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The Transactionalization of EU Competition Law: A Positive Development?

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ABSTRACT

Over the last few years, a growing number of competition law investigations launched by the Commission end with the adoption of a commitments or, in the case of cartels, settlement decision. The success of these procedures is explained by the benefits they bring to both the Commission and the investigated undertakings. These procedures allow the Commission to save resources and obtain results quickly, while they allow undertakings to avoid the imposition of a fine (in the case commitments) or a decrease of the fine (in the case of settlements), as well as end the distraction created by investigation and control the damage to their reputation. This paper argues that excessive reliance on these procedures may have some downsides in that they may be poorly suited to deal with cases involving complex and novel questions of competition law. Moreover, in the case of commitments, there is a danger that this procedure by the Commission be used to extract remedies that it may not be able to include in an infringement decision subject to judicial review. As these procedures generate few appeals, there is also a danger that these procedures undermine the evolution of the case-law.

Keywords: competition law, commitments, settlements, cartels, remedies, judicial review, procedural.

JEL: K21, K42, L41, L42

I. Introduction

One of the most significant developments in EU competition law in the past decade is the growing opportunity given to undertakings investigated by the European Commission (the "Commission") to bring the matter formally to an end by offering commitments (in cases involving Article 101 and/or 102 of the Treaty on the Functioning of the European Union ("TFEU"))[1] or by negotiating

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1 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L1/1 ('Regulation 1/2003'), Article 9.

a settlement (in the case of cartels).[2] As per Article 9 of Regulation 1/2003, undertakings "can offer commitments to meet the competition concerns addressed to them by the Commission." If the Commission accepts the proposed commitments, it may by decision make them binding, without a fine being imposed. Under the cartel settlement procedure, the undertakings concerned can acknowledge their participation and liability in a cartel in exchange for a reduction of the fine that would otherwise be imposed on them.

These procedures have been abundantly used by undertakings. For instance, since 2004, the Commission adopted 22 commitments decisions in cases involving Article 102 TFEU (compared to 9 infringement decisions). It has also adopted 22 commitments decisions involving Article 101 TFEU, and 1 decision involving Articles 101 and 102 TFEU. Since 2010, the Commission has also adopted 24 cartel settlements (compared to 21 infringement decisions during the same period). Clearly, commitments decisions and cartel settlements have become extremely popular tools, probably more so than one could have anticipated when these instruments were adopted.

While the commitments and settlements procedures offer significant advantages, this paper argues that excessive reliance on these procedures may have some downsides. First, these procedures may be poorly suited to deal with cases involving complex and novel questions of competition law, and where guidance is needed. Moreover, in the case of commitments, there is a danger that this procedure by the Commission be used to extract remedies that it may not be able to include in an infringement decision subject to judicial review. As these procedures generate few appeals, there is also a danger that these procedures undermine the role of the EU courts, as well as the evolution of the case-law.

Against this background, this paper is divided in four parts. Part II provides statistics over the use of the commitments and settlement procedures, and explains the reasons why these procedures have been so successful. Part III discusses whether the extensive use of the commitments and settlement procedures is necessarily a good thing for the development of EU competition law. Part IV concludes.

[2] Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, OJ [2008] L171/3 and Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ [2008] C167/1 ('Settlement Notice').

II. Reasons explaining the success of the commitments and cartel settlement procedures

Both the commitments and settlement procedures were introduced by the Commission to streamline the administrative procedure and to save resources.[3] Efficiency considerations were thus at the core of the introduction of the procedures in the Commission's tool box. These procedures also offered significant benefits to undertakings subject to investigations ("undertakings concerned") and are thus part of the strategy used by undertakings to end Commission proceedings with the best possible outcome.

A. Commitments

The commitments procedure allows the Commission to save significant resources compared to the procedure leading to an infringement decision. First, the Commission can communicate its competition concerns in a shorter and less detailed Preliminary Assessment ("PA").[4] The Statement of Objections ("SO") prepared by the Commission in the context of an infringement procedure contains a detailed assessment of the facts of the case by the Commission, while the PA in principle contains summary references to the main evidence of the alleged infringement. The PA is around twenty pages, which is relatively short compared to the typical SO, which in a complex case can run over several hundred pages.[5] Second, a commitments decision is significantly shorter than an infringement decision, in terms of pages and substantive analysis. The Commission is not required to establish an infringement of competition law and in principle limits its analysis to a brief discussion of its competition concerns. Besides the reduced amount of drafting, the commitments procedure allows the Commission to achieve quick results, which may be an important benefit in cases involving fast-moving industries, and it decreases the likelihood of an appeal.

As far as undertakings are concerned, the most attractive feature of the commitments procedure is that it allows them to escape fines, the level of which significantly increased in the last twenty

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3 Settlement Notice, para. 1. See also Commission Staff Working Paper – Report on the functioning of Regulation 1/2003 (COM(2009)206), §94 and 132.

4 It must be submitted however that in practice, still nearly 40% of the commitments procedures have been opened by SO.

5 E. Gippini-Fournier, "The Modernisation of European Competition Law: First Experiences with Regulation 1/2003", *Community Report to the FIDE Congress* 2008, 35, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1139776. According to Gippini-Fournier, the 'preliminary assessment' is "*reminiscent of the 'warning letters' sent by the Directorate-General for competition, with the significant difference that preliminary assessments are adopted by the Commission by the same procedure used for statements of objections*".

years.[6] Commitments shorten the length of the procedure (and thus the internal and external resources needed to fight the case), reduce managerial distraction linked to the investigation and reduce the damage to the undertakings' reputation. There is less "stigma" attached to a commitments decision and it does not "count" for recidivism purposes. Finally, because of their streamlined nature and the fact they do not establish an infringement, commitments decisions may reduce the risk of damages actions.

These advantages explain the popularity of commitments decisions, both in Article 101 and 102 TFEU investigations as illustrated by the tables below. Clearly, but for cartel cases, commitments decisions have become the most common procedure to bring Articles 101 and 102 TFEU investigations to an end.

Table 1

Commitments decisions / Article 101 TFEU			
Reference	**Date**	**Type of infringement**	**Appeal**
37.398 - UEFA	23.07.03	Joint selling agreement (horizontal)	
37.214 - Bundesliga	19.01.05	Joint selling agreement (horizontal)	
38.173 - FA Premier League	22.03.06	Joint selling agreement (horizontal)	
38.348 - Repsol	12.04.06	Non-compete (vertical)	T-45/08; C-36/09 P*
38.681 - Cannes Extension	04.10.06	Collective management of rights (horizontal)	
39.143 - Opel	13.09.07	Access to technical information (vertical)	
39.142 - Toyota	13.09.07	Access to technical information (vertical)	
39.141 - FIAT	13.09.07	Access to technical information (vertical)	
39.140 - DaimlerChrysler	13.09.07	Access to technical information (vertical)	
39.416 - Ship classification	14.10.09	Standard-setting (horizontal)	
39.596 - BA/AA/IB	14.07.10	Airline alliance (horizontal)	
39.398 - Visa I	08.12.10	Joint setting of MIFs (horizontal)	
39.736 - Siemens/Areva	18.06.12	Non-compete (vertical)	
39.847 – e-books I	18.06.12	Hub-and-spoke	
39.230 - Rio Tinto Alcan	20.12.12	Tying/Bundling**	
39.595 - A++	23.05.13	Airline alliance (horizontal)	
39.847 – e-books II	25.07.13	Hub-and-spoke	
39.398 - Visa II	12.05.15	Joint setting of MIFs	
39.964 - Skyteam	12.05.15	Airline alliance (horizontal)	
39.850 - Container liner shipping	07.07.16	Container liner shipping (horizontal)	
39.745 - ISDA	20.07.16	Refusal to license	
39.745 - Markit	20.07.16	Refusal to license	
40.023 - Paramount	26.07.16	Geo-blocking	

*Appeal by third party

**Proceedings both under Article 101 and Article 102 TFEU

[6] For the statistics, see ec.europa.eu/competition/cartels/statistics/statistics.pdf. See also R. Sauer, "Public sanctions. Public Enforcer" in F. Wijckmans and F. Tuytschaever (eds.), *Horizontal agreements and cartels in EU competition law*, Oxford, Oxford University Press, 2015, 211-212.

Table 2

Commitments decisions / Article 102 TFEU			
Reference	**Date**	**Type of infringement**	**Appeal**
39.116 - Coca-Cola	22.06.05	Exclusivity and rebates	
38.381 - De Beers	22.02.06	Exclusivity	T-170/06; C-441/07 P*
37.966 - Distrigaz	11.10.07	Long-term supply contracts	
39.388 - GEWM (E.ON electricity)	26.11.08	Inflating balancing costs	
39.389 - GEBM (E.ON electricity)	26.11.08	Export restrictions	
39.402 - RWE	18.03.09	Refusal to supply / Margin squeeze	
39.316 - GDF	03.12.09	Refusal to supply	
38.636 - Rambus	09.12.09	Excessive pricing	
39.530 - Microsoft	16.12.09	Tying/Bundling	
39.386 - EDF	17.03.10	Long-term supply contracts	
39.351 - SvK	14.04.10	Discrimination	
39.317 - E.ON	04.05.10	Refusal to supply	
39.315 - ENI	29.09.10	Capacity hoarding and degradation / Strategic underinvestment	
39.592 - S&P	15.11.11	Excessive pricing	
39.692 - IBM	13.12.11	Refusal to supply	
39.654 – Thomson Reuters	20.12.12	Refusal to supply	T-76/14*
39.230 - Rio Tinto Alcan	20.12.12	Tying/Bundling**	
39.727 - CEZ	10.04.13	Capacity hoarding	
39.678 - Deutsche Bahn I	18.12.13	Margin Squeeze	
39.731 - Deutsche Bahn II	18.12.13	Margin Squeeze	
39.939 - Samsung	9.04.14	Seeking of injunctions (SEPs)	
39.767 - BEH	10.12.15	Territorial restrictions on resale	
40.153 - Amazon	04.05.17	Abusive contractual clauses	

*Appeal by third party

**Proceedings both under Article 101 and Article 102 TFEU

B. Settlements

The settlement procedure similarly provides significant procedural gains for the Commission. In order to reach a settlement with the Commission, the undertakings concerned have to acknowledge their liability for the infringement and refrain from requesting access to the file and an oral hearing.[7] Moreover, the Commission only needs to issue an SO that reflects the settlement submissions of the undertakings,[8] which is considerably shorter than the SO in the infringement procedure.[9] Settlement submissions of the undertakings concerned contain an acknowledgment of

[7] Settlement Notice, para. 20.

[8] Settlement Notice, paras. 22 and 23, fn 1. An exception is the *Trucks* case where the undertakings concerned approached the Commission informally to request settlement discussions. The Commission started the settlement procedure, while the undertakings concerned at that point in the proceedings already received a regular SO and have had access to the complete file of the Commission.

[9] F. Laina and E. Laurinen, "The EU Cartel Settlement Procedure: Current Status and Challenges", (2013) 4(4) *Journal of European Competition Law and Practice* 305.

participation in the cartel and of an infringement, an indication of the maximum amount of the fine they are willing to accept, the confirmation that the undertakings have been sufficiently informed by the objections of the Commission and that they will not request access to file or an oral hearing.[10] The undertakings must provide a short reply to the SO within two weeks, which will simply confirm that the SO reflects the settlement submissions.[11] As in the case of commitments, the reduced likelihood of a subsequent appeal constitutes another advantage for the Commission.

Although the cartel settlement procedure only grants a 10% reduction on the fine that would otherwise have been imposed by the Commission, it offers undertakings benefits comparable to those offered by commitments decisions, such as reduced legal costs and reputational damage,[12] and fewer distractions from conducting their business. Settlements also reduce the amount of publicly available information to potential damage claimants. Moreover, it is not excluded that *de facto* the reward for settling is higher than the 10% contemplated by the Settlement Notice as the settlement procedure allows for more meaningful and transparent discussions with the Commission than under a standard cartel procedure. Although this is speculative, these discussions potentially increase the ability of the undertakings concerned to influence the Commission on elements that are taken into account in the calculation of the fine (e.g., the duration of the infringement, the sales involved, etc.).

The popularity of the settlement procedure is reflected in the number of settlement decisions. Since 2010 the Commission has adopted 24 settlement decisions as compared to 21 regular prohibition decisions adopted in the same timeframe. Since the adoption of the first settlement decision, the settlement procedure has been applied in more than 50% of the prohibition decisions. The importance of the settlements is increasing and recent years show particularly high ratio of the settlements, namely 80% in 2014 and 60% in 2016.[13]

Table 3

Reference	**Date**	**Number of undertakings involved**	**Fine**	**Appeal**
39.511 - DRAMs	19.05.10	10	€ 331,273,800	
38.866 - Animal feed phosphates	20.07.10	5 (+ 1 non-settling)	€ 175,647,000	T-456/10; C-411/15P*

10 Settlement Notice, para. 20.

11 Settlement Notice, para. 26.

12 Cartel infringements are stigmatized, and presented and perceived as a serious form of consumer abuse. The willingness of undertaking to cooperate and admit their liability may limit the stigma linked to such infringements.

13 D. Geradin and K. Sadrak, "The EU Competition Law Fining System: A Quantitative Review of the Commission Decisions between 2000 and 2017", *TILEC Discussion Paper* 2017-018, 24, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2958317.

39.579 – Laundry powder detergents	13.04.11	3	€ 315,200,000	
39.605 - CRT glass bulbs	19.10.11	4	€ 128,736,000	
39.600 - Refrigeration processors	07.12.11	5	€ 161,198,000	
39.611 - Water management products	01.11.12	3	€ 13,661,000	
39.748 - Automotive Wire harnesses	10.07.13	5	€ 141,791,000	
39.914 - Euro rate derivatives	04.12.13	6 (+ 1 non-settling)	€ 1,042,749,000	T-98/14; T-113/17* T-611/15**
39.861 - Yen rate derivatives	04.12.13	4 (+ 3 non-settling)	€ 669,719,000	T-180/15*
39.801 - Polyurethane foam mattresses	29.01.14	4	€ 114,077,000	
39.952 - Power exchanges	05.03.14	2	€ 5,979,000	
39.922 - Automotive bearings	19.03.14	6	€ 953,306,000	
39.792 - Steel abrasives	02.04.14	4 (+ 3 non-settling)	€ 30,707,000	T-433/16*
39.965 - Canned mushrooms	25.06.14	3 (+ 1 non-settling)	€ 32,225,000	
39.924 - SIRD (Libor)	21.10.14	2	€ 61,676,000	
39.924 - SIRD (Bid ask spread)	21.10.14	4	€ 32,355,000	
39.780 - Envelopes	11.12.14	5	€ 19,485,000	T-95/15
40.055 - Parking heathers	17.06.15	2	€ 68,175,000	
40.098 - Blocktrains	15.07.15	3	€ 49,154,000	
40.028 - Alternators and starters	27.01.16	3	€ 137,789,000	
39.824 - Truck producers	19.07.16	5 (hybrid)	€ 2,926,499,000	
39.904 - Rechargeable batteries	12.12.16	4	€ 165,841,000	
39.960 - Thermal systems	08.03.17	6	€ 155,575,000	
40.013 - Car lighting	21.06.17	3	€ 26,744,000	

* Appeal by non-settling party

**Appeal by third party

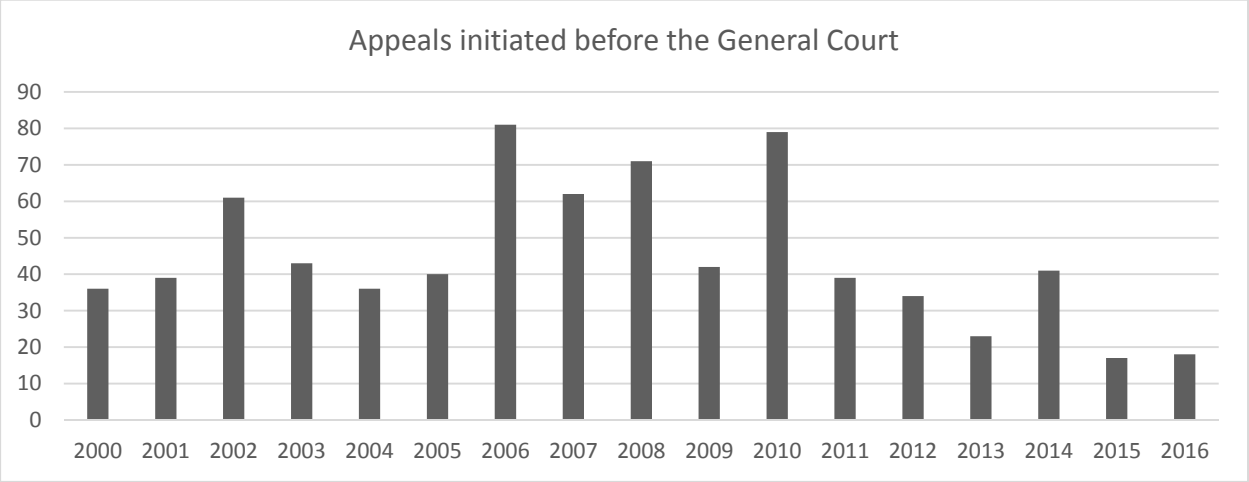
III. Are commitments decisions and cartel settlements too much of a good thing?

While it is hard to deny the advantages of the commitments and the settlement procedures, their extensive use raises the question of whether they are not too much of a good thing. As we argue hereafter, this depends. We first observe the significant decline of the number of appeals before the General Court of the EU ("GCEU") in the past few years, which largely corresponds to the increased reliance by the Commission on commitments and settlement decisions. While a reduction in the number of appeals may not necessarily be a problem in itself as some appeals have limited merits, it is however important that decisions involving complex and/or novel questions of law be subject to judicial review. In this respect, we are concerned that in certain cases, more particularly in commitments decisions, the Commission uses the reduced risk of appeals by the parties to extend its discretion.

A. A review of the data on the reduction of the number of appeals of Commission decisions to the EU Courts

An analysis of the number of appeals filed against competition decisions adopted by the Commission since 2000 shows a downward trend since 2011, with a significant drop in 2015 and 2016. While the average number of appeals for the period 2000-2010 was 54, the average number for the period 2011-2016 is 29. While several factors may be at play, a review of the appeals against commitments and settlement decisions shows that these decisions are rarely appealed by the undertakings concerned, and thus – given the number of such decisions adopted by the Commission – they have had a deflationary impact on the number of appeals.

Table 4



Source: Annual reports of the Court of Justice of the European Union

Our analysis shows that none of the undertakings subject to a commitments decision have appealed the Commission decision. In three cases, however, a third-party did bring an appeal before the GCEU.[14] These appeals were based on an alleged infringement of essential procedural requirements. In its *Alrosa* judgment, the CJEU limited the application of the principle of proportionality to the commitments vis-à-vis third-parties, thereby confirming the Commission's wide margin of discretion in these cases.[15] Consequently, the responsibility for avoiding disproportionate commitment decisions will lay in the first place with the undertakings concerned. It is for them to refuse commitments that go beyond what is required to solve the competitive concerns raised and to offer alternative, less onerous remedies. Whether undertakings can resist

[14] Judgment of 17 July 2007, Alrosa v Commission, T-170/06, EU:T:2007:220 (in appeal: Judgment of 29 June 2010, *Alrosa v Commission*, Case C-441/07 P, EU:C:2010:3779); Judgment of 15 September 2016 in *Morningstar v Commission*, T-76/14, EU:T:2016:48; Order of 14 November 2008 in *Transportes Evaristo Molina v Commission*, T-45/08, EU:T:2008:499 (upheld in judgment of 11 November 2010, *Transportes Evaristo Molina v Commission*, C-36/09 P, EU:C:2010:670).

[15] In the *Morningstar* judgment, the GC followed the approach of the CJEU. See Judgment of 15 September 2016 in *Morningstar v Commission*, T-76/14, EU:T:2016:48.

offering disproportionate commitments when the alternative is a large fine is, however, questionable.

As far as settlement decisions are concerned, only two settling parties have appealed such decisions so far, while a total number of 101 undertakings were fined under the settlement procedure. The appeal that resulted in a judgment was based only on an alleged infringement of essential procedural requirements in relation to the determination of the amount of the fine.[16] The GCEU annulled the fine due to the Commission's failure to state reasons.[17] In four of the six hybrid settlement cases, a non-settling party appealed the infringement decision. All these appeals were based on both alleged misapplication of the law or on procedural grounds.[18] The incentive to appeal – and the possible grounds for appeal – thus appears to be significantly lower with settling undertakings.

While the GCEU was very much seen when it was created as a competition law court, the CJEU is in fact handling almost as many competition cases. Of course, the CJEU is yet to see the impact of the reduced number of appeals filed to the GCEU as there is a delay of 2-3 years before the moment they are filed to the GCEU and the moment appeals against GCEU judgments are filed before the CJEU. Importantly, however, the CJEU must deal with several requests for preliminary ruling. The increased decentralisation of the enforcement of competition law combined with the growth in damages litigation, the number of preliminary rulings is likely to increase in the years to come.

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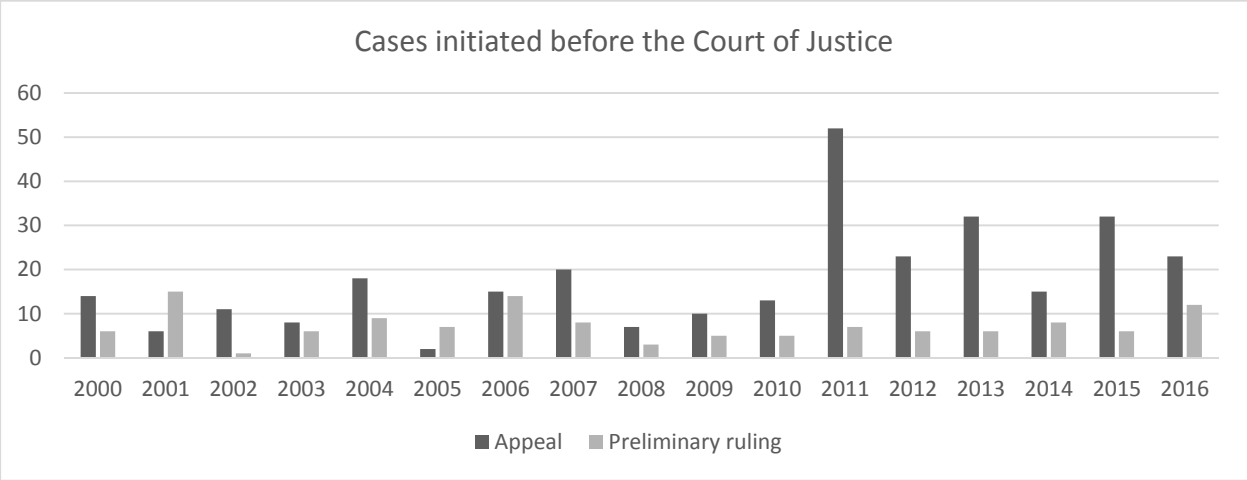
16 Judgment of 13 December 2016, *Printeos v Commission*, T-95/15, EU:T:2016:722, challenging the decision in case 39.780. The grounds were: an alleged infringement of the duty to state reasons regarding the adjustment of the basic amount of the fine, of the principle of equal treatment and of the principle of proportionality and non-discrimination, all in relation to the determination of the amount of the fine. Since the GC annulled the fine on the basis of the Commission's failure to state reasons, it did not go into the other two pleas.

The second appeal had been withdrawn after the Commission had adjusted the fine for Société Générale. According to a short statement of the Commission, "[t]he amended fine is based on amended value of sales data provided by Société Générale in February 2016 after the bank realised that it had initially provided incorrect data to the Commission". See Order of 2 March 2016, *Société Générale v Commission*, T-98/14, EU:T:2016:131, challenging the decision in case 39.914.

17 Judgment of 13 December 2016 in *Printeos e.a. v Commission*, T-95/15, EU:T:2016:722, para. 51*ff*.

18 Action brought on 14 April 2015 in *Icap a.o. v Commission*, T-180/15; Action brought on 3 August 2016 in *Pometon v Commission*, T-433/16; Action brought on 20 Feburary 2017 in *Crédit Agricole and Crédit Agricole Corporate and Investment Bank v Commission*, T-113/17 and Judgment of 20 May 2015, *Timab Industries*, T-456/10, EU:T:2015:296, upheld by the judgment of 12 January 2017, *Timab Industries*, C-411/15 P, EU:C:2017:11.

Table 5



Source: Annual reports of the Court of Justice of the European Union

B. Impact of the extensive use of commitments and settlement decisions on competition law enforcement

In this Section, we explore the possible adverse consequences of an extensive use of commitments and settlement decisions on competition law enforcement.

1. Commitments

The alleged infringements that have been so far subject to the commitments decision, include horizontal cooperation agreements,[19] vertical agreements[20] and abuse of a dominant position.[21]

a. Use of commitments in Article 101 TFEU cases

An analysis of the commitments decisions adopted in the context of alleged breaches of Article 101 TFEU suggests that the commitments procedure may have been used by the Commission to broaden the scope of restrictions by object without a proper check by the EU courts. In its first commitments decisions, the Commission appeared to refrain from identifying the behaviour in question as a possible restriction by object or effect – at least explicitly. As the number of

[19] In the context of horizontal cooperation agreements, the cases addressed *i.a.* joint selling agreements, collective management of rights, alliances, standard-setting, joint setting of MIFs and various types of information exchange, such as through hub-and-spoke collusion, JVs and signaling.

[20] Vertical agreements consisted of non-compete clauses, refusing access to technical information and geo-blocking.

[21] The type of alleged abuses of dominance were exclusionary and/or exploitative, such as rebates, tying and bundling, refusal to supply, margin squeeze, excessive pricing, SEPs and network and non-network related signaling.

commitments decisions grew, the Commission became bolder and classified the behaviour as possible restrictions by object and/or effect[22] or as restrictions by object.[23]

One of the consequences of a broad interpretation of restriction by object is that it allows the Commission to do away with an effect-based analysis of the agreement in question. This may be especially problematic in cases where pro-competitive effects cannot be excluded or where the assessment of the agreement is rather complex or novel. For example, in the *e-books* case,[24] the Commission was concerned that the joint switch by five international publishers from a wholesale model for the sale of e-books to an agency model containing the same key terms for retail prices, was part of a concerted practice between these publishers and Apple. According to the Commission, the publishers engaged in direct and indirect (through Apple) contact to jointly adopt a contract model that would enable them to either raise retail prices of e-books or to prevent the emergence of lower prices for e-books as a response to Amazon's sharp pricing policy. However, this so-called "hub-and-spoke" conspiracy, where horizontal collusion is made possible through vertical agreements, is a complex concept. The assessment of hub-and-spoke practices has proved challenging and would benefit from further guidance to help undertakings to identify when their behaviour amounts to an infringement.[25] The Commission has acknowledged that information exchanged indirectly between competitors through a common third-party may constitute a horizontal infringement,[26] and the use of a supplier as a common point of reference by competing distributors in the context of a vertical agreement may facilitate collusion,[27] but it has not yet provided further guidance as to how such practice should be assessed. The succinct analysis comprised in a commitments decision does not assist much.

b. Application of Article 102 TFEU

The application of Article 102 TFEU typically raises complex legal and economic questions. Although the Commission may want to obtain an early closure of the investigation through the adoption of commitments meeting its competition concerns, in some cases, the need for guidance

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22 See *i.a.* the *Cannes Extension Agreement* decision, the *BA/AA/IB* decision, the *Visa I* and *Visa II* decision, the *A++* decision, the *SkyTeam* decision.

23 See *i.a.* the *Paramount* decision, the *Container Liner Shipping* decision, the *e-books* decisions, the *Siemens/Areva* decision.

24 See the *e-books I* decision.

25 See O. Odudu, "Indirect Information Exchange: The Constituent Elements of Hub and Spoke Collusion", (2011) 7(2) *European Competition Journal* 205-242.

26 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ [2011] C11/1, para. 55.

27 Commission notice - Guidelines on Vertical Restraints, OJ [2010] C130/1, para. 211.

and/or evolution of the case-law should, in our view, prevail.[28] This is especially true where the behaviour relates to unchartered areas of Article 102 TFEU.

For example, almost all the investigations launched by the Commission in the energy sector ended with commitments decisions,[29] leaving the industry with little if any guidance, while arguably extending the scope of Article 102 TFEU with far-reaching implications for the undertakings concerned. The *E.ON electricity* and *ENI* cases illustrate the Commission's willingness to apply and interpret principles of abuse of dominance in an extensive and controversial manner.[30] In the *ENI* case, the Commission considered that ENI may have committed an abuse of its dominant position on the gas transport markets by refusing to grant competitors access to capacity available on the network by granting access in an impractical manner and by strategically limiting investment in ENI's international transmission pipeline system. While the refusal by a dominant firm to grant access to an essential infrastructure is an issue that has been subject to several EU courts' judgments, whether strategically underinvesting in one's infrastructure can be considered abusive is to say the least a controversial issue that would have benefited from guidance from the Commission and the EU courts. In the *E.ON electricity* case, the Commission also wanted to apply Article 102 TFEU to E.ON's withholding of available capacity, i.e. its deliberate failure to offer for sale the production of certain power stations which was available and economically rationale, with a view to raising electricity prices to the detriment of consumers. Whether this behaviour was abusive and, if so, what was the nature of the abuse are controversial issues, which once again would have benefited from a full analysis from the Commission and, in case of confirmed infringement, a decision reviewed by the EU courts.

c. Commission's discretion

One of the concerns that is most frequently voiced with respect to commitments is the potential that they may be used by the Commission as a regulatory approach, going beyond the "mere" enforcement of competition law.[31] In other words, the Commission may be tempted to use this

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28 For instance, since 2004, almost all abuse of dominance investigations ended with commitments decisions.

29 In the energy sector, the Commission took 11 commitments decisions (cases 37.966, *Distrigaz*; 39.388 and 39.389; *German Electricity Wholesale Markets and German Electricity Balancing Markets*; 39.402, *RWE Gas Foreclosure*; 39.116, *Gaz de France*; 39.386, *Long-Term Contracts France*; 39.951, *Swedish Interconnectors*; 39.317, *E.ON Gas*; 39.315, *ENI*, 39.767, *BEH Electricity*, 39.315, *ENI*, 39.727, *CEZ*). The exceptions are Cases 38.700, *Greek lignite and electricity markets* (although this was an Article 102 and 106 TFEU case) and 39.984, *Romanian Power Exchange/OPCOM*.

30 In the *E.ON electricity* cases, the commitments were of a structural nature and consisted of the divesture of generation capacity by divesting (shares and rights in) certain power plants and the divestiture of transmission network. In the *ENI* case, the commitments were also of a structural nature and consisted of the divestiture of its shareholdings undertakings related to international gas transmission pipelines.

31 N. Dunne, "Commitments decisions in EU competition law", (2014) 10(2) *Journal of Competition Law and Economics* 400.

procedure to impose remedies going beyond what could realistically be achieved through formal infringement decisions.[32] This creates a risk that competition law could be instrumentalized to, for instance, meet the objectives of sector-specific regulation.[33] Because appeals against commitments decisions are rare, there is a loss of control by the EU courts, increasing the broad margin of discretion of the Commission.

For instance, the Commission has been criticized for using its commitments procedure as an instrument to enforce its energy liberalisation policy.[34] Specifically, the Commission was criticized for resorting to the commitments procedure for aspects on which it had not been able to persuade Member States to support its legislative proposals.[35] For example, during the negotiations on the Third Energy Package to liberalize the energy markets[36], Germany was a strong opponent of "ownership unbundling" as a regulatory instrument to achieve liberalisation.[37] Ownership unbundling would have imposed on integrated energy undertakings (such as E.ON) to separate their production and transmission activities through divestiture of the transmission network.[38] As a compromise[39], the Commission made ownership unbundling optional for the Member States.[40] However, even though Germany opted-out from the ownership unbundling option, the Commission used the commitments procedure[41] to individually "negotiate" with E.ON the

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32 P. Choné, S. Souam and A. Vialfont, "On the optimal use of commitments decisions under European competition law", 33, available at www.crest.fr/ckfinder/userfiles/files/Pageperso/Chone/Commitments%20in%20Antitrust_IRLE_ReSub2_Version2.pdf.

33 P. Ibáñez Colomo, "On the application of competition law as regulation: elements for a theory" in P. Eeckhout and T. Tridimas (eds.), *Yearbook of European Law*, Oxford, Oxford University Press, 2010, 276-277.

34 M. Sadowska, "Energy liberalization: excessive pricing actions dusted off?", (2011) 5 *International Energy Law Review* 228.

35 *Id.*, 231.

36 Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ [2009] L211/55 and Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ [2009] L211/94. For more, see http://ec.europa.eu/energy/en/topics/markets-and-consumers/market-legislation.

37 "E.ON surprise grid offer bolsters EU liberalisation hopes", *Euractiv*, 29 February 2008, available at https://www.euractiv.com/section/energy/news/e-on-surprise-grid-offer-bolsters-eu-liberalisation-hopes/.

38 "Questions and Answers on the third legislative package for an internal EU gas and electricity market", MEMO/11/125, 2 March 2011, available at http://europa.eu/rapid/press-release_MEMO-11-125_en.htm?locale=en.

39 "EU strikes deal on energy market liberalization", *Euractiv*, 25 March 2009, available at http://www.euractiv.com/section/energy/news/eu-strikes-deal-on-energy-market-liberalisation/.

40 The other two unbundling models consisted of the Independent System Operator (where the undertaking can still own the physical network, but has to leave the entire operation, maintenance and investment to an independent company) and the Independent Transmission System Operator (where the undertaking can own and operate the network, but the management must be done by a subsidiary).

41 See the *E.ON electricity* cases.

divestiture by E.ON of power plants and its transmission network, thereby ensuring "ownership unbundling" in Germany.[42]

Another example is the e-commerce sector, where the Commission's approach was arguably regulatory in nature. For instance, in the *Paramount* case, certain respondents to the market test notice claimed that

> "if the Commission were to make binding the commitments offered by Paramount, this would constitute a misuse of power. Any change that the commitments offered by Paramount would bring about should be achieved through a review of EU copyright law rather than a decision pursuant to Article 9."[43]

The Commission rejected this claim by stating that a

> "measure may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken with the exclusive purpose, or at any rate the main purpose, of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case."[44]

These examples are a clear reminder that the role of competition authorities is not to regulate a sector or create a level playing field, but to prohibit breaches of competition rules and adopt (infringement decision) or accept (commitments decision) remedies that directly address the specific competition concerns it has identified.

2. Settlements

The underlying restrictive agreements in the case of settlement decisions involved price fixing, market sharing and exchange of commercially-sensitive information.

Based on the limited information provided by the Commission in its settlement decisions, these decisions included straightforward cases of price fixing in which the undertakings coordinated tender prices or responses to requests issued by customers,[45] current and future (intended) prices,[46]

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42 P. Chauve et.al., "The E.ON electricity cases: an antitrust decision with structural remedies", (2009) 1 *Competition Policy Newsletter* 54; R. Karova and M. Botta, "Sanctioning excessive energy prices as abuse of dominance – are the EU Commission and the National Competition Authorities on the same frequency?" in P.L. Parcu, G. Monti and M. Botta (eds.), *Abuse of dominance in EU competition law. Emerging Trends*, Cheltenham, Edward Elgar Publishing, 2017, 175.

43 The *Paramount* decision, para. 70.

44 *Id.*, para. 71.

45 See *e.g.* the *Alternator and starters* decision, *parking heaters* decision, *mushrooms* decision, *Automotive Wire Harnesses* decision, *Automotive bearings* decision.

46 See *e.g.* the *Water Management* decision.

and the passing-on of raw material price increases to the customers.[47] These decisions also involved instances of indirect price fixing, such as the coordination of "gross list" price increases,[48] agreements on a uniform calculation model for a common surcharge,[49] and a high degree of transparency at meetings with regard to trading conditions.[50] Price fixing practices often occurred in combination with an exchange of commercially sensitive information, on prices, market strategies,[51] and other trading conditions (*e.g.* stock levels, sales, customer developments, raw material costs and an estimation of the demand and sales, and monitoring mechanisms).[52] Settlement decisions also concerned market-sharing practices, such as the allocation of supply and customers, applying the "incumbent supplier principle", which meant that they would not aggressively pursue individual customers or specific models supplied historically[53] or respect quotas reflecting estimated historic market shares.[54]

While judicial review is an important part of the evolution of a legal regime, the cartel case-law is highly developed and most appeals of Commission cartel decisions focus on the level of the fines rather than important competition law questions (with some exceptions, such as, for instance, parental liability issues). Nevertheless, the Commission may be tempted to use the settlement process to stretch the law beyond its original bounds, especially when the issue at stake is not a blatant price-fixing or market-sharing cartel, but exchanges of commercially-sensitive information.

In any event, when the undertakings concerned and the Commission disagree on the facts or on the law principles, nothing prevents these undertakings (or *some* of them as hybrid settlements are possible) to step out of the settlement and return to the infringement procedure.[55] The number of hybrid settlements suggest that undertakings do not hesitate to abandon settlement negotiations. In

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47 See e.g. the *Automotive bearings* decision, *Foam matresses* decision.

48 See *e.g.* the *truck producers* decision.

49 See *e.g.* the *Steel abrasives* decision.

50 See *e.g.* the *CRT glass* decision.

51 See *e.g.* the *Alternator and starter* decision, *parking heaters* decision.

52 See *e.g.* the *Laundry power detergents* decision, *Refrigeration compressors* decision, *CRT glass* decision, *DRAM* decision.

53 See *e.g.* the *Alternator and starters* decision, *parking heaters* decision.

54 See *e.g.* the *Animal Feed Phosphates* decision.

55 Except perhaps for the (subjective) fear of getting "penalized" for stepping out of the settlement and receive, for instance, a higher fine. For example, in the *DRAMs* settlement case, *Timab*, the non-settling undertaking, challenged the decision after having received a significantly increased fine compared to the range of fine originally discussed in the settlement procedure, and claimed that it had been "penalized" for having withdrawn from the settlement procedure by a fine which is greater than that which they were entitled to expect. Judgment of 20 May 2015, *Timab Industries*, T-456/10, EU:T:2015:296. See also N. Lenoir and M. Truffier, "Timab Industries et al.: General Court's Ruling on the First Hybrid Settlement Case", (2016) 7(1) *Journal of European Competition Law and Practice* 24-25.

this respect, one of the risks of excessive reliance on cartel settlements is that, in the long-run, there is a risk that lawyers that are used to negotiate "deals" with the Commission forget that there are situations where it is worth stepping out of the settlement and fighting hard for the client.

IV. Conclusion

Commitments and settlement decisions present significant advantages to both the Commission and investigated undertakings, which explains the popularity of these procedures. While we see few downsides in settling hard-core cartels as few of such cases raise novel questions, the application of the settlement or the commitments procedure to cases that raise such questions is more debatable. We are also concerned that on some occasions these procedures may be used to stretch the application of the law or even to regulate a sector.

We finally note that in abuse of dominance cases, one of factors that has contributed to the willingness to offer commitments even when they considered they did not engage in any wrongdoing is the concern that, should the Commission adopt an infringement decision, their ability to have it overturned by the EU courts was slim given the unbroken series of victories of the Commission in appeals launched against its Article 102 TFEU decisions. Whether the recent judgment of the CJEU in the Intel case,[56] which struck down the controversial judgement of the GCEU,[57] will make more dominant firms more willing to fight alleged cases of abuses made by the Commission is an open question, but it will hopefully reinvigorate the appeal process in dominance cases.

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[56] Judgment of 6 September 2017, *Intel Corp v Commission*, C-413/14 P, EU:C:2017:632.

[57] Judgment of 12 June 2014, *Intel Corp v Commission*, T-286/09, EU:T:2014:547.