remedies Charlottesville, Virginia, 2008, p. 1-9, available at <http://www.justice.gov/atr/public/speeches/233884.htm> (accessed 02 July 2014).

Whish, Richard, 'Commitment Decisions Under Article 9 of the Modernisation Regulation: Some Unanswered Questions', in Martin Johansson, Nils Wahl, and Ulf Bernitz (eds.), *Liber Amicorum in Honour of Sven Norberg, A European for all seasons* (Brussels 2006), p. 555-72.

Wils, Wouter P. J., *Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003*, *World Competition*, 29 vol., 3 iss., 2006, p. 345-66.

---, *The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles*, *World Competition*, 31 vol., 3 iss., 2008, p. 335-52.

2. Case Law

GC, 3 May 2011, Case C-375/09, ECR 2011 I-3055 – Tele2 Polska.

OLG Düsseldorf, 04 October 2007, NJOZ 2008, 891 = WuWE DE-R 219 – E.ON Ruhrgas AG.

ECJ, 6 April 1995, Joined Cases C-241/91 P and C-242/91 P, ECR 1995 I-743 – RTE and ITP (Magill).

CFI, 6 October 1994, Case T-83/91, ECR 1994 II-755 – Tetra Pak.

CFI, 8 June 1995, Case T-7/93, ECR 1995 II-1533 – Langnese-Iglo.

CAT, 08/04/2005, Case 1017/2/1/03 – Pernod-Ricard SA & Campbell Distillers Ltd. v. OFT/Bacardi-Martini Ltd.

GC, 11 July 2007, Case T-170/06, ECR 2007 II-2601 – Alrosa.

CFI, 14 May 1998, Case T-310/94, ECR 1998 II-1043 – Gruber + Weber.

CAT, 16 December 2010, Case 1026/2/3/04 – Wanadoo UK PLC v. Office of Communications.

AG Kokott, 17 September 2009, Case C-441/07 P, ECR 2010 I-5949 – Alrosa.

CFI, 18 September 1992, Case T-24/90, ECR 1992 II-2223 – Automec.

CFI, 28 February 2002, Case T-395/94, ECR 2002 II-875 – Atlantic Container Line.

ECJ, 29 June 2010, Case C-441/07 P, ECR 2010 I-5949 – Alrosa.

CAT, 29 November 2004, Case 1026/2/3/04 – Wanadoo UK PLC v. Office of Communications.

CAT, 31/10/2007, Case 1087/2/3/07 – IMS v. Ofcom/Red Bee Media Ltd./BBC.

3. Decisions

Bundeskartellamt, 01 December 2008, Commitment Decision B10-38/08 – Bad-Honnef AG.

---, 01 December 2008, Commitment Decision B10-41/08 – Thüga AG.

---, 01 December 2008, Commitment Decision B10-21/08 – RheinEnergie AG.

---, 01 December 2008, Commitment Decision B10-25/08 – MITGAS Mitteldeutsche Gasversorgung GmbH.

---, 01 December 2008, Commitment Decision B10/51/08 – Energie SaarLorLux.

---, 01 December 2008, Commitment Decision B10-22/08 – Stadtwerke Karlsruhe GmbH.

---, 01 December 2008, Commitment Decision B10-43/08 – EVL Energieversorgung Limburg GmbH.

---, 01 December 2008, Commitment Decision B10-18/08 – Harz Energie GmbH.

---, 01 December 2008, Commitment Decision B10-47/08 – Energieversorgung Gera GmbH.

---, 01 December 2008, Commitment Decision B10-33/08 – Stadtwerke Homburg GmbH.

---, 01 December 2008, Commitment Decision B10-55/08 – Gas-Versorgungsbetriebe Cottbus GmbH.

---, 01 December 2008, Commitment Decision B10-34/08 – Stadtwerke Düsseldorf AG.

---, 02 December 2013, Commitment Decision B8-180/11-1 – Gemeinde Cölbe/Stadtwerke Marburg GmbH.

---, 2. December 2008, Commitment Decision B10-36/08 – Süwag Energie AG (Gas Prices).

---, 03 June 2009, Commitment Decision B10-71/08 – GGEW.

---, 05 July 2010, Commitment Decision B10-45-09 – Erdgas Münster GmbH.

---, 05 July 2010, Commitment Decision B10-44-09 – EWE AG.

---, 05 July 2010, Commitment Decision B10-47-09 – WINGAS GmbH & Co KG.

---, 05 July 2010, Commitment Decision B10-10-10 – ENTEGA Vertriebs GmbH & Co KG.

---, 05 July 2010, Commitment Decision B10-14-10 – Stadtwerke Hannover AG.

---, 05 July 2010, Commitment Decision B10-48-09 – RWE AG.

---, 05 July 2010, Commitment Decision B10-20-10 – Köthen Energie GmbH.

---, 05 July 2010, Commitment Decision B10-19-10 – Stadtwerke Kiel AG.

---, 05 July 2010, Commitment Decision B10-11-10 – SWM Versorgungs GmbH.

---, 06 February 2008, Commitment Decision B8-113-03-12 – Erdgasversorgungsgesellschaft Thüringen-Sachsen.

---, 06 July 2010, Commitment Decision B10-23-10 – EnBW Ostwürttemberg DonauRies AG.

---, 06 July 2010, Commitment Decision B10-24-10 – Erdgas Südwest GmbH.

---, 06 October 2010, Commitment Decision B10-22-10 – EnBW Gas GmbH.

---, 07 August 2008, Commitment Decision B8-113-03-2 – RWE AG and RWE Energy AG.

---, 8 October 2007, Commitment Decision B8-113-03-3 – Verbundnetz Gas AG.

---, 10 October 2007, Commitment Decision B8-113-03-10 – E.ON Avacon AG.

---, 12 January 2012, Commitment Decision B 6-114/10 – Bundesliga.

---, 17 September 2009, Commitment Decision B10-74/08 – Stadtwerke Torgau GmbH.

---, 17 September 2009, Commitment Decision B 2 – 90/01-1 – Marketing of Timber, Thüringen.

---, 18 February 2008, Commitment Decision B8-113-03-9 – EWE AG.

---, 18 October 2011, Commitment Decision B10-6/11 – Große Kreisstadt Dinkesbühl.

---, 19 July 2010, Commitment Decision B10-12-10 – RheinEnergie AG.

---, 19 July 2010, Commitment Decision B10-18-10 – N-ERGIE AG.

---, 19 July 2010, Commitment Decision B10-13-10 – Stadtwerke Leipzig GmbH.

---, 19 March 2012, Decision B10-16/09 – ENTEGA Privatkunden GmbH & Co. KG.

---, 21 November 2011, Commitment Decision B10-17/11 – Stadt Markkleeberg.

---, 22 April 2010, Commitment Decision B10-42/09 – Stadtwerke Völklingen Holding GmbH.

---, 22 June 2012, Commitment Decision B10-16/11 – Stadt Pulheim et al.

---, 29 July 2010, Commitment Decision B10-25-20 – Stadtwerke Düsseldorf AG.

---, 29 October 2007, Commitment Decision B 7 – 17/06 – Mobile Broadcasting.

---, 29 October 2010, Commitment Decision B10-21-10 – EnBW Vertriebs GmbH.

---, 29 October 2010, Commitment Decision B10-22/09 – RWE Vertrieb AG.

CMA, 24 June 2014, Commitment Decision MP-SIP/0034/ – Western Isles Road Fuels.

Commission, 11 October 2007, Commitment Decision COMP/B-1/37.966 – Distrigaz.

---, 12 December 2012, Commitment Decision COMP/AT.39.847 – E-Books.

---, 18 June 2012, Commitment Decision COMP/39.736 – Siemens/Areva.

---, 18 March 2009, Commitment Decision COMP/39.402 – RWE gas foreclosure.

---, 19 January 2005, Commitment Decision, COMP/37.214 – Bundesliga.

---, 22 March 2006, Commitment Decision, COMP/C.2/38.173 – Joint selling of the media rights of the FA Premier League.

- , 23 July 2003, Commitment Decision, COMP/C.2/37.398 – Joint Selling of the commercial rights of the UEFA Champions League.
- , 2011, OJ 2011/C 308/06 – Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU.
- Government, Federal, 12 August 2004, BT-Drs. 15/3640 – Government Draft on the Seventh Amendment to the Act Against Restraints of Competition.
- Ofcom, 2 November 2010, Decision CW/00613/04/03 – Investigation into BT's residential broadband pricing.
- Ofgem, 23 November 2011, 158/11 – Notice of intention to accept binding commitments from Electricity North West Limited
- , 24 May 2012, Commitment Decision, 76/12 – North West Ltd (connection charges).
- , October 2005, Commitment Decision – SP Manweb.
- OFT, 1 March 2006, CA98/02/2006, CE/2479/03 – London-wide newspaper distribution.
- , 09 September 2014, Commitment Decision, CMA, CE/9496-11 – Vehicle service, maintenance and repair platforms in the UK.
- , 24 May 2005, Commitment Decision, No. CA98/03/2005 – TV Eye Limited.
- , 31 January 2014, Commitment Decision, OFT1514dec – Hotel online booking.
- , December 2011, Commitment Decision, OFT1395, CE/9388/10 – Private Motor Insurance.

4. Other Primary Sources

The Competition Act 1998 and Other Enactments (Amendment), Regulations 2004 No. 1261, Autorité de la concurrence, 2009, Notice on Competition Commitments, http://www.autoritedelaconcurrence.fr/doc/cpro_enga_2mars09_uk.pdf (accessed 09/06/2014).

Bundeskartellamt, 01 October 2011, Activity Report 2008, short version (English).

---, 13 September 2005, press release – Öffnung der langfristigen Gasverträge wird kommen.

- , 15 June 2010, Bericht über die Evaluierung der Beschlüsse zu langfristigen Gaslieferverträgen.
- , 20 July 2011, Activity Report 2009/2010, BT-Druck. 17/6640.
- , 22 June 2009, Activity Report 2007/2008, BT-Druck. 16/13500.
- , 25 January 2005, B 8-113/03, Kartellrechtliche Beurteilungsgrundsätze zu langfristigen Gasverträgen.
- , 29 May 2013, Activity Report 2011/2012, BT-Druck. 17/13675.
- , December 2009, Sector Inquiry (Gas Transmission) B10-7/09, "Kapazitätssituation in den deutschen Gasfernleitungsnetzen".
- , September 2010, Sector Inquiry (Heating Current), "Sektorenuntersuchung Heizstrom, Marktüberblick und Verfahren".
- Bundesnetzagentur, Bundeskartellamt and, 15 December 2010, Gemeinsamer Leitfaden von Bundeskartellamt und Bundesnetzagentur zur Vergabe von Strom- und Gaskonzessionen und zum Wechsel des Konzessionsnehmers, available at http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Leitfaden/Leitfaden_Vergabe_von_Strom-und_Gaskonzessionen.pdf?blob=publicationFile&v=1 (accessed 17 February 2014).
- Cartels, ICN Working Group on, 2005, Defining Hard Core Cartel Conduct: Effective Institutions, Effective Penalties, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc346.pdf> (accessed 12 May 2014).
- Commission, 9 July 2014, Commission Staff Working Document SWD (2014) 230/2 – Ten Years of Antitrust Enforcement under Regulation 1/2003.
- , 10 January 2007, Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report).
- , 17/09/2004, MEMO/04/217, Commitment decisions (Article 9 of Council Regulation 1/2003 providing for a modernised framework for antitrust scrutiny of company behaviour), available at http://europa.eu/rapid/press-release_MEMO-04-217_en.htm (accessed 12/05/2014).
- , 28 April 1999, White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programm 99/027, OJ C 132/1 (1999).

---, 1985, Fourteenth Report on Competition Policy (Published in conjunction with the 'Eighteenth General Report on the Activities of the European Communities 1984').

---, 1988, Seventeenth Report on Competition Policy (Published in conjunction with the 'Twenty-first General Report on the Activities of the European Communities 1987').

---, 1998, XXVIIIth Report on Competition Policy (1997) (Published in conjunction with the General Report on the Activities of the European Union - 1997).

Department for Business, Innovation and Skills, 2012, Growth, Competition and the Competition Regime, Government Response to Consultation, available at https://http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31879/12-512-growth-and-competition-regime-government-response.pdf (accessed 20 January 2014).

DG Competition, 2012, Antitrust Manual of Proceedings, Internal DG Competition working documents on the procedures for the application of Articles 101 and 102 TFEU, available at http://ec.europa.eu/competition/antitrust/information_en.html (last visited 11/06/2014).

---, March 2014, Competition policy brief, To commit or not to commit? Deciding between prohibition and commitments, available at http://ec.europa.eu/competition/publications/cpb/2014/003_en.pdf (accessed 01 September 2014).

Industry, Department of Trade and, 2003, Regulatory Impact Assessment Giving Effect to Council Regulation 1/2003, available at <http://webarchive.nationalarchives.gov.uk/+http://www.dti.gov.uk/ccp/consultpdf/compmodria.pdf> (accessed 12 October 2013).

---, 2003, Modernisation - a consultation on the Government's proposals for giving effect to Regulation 1/2003 EC and for re-alignment of the Competition Act 1998, available at <http://webarchive.nationalarchives.gov.uk/+http://www.dti.gov.uk/ccp/consultpdf/compmodcon.pdf> (accessed 12 October 2013).

OFT, 05/01/2011, press release PN 02/11 – Bar Council of Northern Ireland modifies its rules to address OFT concerns.

---, 16/08/2012, press release PN 71/12 – OFT welcomes action by NHS trusts to ensure compliance with competition law.

---, 2004, Enforcement, Incorporating the Office of Fair Trading's guidance as to the circumstances in which it may be appropriate to accept commitments, available at http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/offt407.pdf (accessed 10 November 2013).

---, 2011, The impact of competition interventions on compliance and deterrence, available at <http://hb.betterregulation.com/external/oft1391.pdf> (accessed 01 September 2014).

---, April 2004, 407a, Draft Guideline on Enforcement.