Judicial Application of Commitment Decisions: from *Gasorba* to the Digital Markets Act

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1. Introduction

At least since the 1980s, the European Commission (the "Commission") has created and used alternative techniques, other than those explicitly provided by Council Regulation (EEC) 17/62 [1], to close antitrust proceedings without the issuance of a formal decision [2]. In addition to comfort letters [3], the Commission engaged in informal negotiations with

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[1] Council Regulation (EEC) 17/1962, First Regulation implementing Articles 85 and 86 of the Treaty.

[2] I. VAN BAEL, *The Antitrust Settlement Practice of the EC Commission*, in *Common Market Law Review*, 1986, Vol. 23, Iss. 1, p. 61; D. WAELBROECK, *New Forms of Settlements of Antitrust Cases and Procedural Safeguards: Is Regulation 17 Falling into Abeyance?*, in *European Law Review*, 1986, Vol. 11, Iss. 4, p. 268.

[3] See Court of Justice, case 37/79, *Anne Marty* [1980] ECLI:EU:C:1980:190, para 9.

the undertakings involved in antitrust proceedings to convince them to "voluntarily" modify the behaviours under investigation [4]. If the undertakings agreed to change their conducts to meet the Commission's *desiderata*, the issuance of a formal decision was deemed unnecessary and therefore suspended. Despite the limited number of published decisions, and therefore the obscurity of this *modus operandi* [5], this practice is well illustrated for example by the *IBM* case [6].

Codifying this informal practice, commitment decisions have been introduced into EU competition law by Article 9 of Council Regulation (EC) 1/2003, according to which if «the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings» and «conclude that there are no longer grounds for action by the Commission» [7].

Commitment decisions have rapidly become a pivotal tool for the enforcement of Articles 101 and 102 TFEU. Their importance is confirmed not only by their practical diffusion but also by the fact that this remedy has been mirrored in the legal orders of all the Member States [8]. The power to accept commitments was included among those that Article 5 of Council Regulation (EC) 1/2003 already directly conferred also to the Member States' National Competition Authorities ("NCAs"): even if no similar instruments were available at the national level, NCAs could al-

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[4] G.M. ROBERTI, *Procedure applicative delle regole di concorrenza*, in M. BESSONE (dir.), *Trattato di diritto privato dell'Unione europea*, Giappichelli, Torino, 2006, p. 1223, p. 1249.

[5] Leading to the creation of an «alternative body of secret jurisprudence» (I. VAN BAEL, *The Antitrust Settlement Practice*, cit., p. 90).

[6] See para 94 of the Commission, Fourteenth Report on Competition Policy (1984) [1985].

[7] Article 9 of Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[8] With reference to the Italian legal order see Article 14-*ter* of Law No 287 of 13th October 1990, Norme per la tutela della concorrenza e del mercato, which has been added by Article 14 of Law Decree No 223 of 4th July 2006, recante disposizioni urgenti per il rilancio economico e sociale, per il contenimento e la razionalizzazione della spesa pubblica, nonché interventi in materia di entrate e di contrasto all'evasione fiscale.

ready use commitment decisions by directly applying this provision [9]. In any case, Directive (EU) 2019/1 ("ECN+ Directive") later introduced an obligation for the Member States to introduce and maintain similar instruments [10].

Being based on the agreement between the antitrust authority and the undertakings, commitment decisions changed the traditional way of enforcing competition rules. Competition law is no longer applied only (or mainly) through the exercise of an authoritative power, but rather by negotiation [11]. This led to a qualitative shift in the Commission's and NCAs' activity: commitment decisions have expanded their possibilities to use competition rules for "meta-competitive" and quasi-regulatory purposes [12]. This shift from antitrust to regulation found its natural and coherent conclusion in the Digital Markets Act (the "DMA") [13], which also allows the Commission to adopt commitment decisions [14].

After a brief overview of the main – substantive and procedural – features of commitment decisions (in section one) and an equally brief discussion of the relationship between this instrument and market regulation (in section two), this chapter, in line with the focus of the COMP.EU.TER Project, will focus (in section three) on the interplay between commitment decisions and private enforcement.

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[9] E.g. Autorité belge de la Concurrence's decision of 31 August 2006 in case CONC-I/O-00/0049 – *Banksys*. However, the direct application of this provision by the NCAs was limited by the fact that the power to sanction the undertakings in the event of a violation of commitments (conferred to the Commission by Article 9(2) of Council Regulation (EC) 1/2003, cit.) did not enjoy direct effect. See *infra* notes 151-155.

[10] Article 12 of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

[11] Commitment decisions are «part of a wider trend that promotes what one could call "consensual competition law enforcement"» (F. WAGNER-VON PAPP, *Best and even Better Practices in Commitment Procedures after Alrosa: The Dangers of Abandoning the "Struggle for Competition Law"*, in *Common Market Law Review*, 2012, Vol. 49, Iss. 3, p. 929).

[12] M. SIRAGUSA, *Le decisioni con impegni*, in P. BARUCCI, C. RABITTI BEDOGNI (eds.), *Vent'anni di antitrust. L'evoluzione dell'autorità garante della concorrenza e del mercato*, Giappichelli, Torino, 2010, p. 386.

[13] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

[14] Article 25 of the DMA.

2. Commitment decisions: procedural issues and key features

2.1. Preliminary remarks

Articles 9 of Council Regulation (EC) 1/2003 and 12 of ECN+ Directive allow the Commission and the NCAs to initiate antitrust proceedings based on competition concerns. At the EU level, the Commission shall inform the undertakings of these concerns by adopting a preliminary assessment ("PA"). According to the Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, the PA must summarise «the main facts of the case» and identify «the competition concerns that would warrant a decision requiring that the infringement is brought to an end» [15]. The PA is a sort of streamlined version of the ordinary statement of objections ("SO") and replaces it. The PA's main purpose is to allow the parties to formulate appropriate commitments capable of addressing the competitive issues raised by the Commission [16].

The regime is similar also with reference to the majority of the NCAs. However, the ECN+ Directive does not explicitly rule out the need for NCAs to send a SO. The reference to the NCAs' "concerns" suggests that the SO should not be necessary [17]. This wording, however, does not seem sufficiently clear to prevent differing practices at the national level. The point is relevant because the need to draft a fully-fledged SO would reduce one of the key benefits that NCAs can gain from commitment decisions, i.e. time and resource savings, allowing the NCAs to detect and investigate more antitrust offenses. This, in turn, may further reduce the deterrent effects of competition rules, already affected by commitment decisions [18].

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[15] Para 121 of Commission Notice of 20 October 2011 on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU.

[16] Para 122 of Commission Notice on best practices, cit.

[17] Article 12 of the ECN+ Directive.

[18] While «it is desirable for there to be mechanisms through which settlements can be arrived at in appropriate cases […], the success of [antitrust rules] also depends to a large extent on its deterrent effect, which means that there is also an important public interest in infringement cases proceeding» (cf. Competition Appeal Tribunal, case 1026/2/3/04, *Wanadoo UK* [2004] paras 123-124; Tribunale Amministrativo Regionale Lazio, No 6173, *Carte di credito* [2011] para 4.2.1). See also A. GAUTIER, N. PETIT, *Optimal Enforcement of Competition Policy: The Commitments Procedure under Uncertainty*, CORE Discussion Papers No 63/2014.

Indeed, if the undertakings offer commitments that are deemed appropriate to address the competitive concerns described in the PA, the Commission and the NCAs have the possibility to close the proceeding without the burden (nor the possibility [19]) of «concluding whether or not there has been or still is an infringement» [20]. As the proceeding is closed without ascertaining any antitrust offence, no sanction can be imposed on the undertakings. The decision has the sole effect to close the proceeding making the commitments binding for the undertakings.

2.2. The scope of application and practical diffusion

Thanks to these characteristics, commitment decisions have become a very popular enforcement instrument [21], especially in the context of new markets and new technologies [22]: as there is no need to prove an antitrust infringement, this instrument allows the antitrust authorities to tackle conducts – not illicit, but simply raising competitive concerns – and to rapidly develop flexible solutions to cope with the innovative competitive issues that often characterize new markets, and especially digital markets [23].

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[19] Article 9 of Council Regulation (EC) 1/2003, cit. «prevent[s] the Commission from making a formal finding of infringement of Article 101 TFEU or Article 102 TFEU» (General Court, case T-342/11, *CEEES* [2014] para 55).

[20] Recital 13 of Council Regulation (EC) 1/2003, cit. and Recital 39 of the ECN+ Directive.

[21] Data published on the Commission's website (available at https://competition-cases.ec.europa.eu/search) show that, between January 2004 and January 2024, about 27% of the cases handled (48 out of 179) and about 63% of non-cartel cases (48 out of 76) were defined with commitments.

[22] E.g. Commission decisions of 16 December 2009 in case COMP/39.530 – *Microsoft (Tying)*; 29 April 2014 in case AT.39939 – *Samsung*; 13 December 2011 in case COMP/39.692 – *IBM (Maintenance Services)*; 12 December 2012 in case COMP/39.847 – *E-books*; 4 May 2017 in case AT.40153 – *E-book MFNs and related matters*; 11 July 2022 in case AT.40305 – *Network sharing - Czech Republic*; 20 December 2020 in case AT.40462 – *Amazon Marketplace* and in case AT.40703 – *Amazon Buy Box*. See also the failed attempt that led to Commission decision of 27 June 2017 in case AT.39740 – *Google Search (Shopping)*.

[23] Accordingly, commitment decisions could represent a useful and appropriate tool to address, from the viewpoint of the Commission or the NCAs, the (clear) competitive concerns created by new digital practices whose illegality is (by contrast) questionable or

Here the rapidity of the intervention is often a key factor. Solving a competitive concern by timely correcting the undertakings' behaviours may be more important than sanctioning them, especially if a fine can be imposed only after a long administrative proceeding and it is likely to become final only after years of litigation. Being characterized by strong network effects and economies of scale and scope and near-zero marginal and distributional costs, digital markets are often "tipping markets", i.e. markets prone to rapidly shift from a competitive status to an oligopolistic or monopolistic one [24]. Sanctioning an undertaking after that the market tipped in its favour and the undertaking became dominant or super-dominant [25], may not be the best solution to safeguard the competitiveness of the market structure, i.e. to achieve one of the priorities of antitrust enforcement [26].

Indeed, the main purpose of the negotiated procedure is to reach an agreement between the antitrust authorities and the undertakings on the adjustments that the latter should make to their future behaviours to eliminate the competitive concerns described in the PA. The attention is therefore directed toward the future, rather than to the assessment of the undertakings' past conducts [27]: the agreement of the undertakings allows

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difficult to prove before a court, such as so-called algorithmic collusion. See L. CALZOLARI, *The Misleading Consequences of Comparing Algorithmic and Tacit Collusion: Tackling Algorithmic Concerted Practices Under Art. 101 TFEU*, in *European Papers*, 2021, Vol. 6, Iss. 2, p. 1193, p. 1220 ff. See also J. BLOCKX, *Dawn of the Robots: First Cases of Algorithmic Collusion*, in this *Book*, p. 117, p. 135.

[24] Cf. F. MUNARI, *Competition on Digital Markets: An Introduction*, in this *Book*, p. 7.

[25] General Court, case T-612/17, *Google* [2021] ECLI:EU:T:2021:763, paras 182-183.

[26] *Inter alia* Court of Justice, case 85/76, *Hoffmann-La Roche* [1979] ECLI:EU:C:1979:36, para 91; Court of Justice, joined cases C-501, C-513, C-515 e C-519/06 P, *GlaxoSmithKline Services* [2008] ECLI:EU:C:2008:738, para 63; Court of Justice, case C-52/09, *TeliaSonera Sverige* [2011] ECLI:EU:C:2011:83 paras 22-24; Court of Justice, case C-883/19 P, *HSBC Holdings* [2023] ECLI:EU:C:2023:11 para 121.

[27] The change of perspective from yesterday to tomorrow was already highlighted by the Opinion of AG Kokott, case C-441/07 P, *Alrosa* [2009] ECLI:EU:C:2009:555 para 74. In other words, the antitrust authorities focus on treating the competitive "symptoms" rather than establishing the "pathology" (M. MARINIELLO, *Commitments or Prohibition? The EU antitrust dilemma*, in *Bruegel Policy Brief*, 2014, p. 1, p. 2) and «[t]he issue is no longer what the parties did but what the Commission wants» (F. JENNY, *Worst Decision of the EU Court of Justice: The Alrosa Judgment in Context and the Future of Commitment Decisions*, in *Fordham International Law Journal*, 2015, Vol. 38, Iss. 3, p. 701, pp. 762-763).

the antitrust authorities to conduct the analysis of the most complex profiles of antitrust litigation in a less detailed manner [28].

2.3. The selection of cases and procedural overview

The Commission and the NCAs are granted wide discretion with respect to the acceptance (or rejection) of commitments. Undertakings are therefore not entitled to receive a commitment decision [29]. The use of commitment decisions by the Commission is considered inappropriate when the latter «intends to impose a fine» [30]. The tie imposed on NCAs is even looser: by stating that «commitment decisions are not appropriate in the case of secret cartels», Recital 39 of the ECN+ Directive does not exclude their use in case of serious violations of Article 102 TFEU [31]. In any case, also because of the limited judicial review in this field, these limitations have a rather limited practical effect: commitment decisions have been used in cases involving (if proved) serious antitrust offences [32], including information exchange between competitors [33] and even price-fixing [34].

From a procedural viewpoint, "negotiations" must be initiated by the undertakings [35]. From the Commission's (and NCAs') standpoint, therefore, there is no difference between beginning an "ordinary" procedure or one

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[28] C.J. COOK, *Commitment Decisions: The Law and Practice under Article 9*, in *World Competition*, 2006, Vol. 29, Iss. 2, p. 209, p. 211.

[29] See para 90 of the White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty.

[30] Recital 13 of Council Regulation (EC) 1/2003, cit. and para 116 of Commission notice on best practices, cit.

[31] A further difference compared to Council Regulation (EC) 1/2003, is that the inappropriateness only operates «[i]n principle», thereby suggesting that the use of commitments in cartel cases is not entirely ruled out.

[32] Cf. A. JONES, B. SUFRIN, *EU Competition Law*, Oxford University Press, Oxford-New York, 2014, p. 982. E.g. Commission decision of 9 December 2009 in case COMP/38.636 – *RAMBUS*; case COMP/39.530 – *Microsoft (Tying)*, cit.; case COMP/39.692 – *IBM (Maintenance services)*, cit.

[33] Commission decision of 7 July 2016 in case AT.39850 – *Container Shipping*.

[34] Case COMP/39.847 – *E-books*, cit.

[35] Para 118 of Commission notice on best practices, cit.

that will be closed with commitments [36]. Unlike in some national legal orders [37], the initiative of the undertakings is not subject to any time limit [38]. This suggests that the remedy can be used also in cases where a rapid conclusion is unlikely: coherently, if the Commission decides to negotiate, it can always revert to the ordinary scenario [39]. Despite the above, in practice, commitments are informally negotiated before being formally offered to the Commission or the NCAs [40].

Both at the EU and national level, the adoption of commitment decisions must follow a market test phase [41]. This is a fundamental procedural stage: the information provided by third parties (e.g. consumers, customers and competitors) increases the transparency of the procedure and the protection of the third parties [42], enabling the antitrust authorities to reduce the information deficit from which they might suffer vis-à-vis the undertaking [43], not least due to the lower intensity with which the investigation phase is carried out during commitments procedures.

In practice, the market test is performed by publishing the provisional draft of the commitments negotiated with the undertakings to allow interested third parties to submit comments. The Commission is not bound to amend the commitments because of the comments receiv-

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[36] E. DE SMIJTER, A. SINCLAIR, *The Enforcement System under Regulation 1/2003*, in J. FAULL, A. NIKPAY (eds.), *The EU Law of Competition*, Oxford University Press, Oxford, 2014, p. 91, p. 131.

[37] This point has not been harmonized by the ECN+ Directive.

[38] Para 123 of Commission notice on best practices, cit.

[39] Discussing commitments «merely represents a preliminary procedural option that […] cannot constitute a precise assurance that the Commission will not revert to the standard procedure for finding an infringement and that it will not impose a penalty» (case T-612/17, *Google*, cit., para 637).

[40] N. DUNNE, *Commitment Decisions in EU Competition Law*, in *Journal of Competition Law and Economics*, 2014, Vol. 10, Iss. 2, p. 399, p. 403.

[41] Article 27(4) of Council Regulation (EC) 1/2003, cit. and Article 12(1) of the ECN+ Directive.

[42] S. MARTÍNEZ LAGE, R. ALLENDESALAZAR, *Commitment Decisions ex Regulation 1/2003: Procedure and Effects*, in C.D. EHLERMANN, M. MARQUIS (eds.), *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law*, Hart Publishing, Oxford-Portland, 2010, p. 581, p. 583.

[43] D. RAT, *Commitment Decisions and Private Enforcement of EU Competition Law: Friend or Foe?*, in *World Competition*, 2015, Vol. 38, Iss. 4, p. 527, p. 529.

ed [44]. However, if the market test leads to the revision of the commitments [45], a second market test must be performed [46].

2.4. The content of the commitments and the peculiar application of the principle of proportionality

Commitments can be structural (e.g. assets' divestiture) or behavioural (e.g. do's and don'ts) [47]. The distinction echoes the one applied to concentrations under Council Regulation (EC) 139/2004 [48]. A preference for behavioural commitments seems to exist, at least in the Commission's practice [49]. One of the reasons is that behavioural commitments are *per se* more proportional than structural ones [50].

Although in a peculiar way, the principle of proportionality indeed applies also to commitment decisions [51]: the Commission is not required to identify by itself the least restrictive commitments out of all the possible alternatives; however, if an undertaking proposes more than one set of commitments suitable to solve the competitive con-

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[44] Commission decision of 4 October 2006 in case COMP/C2/38.681 – *The Cannes Extension Agreement*, paras 47-48.

[45] Commission decisions of 12 April 2006 in case COMP/B-1/38.348 – *Repsol CPP*, para 39; 17 March 2010 in case COMP/39.386 – *Long term electricity contracts in France*, paras 52-66; 18 March 2009 in case COMP/C.39.402 – *RWE Gas Foreclosure* para 44.

[46] Commission decision of 20 December 2012 in case COMP/39.654 – *Reuters Instrument Codes (RICs)*.

[47] Para 127 of Commission notice on best practices, cit.

[48] Cf. Article 8(2) of Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

[49] Structural remedies have been used mainly in the energy sector to support the liberalization of domestic markets. E.g. Commission decisions of 26 November 2008 in cases COMP/39.388 – *German Electricity Wholesale Market* and COMP/39.389 – *German Electricity Balancing Market*; 3 December 2009 in case COMP/39.316 – *Gaz de France*; 29 September 2010, COMP/39.315 – *ENI*.

[50] Others expected that authorities would have developed a preference for structural commitments because these do not require monitoring (J. TEMPLE LANG, *Commitment decisions under Regulation 1/2003: legal aspects of a new kind of competition decision*, in *European Competition Law Review*, 2003, Vol. 24, Iss. 8, p. 347, p. 349).

[51] General Court, case T-170/06, *Alrosa* [2007] ECLI:EU:T:2007:220, para 92; Court of Justice, case C-441/07 P, *Alrosa* [2010] ECLI:EU:C:2010:377, para 36.

cerns, the Commission must select the least intrusive one [52].

While proportionality should in theory make behavioural commitments preferable, its reduced practical scope with respect to commitments actually extends the possibilities to use structural remedies. Since no antitrust violation is ascertained, the standard set forth in *Microsoft* cannot be applied: the "negotiated" remedies can thus exceed «what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed» [53].

In any case, the difference between the two categories becomes more nuanced as the duration of behavioural commitments increases [54]. Neither Council Regulation (EC) 1/2003 nor the ECN+ Directive takes a position on this point. From an empirical analysis, the average duration of commitments appears to be around five years [55], but there are examples of both longer [56] and shorter commitments [57].

3. Competition law and market regulation: the role of commitment decisions

3.1. Bridging the gap between antitrust and regulation: from Article 9 of Council Regulation (EC) 1/2003 …

The above should have already highlighted that commitment decisions can be used by the Commission and NCAs (also) to pursue broader pur-

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[52] Case C-441/07 P, *Alrosa*, cit., para 41.

[53] General Court, case T-201/04, *Microsoft* [2007] ECLI:EU:T:2007:289, para 1276.

[54] If behavioural commitments last for a long period of time, they eventually acquire «a quasi-structural dimension» (also for some references, P. MOULLET, *How should Undertakings Approach Commitment Proposal in Antitrust Proceedings*, in *European Competition Law Review*, 2013, Vol. 34, Iss. 2, p. 86, p. 92.

[55] E.g. Commission decisions of 22 June 2005 in case COMP/A.39.116/B2 – *Coca-Cola*, para 52; 15 November 2011 in case COMP/39.592 – *Standard & Poor's*, para 80; case AT.39939 – *Samsung*, cit., para 62; case COMP/B-1/38.348 – *Repsol CPP*, cit., para 47.

[56] Commission decision of 4 May 2010 in case COMP/39.317 – *E.ON Gas*, para 40.

[57] For example, all the commitments in the automotive sector lasted less than three years (Commission decisions of 13 September 2007 in cases COMP/E-2/39.142 – *Toyota*; COMP/E-2/39.141 – *Fiat*; COMP/E-2/39.140 – *DaimlerChrysler*; COMP/E-2/39.143 – *Opel*).

poses than ensuring compliance with Articles 101 and 102 TFEU. Since there is no formal connection to an antitrust infringement, this enforcement tool can be used in situations beyond those that could lead to the adoption of a prohibition decision.

The fact that the action of the antitrust authorities is forward- rather than past-oriented [58] led many to believe that commitment decisions entail a shift from a system where the Commission and NCAs play an "adjudicative" role, detecting and punishing infringements of competition rules, to one in which they are entitled to exercise (also) a market regulatory power [59].

Articles 101 and 102 TFEU should apply to (anticompetitive, and thus illegal) conduct already implemented by undertakings, while regulatory activity should be functional to prevent future market failures. Commitment decisions may blur the difference between these two – *prima facie* different – functions, especially in the light of the discretion enjoyed by antitrust authorities in selecting the cases and negotiating the remedies, as well as of the limited extension of judicial review over commitment decisions [60]. The fact that commitment decisions can be directed toward meta-competitive goals is particularly evident if one considers the large number of decisions that, following a market investigation performed in 2007 [61], the Commission adopted in the energy sector. In nearly all cases, commitment decisions were used to support the liberalization of this sector, which was at the time a Commission's political priority. In other words, the Commission used commitment decisions to shape the future structure of the energy market [62], both at the EU and national levels. The (regulatory) results

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[58] See above notes 27-28.

[59] E.g. N. DUNNE, *Commitment decisions*, cit., p. 419; M. SIRAGUSA, E. GUERRI, *Antitrust Settlements under EC Competition Law: The Point of View of the Defendants*, in C.D. EHLERMANN, M. MARQUIS M. (eds.), *European Competition Law*, cit., p. 185, p. 191; H. SCHWEITZER, *Commitment Decisions under Article 9 of Regulation 1/2003: The Developing EC Practice and Case Law*, in C.D. EHLERMANN, M. MARQUIS (eds.), *European Competition Law*, cit., p. 547, p. 577.

[60] Indeed, the agreement between undertakings and antitrust authorities reduces the likelihood that commitment decisions are challenged. See W.P.J. WILS, *The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles*, in *World Competition*, Vol. 31, Iss. 3, 2008, p. 335, p. 339; M. SIRAGUSA, E. GUERRI, *Antitrust Settlements*, cit., p. 192.

[61] Inquiry of 10 January 2007 pursuant to Article 17 of Regulation (EC) 1/2003 into the European gas and electricity sectors, COM (2006) 851 final.

[62] The wording used in the Commission decision of 11 October 2007 in case

achieved by the Commission were even more incisive than what was envisaged and permitted, in those years, by EU secondary legislation.

One of the main factors that allow the Commission to influence the (future) structure of the market is the mentioned limited scope of proportionality, and hence the possibility of using structural remedies more easily than in the context of ordinary procedures. Any measure proposed by the undertakings, even if particularly cumbersome [63], and even if not strictly related to the content of the PA, can be enshrined in a commitment decision. The principle of proportionality is not infringed, unless the undertakings proposed other commitments that, although suitable to achieve the same result, were less restrictive [64].

One may wonder why undertakings should accept commitments (more or less) unrelated to any violation of competition rules and, admittedly, even not linked to their behaviours. The answer is straightforward: undertakings are not interested in whether the commitments do or do not address a legitimate competitive concern or a regulatory objective pursued by the Commission (or an NCA). If the negotiated commitments do not affect too heavily their core business, the undertakings are likely to base their decision mainly (or only) on the fact that accepting the commitments leads to a quick and safe closure of the proceeding: as no violation is established, undertakings avoid the risk of being sanctioned and, as we will see below, reduce the risk of damages actions. In other words, the choice is based on a costs-benefits analysis: if the expected costs of the commitments (e.g. lower revenues or higher costs resulting from their implementation) are lower than the expected costs of the prosecution of the public enforcement proceeding according to the ordinary procedure (e.g., legal costs, sanctions, follow-on actions), the undertakings are likely to commit.

Commitment decisions, therefore, can alter the mission of public antitrust enforcement. While the Commission's "regulatory overreach" is certainly not a consequence of commitment decisions alone [65], the possi-

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COMP/B-1/37.966 – *Distrigas*, para 5 is self-explanatory of the Commission's efforts to reshape European energy markets through competition enforcement: «[t]*he concern is that the effect of these long-term contracts could be to foreclose the market to alternative suppliers and therefore hinder the development of competition following liberalisation of the gas sector*». See also N. DUNNE, *Commitment Decisions*, cit., p. 421.

[63] See above para 2.4.

[64] Case C-441/07 P, *Alrosa*, cit., para 41.

[65] Suffices it to recall that state aid rules are often (and often improperly) used to trig-

bility of occupying a regulatory space through a (perhaps) too relaxed approach to commitment decisions has been often criticized [66]. The issue is more problematic when it comes to NCAs: the Commission, at least, is not only – nor mainly – an antitrust authority, having much broader functions [67]; the NCAs' institutional mission, conversely, is limited to the enforcement of EU and national competition rules.

3.2. … to the Digital Markets Act

This shift from antitrust to regulation found its natural and consistent conclusion in the DMA. By establishing a regulatory regime aiming at ensuring that digital markets remain (or become again) fair and contestable, the DMA aims at safeguarding the proper functioning of the internal market in the digital era [68]: it is therefore a regulatory instrument falling at the borders of the competition law realm. The target of the DMA are so-called gatekeepers, i.e. undertakings «providing core platform services» [69] (qualitative requirement) and having a strong and durable economic and intermediation position (quantitative requirement) [70]. The status of gatekeeper is not directly applicable: undertakings are not gatekeepers because they meet the requirements but only following the adoption of a designation decision

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ger Member States to reform important industrial sectors. See e.g. Commission decision of 4 December 2020 in case SA.38399 – *Corporate Taxation of Ports in Italy*, only partially annulled by General Court, case T-166/21, *Autorità di sistema portuale del Mar Ligure occidentale and Others v Commission* [2023] ECLI:EU:T:2023:862.

[66] F. JENNY, *Worst Decision of the EU Court of Justice*, cit., p. 763; N. DUNNE, *Commitment decisions*, cit., pp. 434-442.

[67] This practice is criticized because the Commission's powers must be exercised according to the procedures set by EU primary law and respecting the other Institutions' powers, while the Commission seem to use commitment decisions to achieve regulatory objectives that it has failed to achieve through legislative procedures. See H. VON ROSENBERG, *Unbundling through the back door…the case of network divesture as a remedy in the energy sector*, in *European Competition Law Review*, 2009, Vol. 30, Iss. 5, p. 237; Y. SVETIEV, *Settling or Learning: Commitment Decisions as a Competition Enforcement Paradigm*, in *Yearbook of European Law*, 2014, Vol. 33, Iss. 1, p. 466.

[68] Article 1(1) of the DMA.

[69] Article 2(2) of the DMA.

[70] Article 3(1) of the DMA.

by the Commission. So far Alphabet [71], Amazon [72], Apple [73], ByteDance [74], Meta [75] and Microsoft [76] have been designated as gatekeepers.

The DMA imposes about twenty obligations (do's and don'ts) on gatekeepers with the aim of avoiding practices that are unfair or limit the contestability of digital markets [77]. However, the system is flexible and the Commission can create new obligations through delegated acts [78]. While there is a macro-division between self- [79] and non-self-executing [80] obligations, the list of obligations somehow "resembles" traditional competition law concepts. First, the list echoes the distinction between exploitative and exclusionary practices that characterizes Article 102 TFEU. Secondly, the DMA is inspired by recent case law, and in particular by cases brought, once again pursuant to Article 102 TFEU, against some of the undertakings later designated as gatekeepers [81]. While the above seems

[71] Cf. Commission Decision of 5 September 2023 in cases DMA.100011 – *Alphabet – OIS Verticals*; DMA.100002 – *Alphabet – OIS App Stores*; DMA. 100004 – *Alphabet – Online search engines*; DMA.100005 – *Alphabet – Video sharing*; DMA.100006 – *Alphabet – Number-independent interpersonal communications services*; DMA.100009 – *Alphabet – Operating systems*; DMA.100008 – *Alphabet – Web browsers*; and DMA.100010 – *Alphabet – Online advertising services*.

[72] Cf. Commission Decision of 5 September 2023 in cases DMA.100018 – *Amazon - online intermediation services – marketplaces*; DMA.100016 – *Amazon - online advertising services*.

[73] Cf. Commission Decision of 5 September 2023 in cases DMA.100013 – *Apple – online intermediation services – app stores*; DMA.100025 – *Apple – operating systems*; and DMA.100027 – *Apple – web browsers*.

[74] Cf. Commission Decision of 5 September 2023 in case DMA.100040 – *ByteDance - Online social networking services*.

[75] Cf. Commission Decision of 5 September 2023 in cases DMA.100020 – *Meta – online social networking services*; DMA.100024 – *Meta – number-independent interpersonal communications services*; DMA.100035 – *Meta – online advertising services*; DMA.100044 – *Meta - online intermediation services – marketplace*.

[76] Cf. Commission Decision of 5 September 2023 in cases DMA.100017 – *Microsoft - online social networking services*; DMA.100023 – *Microsoft - number-independent interpersonal communications services*; DMA.100026 – *Microsoft - operating systems*.

[77] Articles 5 to 7 of the DMA. See C. LOMBARDI, *Gatekeepers and Their Special Responsibility under the Digital Markets Act*, in this *Book*, p. 139.

[78] Article 12 of the DMA.

[79] Article 5 of the DMA.

[80] Articles 6 and 7 of the DMA.

[81] Case AT.39740, *Google Shopping*, cit. for the prohibition of self-preferencing and

to confirm (rather than denying) the connection between competition policy and the DMA [82], the significant differences between them should not be overlooked.

The Commission pushed for the adoption of the DMA precisely to complement (and perhaps almost replace) competition law in digital markets. The Commission was convinced that digital markets cannot be safeguarded from the market power of the largest companies through antitrust law alone. Indeed, antitrust enforcement, and even more so cases under Article 102 TFEU, requires the antitrust authorities to overcome particularly complex issues (e.g. the relevant market, dominance, the theory of harm, anticompetitive effects) before a decision can be adopted. According to the Commission, public antitrust enforcement is thus not fully effective on digital markets, which are innovative by definition and subject to rapid transformation.

This also helps explaining the relationship between the DMA and competition law: like the two sides of a coin, they are very similar but at the same time diametrically opposed one to another. As mentioned, and in any case shown by the legal basis [83], the DMA is a regulatory instrument that imposes on gatekeepers clear and predetermined legal obligations: by introducing specific *ex ante* regulation, the DMA offers the Commission a much simpler solution for acting against gatekeepers than antitrust litigation. The Commission does not need to deal with the (mentioned) complex issues that characterize antitrust litigation and cases against gatekeepers under the DMA seem to have a "quasi-contractual" nature: the Commission must ascertain whether the gatekeepers complied with Articles 5-7 of the DMA, rather than establishing whether, on a given relevant market, a dominant undertaking has violated an open-ended

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cases AT.40462 – *Amazon Marketplace* and AT.40703 – *Amazon Buy Box*, cit. for cross-markets data leveraging.

[82] After all, having an open market structure is indeed a (if not the) goal of EU competition law (see above note 26).

[83] The DMA has been adopted pursuant to Article 114 TFEU alone, which is the internal market legal basis. Contrary to what was done for both the ECN+ Directive and Directive (EU) 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, Article 103 TFEU (which is the competition policy legal basis) has not been used as a joint legal basis.

provision as Article 102 TFEU. As the DMA appears to ease the Commission's task, many believe that, on digital markets, more actions are likely to be brought under the DMA than under competition rules.

Going back to the main topic of this paper, it is not fully clear why the DMA conferred to the Commission the power to adopt commitment decisions. By way of background, the Commission is given the power to conduct market investigations to designate new gatekeepers or to assess any systematic non-compliance of gatekeepers with their obligations under the DMA [84]. If systematic non-compliance is associated with a strengthening of the gatekeeper's position, the Commission is entitled to adopt an implementing act imposing on that gatekeeper «any behavioural or structural remedies which are proportionate and necessary to ensure effective compliance» [85]. As an alternative, the Commission may decide to accept the commitments «for the relevant core platform services» that the gatekeeper may offer if they ensure «compliance with the obligations laid down in Articles 5, 6 and 7» of the DMA. In this case, the Commission shall «declare that there are no further grounds for action» against the gatekeeper [86]. In this respect, the text of Article 25 of the DMA differs from Article 9 of Council Regulation (EC) 1/2003 insofar as the wording «by the Commission» is not repeated. This is probably due to the limited role the DMA reserves to NCAs [87], but one might wonder whether this difference may also affect and somehow prevent the possibility that Article 25 DMA decisions can be applied by national courts [88]. Although with different legal force, however, Recital 76 of the DMA is worded in a "traditional" manner, thereby further reducing the possibility of developing an argument such as the one just alluded to.

In the context of the DMA, the legal framework to be applied to the specific case by an ordinary or a commitment decision is composed by clear and precise rules, i.e. the gatekeepers' obligations. The Commission, therefore, does not have to deal with generally worded provisions that need to be filled through complex legal-economic analysis as Articles 101 and especially 102 TFEU. In addition, systematic non-compli-

[84] Articles 17 and 18 of the DMA.

[85] Article 18(1) of the DMA.

[86] Article 25(1) of the DMA.

[87] Articles 37 and 38 of the DMA.

[88] See *infra* para 5.

ance can be presumed if the Commission, in the last eight years, already sent to the gatekeeper at least three non-compliance decisions under Article 29 of the DMA; similarly, the assessment of the strengthening of the gatekeeper's position is based on the already mentioned quantitative requirements set by Article 3 of the DMA, for which there are presumption thresholds.

As the Commission's effort seems to be lower than the one needed, for example, to identify the relevant market or to establish dominance, it is not entirely clear what benefits the Commission can derive from adopting a commitment decision *ex* Article 25 of the DMA instead of one under Article 18 of the DMA. The difference between competition rules and Articles 5, 6 and 7 of the DMA makes it equally challenging to imagine what the difference might be in terms of the content of the two kinds of decisions. In this regard, one difference is that proportionality is not mentioned in Article 25 of the DMA, whereas this principle shall guide (and limit) the Commission when it drafts the remedies to be imposed on gatekeepers under Article 18 of the DMA. Although proportionality is a general principle of EU law and thus applicable to any piece of EU secondary law, the different wording could imply that, with the gatekeeper's consent, the Commission could be entitled to implement commitments even if not strictly related to the systematic non-compliance at stake or that go beyond what is strictly necessary to address it. Or, in other words, that Article 25 of the DMA could originate a sort of regulatory activity "on steroids" by the Commission, i.e. the application of a regulatory instrument for regulatory purposes other than the ones for which it was implemented.

4. The judicial application of commitment decisions

The interplay between commitment decisions and private enforcement can be assessed by three different perspectives. The key factor to be considered is timing. Damages or other kind of private actions can be brought before national courts with regard to a conduct occurred prior, within or after the period covered by the commitment decision [89].

[89] This taxonomy is inspired by M. SOUSA FERRO, *Committing to Commitment Deci-*

4.1. Conducts that occurred before the period covered by a commitment decision

The first scenario can be discussed briefly. The differences with the ordinary scenario (i.e., actions concerning a conduct that occurred before an infringement ascertained by a prohibition decision) are indeed limited. In both cases, we are dealing with a stand-alone action, whose difficulties (especially from an evidentiary perspective) have already been outlined.

However, one may wonder whether the qualitative difference in the enforcement activity of the antitrust authorities when they use commitment rather than prohibition decisions can have any relevance. When it adopts a prohibition decision, an antitrust authority must ascertain the existence of the violation as accurately as possible, if only because the decision is likely to be challenged by the undertakings. The ascertainment of the infringement also includes the definition of its temporal scope. If a prohibition decision establishes that the infringement began on a specific date, it means that the Commission or the NCAs themselves believed that, before that date, there was no offense (or anyway it could not be proven). *Tertium non datur*: there is no reason why antitrust authorities should exclude from a prohibition decision a period (or a market) in which they believe a violation occurred. The longer the duration of the infringement is, the higher the sanction that can be imposed on undertakings: the higher the sanction, the greater the benefit to the public enforcement of EU competition law and the authorities themselves, both in terms of deterrence, accountability, and reputation.

The picture changes for commitment decisions. As mentioned, here the antitrust authorities focus on the future rather than the past. The Commission and the NCAs have no incentive to establish the exact starting date of the conduct originating concerns. The limited scope of proportionality and the unlikelihood of judicial review loosen the ties between the conduct and remedies: a shorter duration does not imply lighter remedies. Undertakings, moreover, are interested that the decision covers the shortest possible period, precisely to further reduce the (already limited) benefit for damaged parties in subsequent litigation. The Commission and NCAs might therefore be tempted to use the temporal (or geo-

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sions – Unanswered Questions on Article 9 Decisions, in *European Competition Law Review*, 2005, Vol. 26, Iss. 8, p. 451, p. 453.

graphic) scope of the decision as a bargaining chip to encourage the acceptance of more vigorous commitments by the undertakings.

The above cannot per se extend the evidential value of commitment decisions. However, one may wonder if there may be other consequences. For example, contrary to the ordinary scenario, it cannot be ruled out that the material collected by the antitrust authorities, although related to facts predating those considered in the decision, could be helpful for potential claimants. Commitment decisions, therefore, could arguably help potential claimants to meet the plausibility threshold for disclosure set by Article 5(1) of Directive 2014/104/EU even if the envisaged damages action relates to facts occurred before the temporal scope of the decision.

4.2. Conducts that occurred during the period covered by a commitment decision

This is by far the most important example of how commitment decisions and private enforcement can overlap and, therefore, deserves to be discussed in greater detail [90]. Immediately after the introduction of commitment decisions among the enforcement tools of EU competition law, it was sometimes argued that they had to grant some sort of immunity to undertakings from civil liability toward third parties. Drawing inspiration from leniency programs [91], the argument was that the risk of being involved in damages actions would have reduced the undertakings' incentives to commit. The more efficient private enforcement is, the less interest undertakings may have in negotiating commitments and, in any case, in waiving their right to challenge the decision.

In addition, damages actions were also deemed inconsistent with the "operative part" [92] of commitment decisions. As under Article 9 of Coun-

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[90] See generally E. OLMEDO-PERALTA, *The Evidential Effect of Commitment Decisions in Damage Claims. What is the Assumptive Value of a Pledge?*, in *Common Market Law Review*, 2019, Vol. 56, Iss. 4, p. 979.

[91] Commission Notice of 8 December 2006 on Immunity from fines and reduction of fines in cartel cases.

[92] See for example the opinion requested, pursuant to Article 15(1) of Council Regulation (EC) 1/2003, cit., by the Juzgado de lo Mercantil de Barcelona to the Commission in the context of a follow-on action related to the case COMP/B-1/38.348 – *Repsol CPP*, cit.

cil Regulation (EC) 1/2003 the Commission shall declare that no more enforcement actions are needed to tackle the concerns initially envisaged [93], it was argued that commitment decisions make any further intervention by NCAs and national courts redundant and, therefore, not permitted [94]. A judgment awarding damages could therefore breach not only Article 16 of Council Regulation (EC) 1/2003 [95] but also the general principle of loyal cooperation enshrined in Article 4(3) TFEU [96].

As suggestive as these arguments may seem, they clash with the very wording of Recital 13 of Council Regulation (EC) 1/2003 and Recital 39 of the ECN+ Directive [97], according to which commitment decisions are «without prejudice to the powers of competition authorities and national courts to make such a finding and decide upon the case» [98]. Recital 22 of Reg. (EC) No 1/2003 further clarifies that commitment decisions adopted by the Commission «do not affect the power of the courts and the [NCAs] to apply Articles» 101 and 102 TFEU.

Unsurprisingly, therefore, legal scholars [99] and national courts have long since recognized that commitment decisions cannot deprive poten-

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[93] See Recital 13 of Council Regulation (EC) 1/2003, cit.

[94] Before the Court solved the issue in the opposite way (see notes 104-105 below), this approach had been suggested by the Commission Staff working paper of 29 April 2009, accompanying the communication from the Commission to the European Parliament and Council, report on the functioning of regulation 1/2003, SEC(2009) 574, paras 106-108.

[95] Although with opposite purposes and effects than the one discussed now, the fact that commitment decisions fall within the scope of Article 16 of Council Regulation (EC) 1/2003, cit., has been held by the Opinion of AG Kokott, case C-547/16, *Gasorba* [2017] ECLI:EU:C:2017:692 para 29 and later confirmed by Court of Justice, case C-132/19 P, *Groupe Canal+* [2020] ECLI:EU:C:2020:1007, paras 109-112.

[96] These arguments are discussed and discarded, for example by W.P.J. WILS, *Efficiency and Justice in European Antitrust Enforcement*, Hart Publishing, Oxford/Portland, 2008, p. 43.

[97] Directive 2014/104/EU, cit., does not address the relation between commitment decisions and private enforcement.

[98] Recital 13 of Council Regulation (EC) 1/2003 refers to the «courts of the Member States».

[99] E.g. I. TACCANI, *Gli effetti delle decisioni della Commissione e delle Autorità nazionali della concorrenza nei giudizi civili per il risarcimento del danno per violazione delle norme di concorrenza*, in F. MUNARI, C. CELLERINO (eds.), *L'impatto della nuova direttiva 104/2014 sul private antitrust enforcement*, Aracne Editrice, Roma, 2016, p. 103, p. 116; M. SIRAGUSA, E. GUERRI, *Antitrust Settlements*, cit., p. 189; D. RAT, *Com-*

tial claimants of their right to bring proceedings before national courts [100]: in other words, commitment decisions do not entail immunity from civil liability for the concerned undertakings [101]. Also considered that commitment decisions do not establish whether or not competition rules were breached [102], there are no regulatory or systemic obstacles that can prevent national courts to exercise their (autonomous) authority to ascertain the antitrust infringement and, if opportune, to grant the necessary remedies [103].

The fact that commitment decisions do not confer to the Commission (or the NCAs) an exclusive competence to deal with the matter nor prevent further – public [104] and – private enforcement initiatives was later definitively confirmed by the CJEU. As far as private enforcement is concerned, in *Gasorba* the CJEU held that national courts remain competent to ensure the effectiveness of individuals' rights arising from Articles 101 and 102 TFEU even when the action is brought with reference to facts already examined by an NCA in a commitments decision: the latter

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mitment Decisions, cit., p. 534; M. TAVASSI, *Le controversie civili in materia antitrust tra diritto nazionale e indicazioni della Direttiva 104/2014*, in F. MUNARI, C. CELLERINO (eds.), *L'impatto della nuova direttiva 104/2014*, cit., p. 49, p. 53.

[100] More specifically, «[a]ttendu que l'acceptation par l'Autorité des engagements répond aux préoccupations de concurrence soulevées dans cette affaire mais non à l'objectif d'indemnisation des préjudices allègues par le demandeur a la procédure et que la décision administrative de l'Autorité de la concurrence ne peut avoir pour effet de priver le demandeur de toute possibilité de faire valoir ses droits dans le cadre d'un contentieux en indemnisation devant le présent tribunal» (cf. Tribunal de commerce de Paris, No 201014911, *Ma Liste de Courses c. Highco* [2011] see also Cour d'Appel de Paris, 12/06864, *Eco-Emballages et Valorplast c. DKT International* [2014].

[101] As the lack of a «formale accertamento dell'illecito non esclude con certezza che gli elementi probatori raccolti fino al momento dell'accettazione degli impegni possano venire utilizzati anche in un giudizio civile», una «decisione con impegni non comporta alcuna immunità sul piano civilistico ma rende solo più difficile il proficuo esperimento delle azioni risarcitorie» (Tribunale Amministrativo Regionale Lazio, No 2900, *Tele2/Tim-Vodafone-Wind* [2008] para 5.1.2).

[102] Indeed, «la nulidad de las relaciones jurídicas litigiosas por entrañar fraude de ley no es incompatible con la Decisión de la Comisión [...] COMP/B-1/38.348-REPSOL C.C.P. [...] porque la propia Decisión [...] no se pronuncia sobre si se ha producido o no una infracción del Derecho de la competencia» (cf. Tribunal Supremo, No 272, *Estación de servicio Fontanet c. Repsol* [2013]).

[103] Consiglio di Stato, No 4773, *AGCM/Conto TV* [2014] para 19.

[104] Case T-342/11, *CEEES*, cit., para 67.

«cannot create a legitimate expectation in respect of the undertakings concerned as to whether their conduct complies with Article 101 TFEU» nor can «'legalise' the market behaviour of the undertaking concerned, and certainly not retroactively» [105]. Even though the case concerned an action for nullity under Article 101(2) TFEU of an agreement whose content was modified following a commitments decision, the points of law can be extended also to damages actions: the individuals' right to compensation cannot depend on the Commission or NCAs' choice to close an investigation by accepting the commitments proposed by an undertaking rather than by a prohibition decision.

The issue, however, deserves to be further discussed. The fact that commitment decisions do not shield *de jure* undertakings from damages actions does not mean that their widespread use in practice cannot *de facto* affect private enforcement. Indeed, the main features that distinguish prohibition and commitment decisions blur the distinction between stand-alone and follow-on actions [106], making it more complex (and therefore less likely, although possible [107]) for prospective claimants to pursue civil actions [108]. In addition to preventing the imposition of sanctions on the undertakings, the fact that the proceeding is closed without ascertaining that an antitrust offence was committed leaves prospective claimants without the so-called "privileged evidence" that suffices to prove before national courts that an antitrust offence occurred [109]. It is therefore the very nature of this enforcement tool that leads to questioning its capability to support damaged parties before national courts [110].

Emphasizing (precisely) the lack of any finding of antitrust infringement, a first and quite restrictive approach holds that commitment deci-

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[105] Court of Justice, case C-547/16, *Gasorba* [2017] ECLI:EU:C:2017:891 para 28.

[106] They should therefore be called «*"quasi follow-on" o "semi follow-on"*» (M. TAVASSI, *Le controversie civili*, cit., p. 53).

[107] The (indisputable) admissibility of stand-alone actions was confirmed by Court of Justice, case C-595/17 *Apple Sales International* [2018] ECLI:EU:C:2018:854, para 35).

[108] M. SIRAGUSA, *Le decisioni con impegni*, cit., p. 392.

[109] As no violation is established, commitment decisions fall outside the scope of Article 9 of Directive 104/2014/EU, cit.

[110] C. FRATEA, *Il private enforcement del diritto della concorrenza dell'Unione europea*, Edizioni Scientifiche Italiane, Napoli, 2015, p. 231).

sions cannot but be irrelevant for the purposes of damages actions: while it may be true that commitment decisions do not grant immunity to the concerned undertakings, they cannot have any evidential effect either. According to this view, also to not reduce their appeal for undertakings, and thus to preserve the *effet utile* of Article 9 of Council Regulation (EC) 1/2003 and Article 12 of the ECN+ Directive, actions based on commitment decisions should be considered as fully stand-alone ones: commitment decisions should have no relevance for the purpose of convincing national courts that Articles 101 and 102 TFEU have been breached [111]. Potential claimants must therefore prove, without the help of a public enforcement decision, the anticompetitive nature of the conduct, in addition to (and before) demonstrating that they have suffered damages and that these damages were caused by the infringement [112]. As stand-alone cases are notoriously much more difficult (and therefore less frequent) than follow-on cases, the decision to submit commitments can be considered as part of a broader strategy of the undertakings to limit as much as possible the expected costs of the investigated conduct [113]. Indeed, when proposing commitments, undertakings are very careful to state that this is not an admission of guilt [114].

This approach raised significant concerns for the development of private enforcement. Although more respectful of the wording of Council Regulation (EC) 1/2003 and the ECN+ Directive than claiming that commitment decisions should grant a *de jure* immunity to the undertakings, the practical effect is not much different: rather than being granted by law, the "immunity" is conferred *de facto*. The concerns are enhanced by the fact that, as mentioned [115], commitment decisions are often used

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[111] *Ex pluribus* C.J. COOK, *Commitment Decisions: The Law and Practice under Article 9*, in *World Competition*, 2006, Vol. 29, Iss. 2, p. 209, p. 219.

[112] D. RAT, *Commitment Decisions*, cit., p. 539.

[113] *Ex pluribus* L. DE LUCIA, *Le decisioni con impegni nei procedimenti antitrust tra sussidiarietà e paradigma neoliberale*, in G. FALCONI, B. MARCHETTI (eds.), *Pubblico e privato nell'organizzazione e nell'azione amministrativa*, Cedam, Padova, 2013, p. 109, p. 115; A. SCOGNAMIGLIO, *Decisioni con impegni e tutela civile dei terzi*, in *Diritto amministrativo*, Vol. 18, Iss. 3, p. 503.

[114] E.g. case COMP/C.39.402 – *RWE Gas Foreclosure*, cit., para 38, which is self-explanatory: «RWE does not agree with the Commission's Preliminary Assessment. It has nevertheless offered Commitments […] to meet the Commission's competition concerns».

[115] See above notes 32-34.

also with respect to conducts that – if proved, could – represent serious antitrust infringements [116]. It is also for this reason that, in practice, a more permissive view emerged soon. The basic idea is simple: while commitment decisions do not establish any antitrust infringement, a violation is not excluded either [117]. Rather, the beginning of the procedure cannot but be based on the existence of some (although not fully defined) competitive concern of the Commission (or NCA) [118]. As put it by Advocate General Pitruzzella, the adoption of a commitment decision «must be founded on a 'potential infringement', that is, on an analysis of the undertakings' conduct and of the context surrounding it that supports the conclusion that it is possible, and actually probable, even if not yet certain, that the undertakings in question have been causing harm to competition» [119]. Otherwise, the principle of proportionality would call for the dismissal of the case [120].

At least to a certain extent, therefore, commitment decisions may "help" potential claimants to meet the burden of proof required in damages actions. While the evidential effect of commitment decisions was already recognized by national courts [121], also this issue was addressed for the first time at the EU level in the *Gasorba* case. Following the opinion of Advocate General Kokott [122], the CJEU held that «the principle of

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[116] L. DI VIA, *Le decisioni in materia di impegni nella prassi decisionale dell'Autorità garante*, in *Mercato, Concorrenza, Regole*, 2007, Vol. 9, Iss. 2, p. 229, p. 233.

[117] E.g. Audiencia Provincial di Madrid, No 278, *Estación de Servicio Villafria c. Repsol* [2011].

[118] J. RATLIFF, *Negotiated Settlements in EC Competition Law: The Perspective of the Legal Profession*, in C.D. EHLERMANN, M. MARQUIS (eds.), *European Competition Law*, cit., p. 305; A. SCOGNAMIGLIO, *Decisioni con impegni*, cit., p. 515.

[119] The opinion goes on clarifying that «[i]t is not a finding, yet the Commission must not confine itself to conjecture or to general hypotheses that are not even summarily tested in the light of the material that has been produced in the proceedings» (Opinion of AG Pitruzzella, case C-132/19 P, *Groupe Canal+* [2020] ECLI:EU:C:2020:355, para 70).

[120] A. PERA, G. CODACCI PISANELLI, *Decisioni con impegni e private enforcement nel diritto antitrust*, in *Mercato, Concorrenza, Regole*, 2012, Vol. 14, Iss. 1, p. 69, p. 85.

[121] According to Tribunal de commerce de Paris, J2012000109, *DKT International* c. *Eco-Emballages et Valorplast* [2015], «*a commitment decision may provide prima facie evidence of wrongdoing of undertakings before the Civil Courts, which undertakings may not be able to rebut such elements, as they have provided commitments to address the competition concerns expressed*», so that «*commitments cases would involve a quasi-admission of an infringement*».

[122] Opinion of AG Kokott, case C-547/16, *Gasorba*, cit., para 35.

sincere cooperation laid down in Article 4(3) TEU and the objective of applying EU competition law effectively and uniformly require the national court to take into account the preliminary assessment carried out by the Commission and regard it as an indication, if not *prima facie* evidence, of the anticompetitive nature» [123] of the conduct at stake.

After *Gasorba* two points can no longer be disputed. Firstly, commitment decisions are not "privileged evidence" *ex* Articles 16 of Council Regulation (EC) 1/2003 or 9 of Directive 104/2014/EU [124] and, thus, do not compel national courts to establish that competition rules were breached: if a court believes that the conduct was lawful, a commitments decision does not force it to "change its mind" [125], paving the way for possible conflicting judgments by different courts. Secondly, however, commitment decisions *must* be taken into consideration by national courts [126]: differently from the ordinary follow-on scenario, claimants must prove the existence of the antitrust infringement; however, the text of the commitments decision and the evidence collected by the antitrust authorities during the investigation [127] shall be evaluated by national courts [128]. Even if in the final decision the Commission (or the NCA) holds that its preliminary competition concerns had not been confirmed during the investigations, this «cannot alter the nature of the [commitments] decision and prevent the national competition authorities and the national courts from taking action», so that «a national court may conclude that the conduct which is the subject of a commitment decision infringes Article 101 or 102 TFEU» [129].

The question, therefore, is no longer *if* commitment decisions can have

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[123] Case C-547/16, *Gasorba*, cit., para 29.

[124] Cf. I. TACCANI, *Gli effetti delle decisioni*, cit., 116.

[125] Also to distinguish commitment from settlement decisions, it has been clarified that commitment decisions «lasciano impregiudicato il potere delle giurisdizioni e delle autorità garanti della concorrenza degli stati Membri di applicare gli articoli 81 e 82 del trattato, così chiarendo che non vincolano il giudice adito in sede di risarcimento del danno con riguardo all'esistenza dell'infrazione antitrust» (see Tribunale di Milano, No 9759, Cave Marmi Vallestrona Srl c. Iveco S.P.A. [2018]). See also Audiencia Provincial di Madrid, No 278, Estación de Servicio Villafria c. Repsol [2011].

[126] E. DE SMIJTER, A. SINCLAIR, *The Enforcement System*, cit., p. 130.

[127] See *infra*.

[128] M. TAVASSI, *Le controversie civili*, cit., p. 53.

[129] General Court, case T-616/18, *Polskie Górnictwo Naftowe i Gazownictwo* [2022] ECLI:EU:T:2022:43, para 133.

evidential effects, but rather *what* evidential effects they can have, i.e. how the content of the decision (and the documents gathered during the investigation) can "help" the prospective claimants. In this perspective, the issue becomes more complex and the case law more variegated. National courts have often (and correctly) recognized that the benefits that the potential claimants can derive from commitment decisions are lower than those resulting from a prohibition decision. After all, commitment decisions are not out-of-court confessions [130] and, therefore, the submission of commitments is not an admission of guilt [131]. Prospective claimants must therefore state and prove the specific facts on which their claim is based in a way that is coherent with the findings of the decision of the Commission or the NCA that they invoke to support their plead [132].

Sometimes a perhaps too restrictive approach to the evidential value of commitment decisions has been applied. For example, despite recognizing that commitment decisions are issued by independent authorities, at the end of particularly complex and technical proceedings, it was considered adequate to set their evidential value (at least) at the level of any other document that a party can submit according to domestic procedural rules [133].

In other cases, the approach of national courts has been closer to, and more consistent with, the already mentioned principles established by the CJEU. Two judgments of the Italian Supreme Court (*Corte di Cassazione*) represent two prominent examples. In the first one, it was held that national courts shall not only duly considered the content of the PA, the pieces of evidence gathered by the antitrust authorities, and the text of the decision but also be ready to qualify these elements as an indication, or even as a principle of proof, of the anti-competitive nature of the relevant conduct [134].

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[130] Tribunale di Milano, No 11893, *Industria Chimica Emiliana Spa c. Prodotti Chimici Alimentari Spa* [2019]. *Contra*, Consiglio di Stato, No 4393, *Carte di credito* [2011] para § 5.2.8, according to which negotiating commitments is, for the undertakings, a decision «dai connotati sostanzialmente confessori in ordine alla sussistenza dell'illecito commesso».

[131] Tribunale di Milano, No 9109, *BT Italia c. Vodafone Omnitel* [2015].

[132] Tribunale di Milano, No 5122 *Dipharma Francis c. Industria Chimica Emiliana e Prodotti Chimici Alimentari* [2019].

[133] *Industria Chimica Emiliana c. Prodotti Chimici Alimentari* [2019], cit., according to which, moreover, in case of action based on commitment decisions, the claimants shall prove the antitrust offence, since these are stand-alone actions.

[134] Corte di Cassazione, No 26869, *Toscana Energia c. Pace Strade* [2021] where the

In the second case, the Italian Supreme Court noted that commitment decisions, being neither infringement nor clearance decisions, cannot have evidential effect equal to either of them. On these premises, the Court held that, in the Italian legal order, commitment decisions must be capable of generating, in follow-on actions, a rebuttable presumption of the anti-competitive nature of the conduct of the undertaking. Being a rebuttable presumption, the concerned undertaking can of course provide evidence to the contrary in court [135], pursuant to Article 2729 of the Italian Civil Code. Although in a different perspective, a similar approach has been proposed also by Advocate General Pitruzzella: in a case dealing with the remedies available to third parties whose contractual rights are affected by a commitment decision [136], he held that the ability of said third parties to «succeed in [their] claim for damages against [their counterparty] is significantly weakened, since it will be necessary to rebut the presumption that the relevant clauses are unlawful» [137].

The differences that can be found in the case law (even within the same Member State) are not surprising. At least in some cases, such differences may entail a "dogmatic" different understanding of commitment decisions by different courts. In most cases, however, such differences are perhaps more likely to be explainable in the light of the specific content of the commitment decision and additional documentation (e.g. the PA) brought to the court's attention in the individual cases. Indeed, there are some features (that will be discussed below) that, by definition, reduce the utility of commitment decisions for the purposes of damages actions. In cases where these aspects are more pronounced [138], the utility that can be drawn from commitment decisions is very limited: it is likely, therefore, that it was in these cases that national courts have taken a more cautious approach to the issue at stake, and vice versa [139]. This is why the

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Italian Supreme Court also clarified that national courts shall not neglect the opposing evidence (if any) that may have been collected during the public enforcement procedure.

[135] Corte di Cassazione, No 5381, *Uno Communications c. Vodafone Italia* [2020].

[136] See below para 4.3.

[137] Opinion of AG Pitruzzella case C-132/19 P, *Groupe Canal+*, cit., para 130.

[138] E.g. case COMP/39.692 – *IBM (Maintenance Services)* cit., paras 26 and 32 («[w]ithout having reached a definitive view, the Commission preliminarily concluded that IBM appeared to be dominant»; the assessment «remains provisional and would need further analysis before any definitive findings could be made».

[139] See case COMP/A.39.116/B2 – *Coca-Cola*, cit.

evidential value of commitment decisions shall be assessed on a case-by-case basis.

The evidential value of commitment decisions is reduced mainly because they contain a less thorough description (compared to prohibition decisions) of the facts, conducts and – most importantly – their effects on the markets and third parties [140]. Prohibition decisions usually consist of hundreds of pages, while commitment decisions do not exceed a few dozen. The same applies to SOs and PAs [141]. Although this should be (at least partly) mitigated by the duty to state reasons incumbent on the Commission (pursuant to Article 296(2) TFEU [142]) and NCAs (under similar national provisions) the burden of proof of potential claimants is therefore lessened to a limited extent.

In addition, one should consider that the most sensitive elements for the purposes of follow-on actions can be "negotiated" between the undertaking and the antitrust authorities. Undertakings can engage with the Commission and the NCA from the very beginning of the investigation: undertakings, therefore, can participate in the definition of aspects such as the relevant market or the temporal scope of the conduct under investigation, and have the possibility of "influencing" the authorities before the latter have taken a stance on the matter [143]. If these (and other) elements are redefined more narrowly than the Commission's or the NCAs' initial assumptions, the effect is to protect undertakings from the possibility of follow-on actions with respect to, precisely, these periods and markets. As commitment decisions are unlikely to be challenged, the antitrust authorities may – be tempted to – use private enforcement as leverage to convince undertakings to "propose" commitments that fit their (often regulatory) purposes [144].

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[140] Tribunal de Grande Instance de Paris, 15/09129, *Société Betclic Enterprises Limited c. GIE Pari mutuel urbain* [2018].

[141] The PA highlights the Commission's concerns, which is «a word notably weaker than the word "objections"» (S. MARTÍNEZ LAGE, R. ALLENDESALAZAR, *Commitment Decisions*, cit., p. 589).

[142] The Commission shall find «a fine balance between the Treaty obligation to give reason and the obligation under Regulation 1/2003 not to conclude whether there has been or still is an infringement» (E. DE SMIJTER, A. SINCLAIR, *The Enforcement System*, cit., p. 133).

[143] See also para 4.1 above.

[144] This «is implicitly part of the deal: the absence of a clear identification of the con-

The above may also reduce the benefit that third parties can gain from accessing the Commission's or NCAs' investigation file. The adoption of a commitment decision is arguably an element that third parties can use to support the plausibility of their claims *ex* Article 5(1) of Directive 2014/104/EU and therefore to convince national courts to order the disclosure of evidence collected by the Commission or the NCA [145]. Just like the text of the decision, however, also the documents included in the Commission's or NCA's file are likely to be less useful for potential claimants than those that could be found if the public enforcement proceeding followed the ordinary procedure. The expectation to close the case with a commitment decision affects the scope of all the activities carried out by the antitrust authorities, not only the text of the final decision. As mentioned, the Commission's and NCA's attention is indeed directed toward the future, rather than the past. Hence, the fact-finding activity of the public enforcers is oriented toward the aim of enabling the drafting and negotiation of commitments that will ensure the development of the market toward the desired structure, rather than to gather evidence on the "lawful" behaviours of undertakings, let alone to assess their effect on third parties.

An (at least partial) exception is represented by hybrid proceedings. Just as for cartel settlements [146], it can happen that only some of the addressees of a PA propose commitments [147]. Commitment decisions may therefore be adopted alongside prohibition ones, the latter being addressed to the undertakings that did not "settle" [148]. Here, commitment decisions

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cerns minimises the risk of private actions for damages against the companies» (M. MARINIELLO, *Commitments or prohibition*, cit., p. 2; F. WAGNER-VON PAPP, *Best and even better practices*, cit., p. 949).

[145] Cour de Cassation, No 08-19761, *Semavem c. JVC*, [2010]. The issuance of a PA should also suffice to meet the requirement. In this case, however, disclosure is limited to pre-existing information, as documents prepared for the proceeding fall within the so-called "grey list" under Article 6(5) of Directive 2014/104/UE, cit.

[146] Commission Regulation (EC) 622/2008 of 30 June 2008 amending Regulation (EC) 773/2004, as regards the conduct of settlement procedures in cartel cases.

[147] See also E. OLMEDO-PERALTA, *The Evidential Effect of Commitment Decisions*, cit., p. 997.

[148] See AGCM decision of 25 January 2007, in case A357 – *Tele2/TIM-Vodafone-Wind*, where the AGCM found that Telecom Italia and Wind abused their dominant position and accepted commitments submitted by Vodafone. Several follow-on actions were launched against both the wrongdoers (e.g. Corte di Appello di Milano, No 1, *Telecom*

cannot be kept completely separated from the prohibition ones: they both originated from the same public enforcement procedure and concern the same or similar practices. Unsurprisingly, national courts have sometimes operated a sort of "cross-fertilization" between the two sets of decisions: the prohibition decisions, the PA and the evidence gathered with respect to the undertakings that did not settle have been used to interpret and "reinforce" the evidential value of commitment decisions [149], the PA [150] and the related evidence [151] for the purposes of damages actions against the committing undertakings.

4.3. Conducts that occurred after the period covered by a commitment decision

Two different cases fall within the third and last scenario: actions before national courts can be brought against the undertakings that breached the commitments or those that, despite complying with them (and perhaps because of such compliance), have nonetheless caused harm (anticompetitive or otherwise) to third parties.

From the public enforcement perspective, Article 9(2) of Council Regulation (EC) 1/2003 provides the Commission with an instrument of "self-protection" to react to the first scenario. If undertakings fail to comply with their commitments, the Commission can reopen the procedure and fine them *ex* Article 23 of Council Regulation (EC) 1/2003. Microsoft was the first undertaking to be fined for breaching a commitment decision when it failed to offer its operating system's users the option to choose alternative browsers than the pre-installed one [152]. This is «a serious breach of Union

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Italia c. *Brennercom* [2017]; Tribunale Milano, No 16319, *Brennercom* c. *Telecom Italia* [2013]; Tribunale di Milano, No 5049, *Uno Communications* c. *Telecom Italia* [2014]) and the committing undertaking (e.g. Tribunale di Milano, No 12227, *Teleunit* c. *Vodafone* [2013]; Tribunale di Milano, No 4587, *Uno Communications* c. *Vodafone* [2014]; Tribunale di Milano, No 12043, *Fastweb* c. *Vodafone* [2014].

[149] Commitment decisions rendered in hybrid cases should have «*valore di prova privilegiata quanto alla posizione rivestita dalla parte sul mercato ed al suo abuso*» (*Teleunit* c. *Vodafone* [2013], cit.).

[150] *Fastweb* c. *Vodafone* [2014], cit.

[151] *Teleunit* c. *Vodafone* [2013], cit.

[152] Commission decision of 6 March 2013 in case AT.39.530 – *Microsoft (Tying)*.

law», as «it undermines the effectiveness of the mechanism provided for in Article 9» of Council Regulation (EC) 1/2003 [153].

While Article 5 of Council Regulation (EC) 1/2003 already empowered NCAs to accept commitments, this provision did not confer NCAs the power to sanction defaulting undertakings: therefore, NCAs used commitments almost only if domestic rules already provided them with sanctioning powers [154], as it was the case for the Italian ANC (the AGCM) [155]. The gap has been filled by Article 12 of the ECN+ Directive, according to which NCAs shall «have effective powers to monitor the implementation of the commitments», including the possibility to «reopen enforcement proceedings» inter alia when the undertakings «act contrary to their commitments». In these cases, what is being punished is the undertaking's default, not a violation of competition rules. Since antitrust authorities do not have to prove the existence of an antitrust offence, the case somehow resembles a contractual dispute.

The question is whether also third parties can trigger this quasi-contractual liability for breaching commitments before national courts. Council Regulation (EC) 1/2003 and the ECN+ Directive remain silent on the private enforceability of commitment decisions. It could be argued that only the "counterpart" of the defaulting undertaking shall be entitled to react: in other terms, one could qualify Articles 9 of Council Regulation (EC) 1/2003 and 12 of the ECN+ Directive as exclusive remedies and hold that the Commission or the NCA shall have a monopoly in this field. Although as an *obiter dictum*, the Tribunal of Rome seems to have recently endorsed this view, stating that only the AGCM can verify compliance of the undertakings with commitment decisions and, in case of default, intervene [156].

Several reasons support the opposite conclusion [157]. Firstly, the deci-

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[153] Case AT.39.530 – *Microsoft (Tying)*, paras 56 e 58.

[154] F. CINTIOLI, *Le nuove misure riparatorie del danno alla concorrenza: impegni e misure cautelari*, in *Giurisprudenza commerciale*, 2008, Vol. 35, Iss. 1, p. 109, p. 118.

[155] Cf. Article 14-*ter* (1) and (2) of Legge No 287/1990, cit. These powers were firstly used in AGCM decision of 28 January 2015 in case I689C – *Organizzazione servizi marittimi nel golfo di Napoli*. The infringed commitments were made binding by AGCM decision of 15 October 2009 in case I689 – *Organizzazione servizi marittimi nel golfo di Napoli*.

[156] Tribunale di Roma, No 5775, *ARTISTI 7607 c. NU. IM.* [2023].

[157] E.g. J. DAVIES, M. DAS, *Private enforcement of Commission commitment deci-*

sion to begin a proceeding *ex* Articles 9(2) of Council Regulation (EC) 1/2003 or 12 of the ECN+ Directive is a discretional choice of the antitrust authorities [158]. This type of control, therefore, may never occur. Secondly, it is difficult to imagine a case in which the commitments made binding by an antitrust authority affect only the legal position of the undertaking that proposed them. As the "settling" undertakings do not operate in a legal and economic vacuum, the ordinary situation is that commitments also affect third-parties that have economic relations with the former [159]. It is also for this reason that, as discussed above, commitment decisions can be adopted only after the performance of the market test [160]. The effects of commitment decisions on third-parties are generally (but not always [161]) favourable to them: undertakings, for example, may commit to set prices below certain thresholds or to apply non-discriminatory conditions [162], to supply third parties, or to refrain from enforcing certain contractual clauses [163]. Third-parties' standing before national courts is instrumental to the protection of such effects [164].

The private enforceability of Commission's decision, however, is also a direct and (inevitable) consequence of the fact that decisions enjoy vertical and horizontal direct effect [165]: if they are clear, precise, unconditional, and capable of conferring rights [166], «[t]here is no reason why this

sions: A steep climb not a gentle stroll, in *Fordham International Law Journal*, 2005, Vol. 29, Iss. 5, p. 921; M. LIBERTINI, *Le decisioni "patteggiate" nei procedimenti per illeciti antitrust*, in *Giornale di Diritto Amministrativo,* 2006, Vol. 12, Iss. 12, p. 1284, p. 1290.

[158] Case T-342/11, *CEEES*, cit., paras 48 e 64.

[159] E. LECCHI, J. LOGENDRA, R. THOMASEN, *Committing others: the commitment procedure and its effect on third parties*, in *Global Competition Litigation Review*, 2011, Vol. 4, Iss. 4, p. 162.

[160] See above notes 41-46.

[161] Case C-132/19 P, *Groupe Canal+*, cit.; General Court, case T-76/14, *Morningstar* [2016] ECLI:EU:T:2016:481.

[162] Case COMP/39.692 – *IBM (Maintenance services)*, cit.

[163] Case COMP/B-1/37.966 – *Distrigas*, cit., para. 27.

[164] Third parties must have the «possibility of protecting the rights they may have in connection with their relations with th[e] undertaking» (case C-441/07 P, *Alrosa*, cit., para 49).

[165] Court of Justice, case 9/70, *Franz Grad* [1970] ECLI:EU:C:1970:78, paras 5-6.

[166] Court of Justice, case 26-62, *Van Gend & Loos* [1963] ECLI:EU:C:1963:1. On the

general principle of EU law should not also apply to commitment rendered binding by an EU act» [167]. Anyone, therefore, can invoke a commitment decision against its addressee [168] and national courts must ensure compliance, in accordance to the principles of equivalence and effectiveness [169] and to preserve their *effet utile* [170].

Using well-known terms in antitrust law, third parties can use commitment decisions both as a "shield", to seek protection from the behaviours that the undertaking undertook not to engage in, or as a "sword", claiming the fulfilment of their content or compensation in case of default. Just like for public enforcement, the subject matter of these cases, therefore, is the undertaking's non-compliance with the obligations agreed with the antitrust authorities, rather than a violation of competition rules. By virtue of the quasi-contractual nature of this kind of litigation, the burden of proof on prospective claimants is lower.

Turning to the second scenario, the fact that undertakings that properly implemented the commitments could nevertheless face litigation before national courts seems more controversial. Many general principles of EU law (e.g. legitimate expectations, legal certainty [171], etc.) and, more generally, the need to ensure the consistency of the legal order seem to suggest the inconceivability of this scenario [172]. However, there are also reasons to hold that compliance with commitments cannot ensure immunity from civil liability. Firstly, such immunity could only be granted if, before accepting the commitments, the Commission or the NCA were required to verify that their implementation can prevent any (current, future, and even only potential) possible violation of com-

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conferral of a right, however, see Court of Justice, case C-61/21, *Ministre de la Transition écologique e Premier minister* [2021] ECLI:EU:C:2022:1015.

[167] E. DE SMIJTER, A. SINCLAIR, *The Enforcement System*, cit., p. 129.

[168] By contrast, individuals may not be able to rely, in legal proceedings against other individuals concerning contractual liability, on decisions addressed to one or more Member States (Court of Justice, case C-80/06, *Carp* [2007] ECLI:EU:C:2007:327, paras 21-22).

[169] M. SIRAGUSA, E. GUERRI, *Antitrust Settlements*, cit., p. 189.

[170] J. TEMPLE LANG, *Commitment Decisions*, cit., p. 351.

[171] Court of Justice, cases C-247/11 P and C-253/11 P, *Areva SA* [2014] ECLI:EU:C:2014:257.

[172] S. MARTÍNEZ LAGE, R. ALLENDESALAZAR, *Commitment Decisions*, cit., pp. 599-600.

petition rules, rather than only assessing their suitability to meet the concerns raised in the PA. Clearly, this would represent a so-called *probatio diabolica*, as the antitrust authorities would be asked to prove a negative fact. Commitment decisions would be impossible to use.

Secondly, it cannot be excluded that commitment decisions may themselves restrict competition. Commitments are initially proposed by the undertakings that, in this context, have no interest in protecting the competitive process. As commitments are often used to pursue regulatory purposes, their content may not be tailored to ensure compliance with competition rules: the authorization of otherwise anticompetitive conduct, after all, is one of the typical features of regulatory activity [173]. The limited scope of judicial review contributes to make such a possibility far from implausible.

Thirdly, an antitrust infringement is a violation of EU primary law (Articles 101 and 102 TFEU) and it cannot become lawful just because it is carried out during the implementation of a piece of EU secondary law, i.e. the commitment decision.

Fourthly, third parties may wish to seek compensation for damages they suffered not as a result of "anticompetitive commitments" but, more simply, by virtue of a breach of contract caused by the commitment decision: for example, if an exclusive supply agreement for or by a (potentially) dominant undertaking leads an antitrust authority to issue a PA, the undertaking might agree to no longer comply with that supply agreement; this commitment clearly affects the contractual rights of the third party that was exclusively supplying or supplied by the dominant undertaking.

While, at least in principle, actions against undertakings that complied with a commitment decision should therefore be considered admissible, they represent a sort of *sui generis* and "aggravated" stand-alone action. Commitment decisions not only do not help the potential claimants to meet their burden of proof, but they make their action even more difficult. Potential claimants must indeed meet a higher burden of proof than if there was no commitment decision. Although it cannot lead to conferring a *de jure* immunity upon the "settling" undertakings, the fact that they have implemented the commitments that an antitrust authority considered suitable to solve the concerns initially detected may (correctly)

[173] J. TEMPLE LANG, *Competition Law and Regulation Law From an EC Perspective*, in *Fordham International Law Journal*, 1999, Vol. 23, Iss. 6, p. 117.

influence national courts in finding that, at least *prima facie*, there were no unlawful behaviours.

The relation between commitment decisions and third parties' pre-existing contractual rights was discussed in the mentioned *Groupe Canal+* case [174]. The case concerns the annulment of a decision by which the Commission accepted the commitments proposed by Paramount [175]. The commitments affected the contractual rights of Canal+ (which of course neither offered nor subscribed to them), as they led Paramount to no longer honor some clauses of the contract in place whit Canal+.

The General Court dismissed Canal+ application *ex* Article 263 TFEU holding that it had alternative domestic remedies: Canal + could have asked a national court to enforce against Paramount the contractual terms that the latter committed to no longer apply. According to the General Court, if a national court finds that the contractual terms do not breach Article 101 TFEU, said clauses may be enforceable under national contract law and, therefore, the national court may order the addressee of the decision to contravene the commitments to comply with its pre-existing contractual obligation [176].

While Advocate General Pitruzzella highlighted the nature of "aggravated" stand-alone action of these claims [177], the Court of Justice took a more radical stance and held that national courts cannot find that a contractual clause made inapplicable by a commitment decision is compatible with Articles 101 and 102 TFEU. According to the Court of Justice, national courts cannot request undertakings to contravene the content of a commitment decision nor uphold damages actions brought by their contractual counterpart, as these situations «would clearly run counter to that decision» within the meaning of Article 16(1) of Council Regulation (EC) 1/2003 [178].

The prohibition to issue "negative decisions" is based on the presumption of the anticompetitive nature of the conduct of the undertak-

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[174] Case C-132/19 P, *Groupe Canal+*, cit.

[175] Commission Decision of 26 July 2016 in case AT.40023 – *Cross-border access to pay-TV*.

[176] General Court, case T-873/16, *Groupe Canal+* [2018] ECLI:EU:T:2018:904 paras 103-104.

[177] See above note 137.

[178] Case C-132/19 P, *Groupe Canal+*, cit., paras 109-111 and 114.

ings that propose commitments and, therefore, fosters the possibilities for potential claimants to seek damages with reference to behaviours covered by a commitment decision. The Court of Justice imposed this prohibition upon national courts on the grounds that, on the one hand, commitment decisions are issued to close proceedings where the Commission intended «to adopt a decision requiring that an infringement be brought to an end» and, on the other hand, the issuance of a commitment decision does not prevent the Commission from reopening the proceeding and adopting «a decision containing a formal finding of an infringement» [179].

The reasoning of the Court, however, is not entirely satisfactory. Firstly, it is true that the Commission could have adopted a prohibition decision, but it chose not to do so: no infringement, therefore, was ended. Secondly, under Article 9(2) of Council Regulation (EC) 1/2003, the possibility to reopen the proceeding is subject to specific conditions: in addition to non-compliance, a material change in the facts on which the decision was based should occur or the information provided by the parties should result to be incomplete, incorrect, or misleading. If this happens, the Commission may, but is not obliged to, reopen the proceeding. The Court, therefore, used something that did not happen and something that may never happen to overcome the wording of Article 9 (which refer to «concerns», and not to «infringement») and of Recitals 13 of Council Regulation (EC) 1/2003 (according to which the Commission shall not conclude «whether or not there has been or still is an infringement» [180]). The fact that no infringement is established would seem to suggest that there can be no "negative decision".

This approach seems too restrictive for the position of third parties, especially if one considers the wide diffusion of commitment decisions and the fact that the latter are used also for regulatory purposes, i.e. with respect to situations that may not be strictly related to an antitrust infringement. The Court's concern and effort to preserve the *effet utile* of commitment decisions, and thus the effectiveness of the obligations negotiated between the Commission and the undertakings, is understandable. However, it would have been enough to rule out only the possibility for third parties to bring enforcement actions, without excluding damages

[179] Case C-132/19 P, *Groupe Canal+*, cit., para 113.

[180] See also Case T-342/11, *CEEES*, cit., para 55.

actions too [181]. Anticompetitive contracts are null and void pursuant to Article 101(2) TFEU so that, in the event of default by one party, the other party is entitled to neither fulfilment nor compensation. However, as commitment decisions represent a grey area, an alternative – and perhaps more proportionate – solution would have been to include only enforcement actions in the scope of the prohibition of "negative decision", leaving the third parties' right to compensation unaffected.

Also to counterbalance the above, the Court affirmed that third parties must be entitled to challenge the Commission's commitment decisions that affect their pre-existing contractual rights before the General Court [182]. However, the recognition of their *locus standi* under Article 263 TFEU does not seem to provide sufficient protection to third parties, if only because of the short time limit for challenging the decision. Actually, it might even be detrimental to their position if this had the effect of preventing the possibility of a preliminary reference of validity in a potential contractual dispute at the national level [183].

5. Conclusion

Commitment decisions have radically altered the traditional ways of enforcing competition rules. Their introduction in Council Regulation (EC) 1/2003 and then in the ECN+ Directive both codified and reinforced a definitive shift from a top-down model in which Articles 101 and 102 TFEU were enforced by the Commission and the NCAs from a position of "power" vis-à-vis the undertakings to a system in which these subjects negotiate on a position of (almost) equal standing.

In the light of their innovative nature and instant practical diffusion, it is not surprising that commitment decisions have originated countless

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[181] Case C-132/19 P, *Groupe Canal+*, cit., para 114.

[182] Case C-132/19 P, *Groupe Canal+*, cit., paras 115-117; see already case C-441/07 P, *Alrosa*, cit.; case T-76/14, *Morningstar*, cit.).

[183] Individuals «who could undoubtedly have sought [the] annulment under Article [263 TFEU]» of a given act are not entitled to plead the illegality of that act before national courts for the purposes of Article 267 TFEU (Court of Justice, case C-441/05, *Roquettes Frères* [2007] ECLI:EU:C:2007:150 para 40) See also Court of Justice, case C-188/92, TWD [1994] ECLI:EU:C:1994:90.

theoretical and practical issues, relating to both public and private enforcement of Articles 101 and 102 TFEU. As discussed in this paper, some of these issues have already been addressed and resolved thanks to the intervention of the Court of Justice and national courts: the case law, for example, had the chance to highlight the peculiar application of the principle of proportionality in this field [184] as well as to address the main profiles of the complex interplay between commitment decisions and third parties' actions for damages. While they do not (nor can [185]) ascertain an antitrust offence, commitment decisions must be taken into account by national courts, which must confer them specific evidential value [186]: the need not to undermine their useful effect, may therefore lead, in some instances, to specific limitations for national courts, which for example cannot authorize undertakings to break the commitments made binding by an antitrust authority [187].

Of course, the above does not mean that there are no longer open questions regarding the private enforcement of commitment decisions issued pursuant to Article 9 of Council Regulation (EC) 1/2003 and 12 of the ECN+ Directive, and indeed there are still many controversial aspects capable of creating relevant doubts and practical problems [188]. A particularly interesting profile, however, could occur at the "border" of competition law. Reference is made to the question as to whether commitment decisions issued by the Commission under Article 25 of the DMA may also be subject to judicial application at the national level. This issue is of course part of the broader – and much heated – debate about whether private enforcement of the whole DMA, including the substantive obligations imposed on gatekeepers, is per se admissible and in which terms [189].

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[184] Case C-441/07 P, *Alrosa*, cit.

[185] Case T-342/11, *CEEES*, cit.

[186] Case C-547/16, *Gasorba*, cit.

[187] Case C-132/19 P, *Groupe Canal+*, cit.

[188] For example, the General Court has recently held that national courts may grant an application for annulment of an arbitration award if the award is contrary to a commitment decision adopted under Article 9 of Council Regulation (EC) 1/2003, cit. (see General Court, case T-616/18, *Polskie Górnictwo Naftowe i Gazownictwo* [2022] ECLI:EU:T:2022:43 para 292).

[189] The issue has only partially been solved by Article 39 of the DMA. See F. CROCI, *Judicial Application of the Digital Markets Act: The Role of National Courts*, in this *Book*, p. 233.

If such a question will arise, it will initially do so before national courts, e.g., at the initiative of a third party who may desire to secure compliance by a gatekeeper with the commitments the latter negotiated with the Commission, and then, sooner or later, it will likely reach the Court of Justice through the preliminary ruling procedure. In this context, it is not easy to predict whether the principles established by the Court of Justice and national courts with respect to the private enforcement of "ordinary" commitment decisions can and will be extended to the private enforcement before national courts of the DMA's commitment decisions.

The first impression, however, seems to point in that direction, at least in the sense that the possibility for national courts to protect the rights of third parties with respect to such delegated acts could very hardly be ruled out, unless the latter are drafted by the parties (the Commission and the gatekeeper) in such a way that they cannot meet the requirements for direct effect, a circumstance that appears, however, difficult to be achieved. If this is not the case, the judicial application of – the DMA, including – the DMA's commitment decisions will increase the effectiveness of this regulatory instrument and it is likely that the Court of Justice and the national courts will not fail to consider the fundamental role of third partes to foster its *effet utile*.