Commitment Decisions within EU and EEA Competition Law

– A Threat to Judicial Review and Effective Private Enforcement?[1]

by Ingrid Margrethe Halvorsen Barlund

Personalia:

Ingrid Margrethe Halvorsen Barlund er postdoktor ved Det juridiske fakultet ved Universitetet i Bergen. Barlund har tidlegare jobba som universitetslektor og stipendiat ved same stad. Ho disputerte i 2019 for avhandlinga "A Legal Analysis of Leniency in the Interaction of Public and Private Cartel Enforcement within EU Competition Law".

Samandrag:

Artikkelen omhandlar vedtak om avhjelpande tiltak etter artikkel 9 i Rådsforordning 1/2003 og artikkel 9 i protokoll 4, kapittel 2 av ODA. Temaet er nærare bestemt desse vedtaka si rolle i handhevinga av EU og EØS-konkurransereglane, med særleg fokus på samspelet med den private handhevinga. Føremålet er å undersøkje eventuelle skilnader mellom EØS EFTA – og EU-pilarane, og vidare ulemper og fordelar ved dette handhevingsinstrumentet. Vidare tek artikkelen føre seg påverknaden denne typen vedtak har på retten til erstatning for tredjepart som har lidt tap som følgje av konkurranseskadeleg åtferd. Avslutningsvis vurderast spørsmålet om det bør vere tilgong for tredjepart til å krevje erstatning av føretak som bryt med dei avhjelpande tiltaka.

#competitionlaw #konkurranserett #enforcement #handheving #antitrustenforcement #commitmentdecisions #avhjelpandetiltak

[1] Artikkelen er basert på prøveførelesinga som eg haldt i samband med min disputas ved Universitetet i Bergen. Temaet for prøveførelesinga var "The role of commitment decisions in the design of the enforcement system - with a particular focus on the impact on private enforcement".

1. Topic and Agenda

Commitment decisions have become an important enforcement instrument for the Commission in the fight against anti-competitive behaviour within the internal market. They are a part of the development seen within EU competition law during the last couple of decades with a move away from more traditional public enforcement methods and court litigation. Rather, we now see that other more "semi-public" procedures are being used,[2] such as cartel settlements and commitment decisions.[3] Common for these enforcement tools are that they rarely end up in court. These settlement mechanisms have been a tradition in the United States for decades, but have only been formally available in the EU since the early 2000s.[4]

Since the introduction of commitment decisions with Article 9 of Regulation 1/2003[5] in cases concerning non-cartel infringements, more than half of the decisions adopted by the Commission in its enforcement of Article 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) have been commitments.[6] A mirroring provision, i.e. Article 9 in Chapter 2 of Protocol 4 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (the SCA),[7] was implemented within the EEA EFTA pillar shortly after the formalisation of commitments within the EU pillar.[8] However, as opposed to the rather extensive use of

[2] I will return to what I mean by "semi-public" enforcement in subchapter 2.2.

[3] About the cartel settlement procedure, see the 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, [2008], OJ C 167/1.

[4] Even if the predecessor of Regulation 1/2003, that is Regulation 17/62, did not contain an Article 9 provision, informal settlements did still occur. This means that the Commission concluded investigations by accepting commitments from undertakings also before the formalisation of Article 9. The problem was, however, that if the undertaking did not comply with the commitments offered, the Commission had no means, as it does today, to enforce the commitments. Further, there was no transparency, neither for third parties interested in the commitments being respected, nor for other undertakings wanting to comply with the rules of the market. Regulation 1/2003 thus sought to amend these weaknesses. For more about this, see N. Dunne, "Commitment Decisions in EU Competition Law", 10 Journal of Competition Law & Economics No. 2 [2014], pp. 399-444, p. 400. See also Wils WPJ, "Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation 1/2003", 29 World Competition No. 3 [2006], pp. 345-366, pp. 346-347.

[5] 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, [2003] OJ L 1/1.

[6] Commitment Decisions in Antitrust Cases - Note by the European Union, [2016], DAF/COMP/WD(2016)22, p. 6.

[7] The protocol may be found at https://www.efta.int/sites/default/files/documents/legal-texts/the-surveillance-and-court-agreement/agreement-annexes-and-protocols/Protocol-4-on-the-functions-and-powers-of-the-EFTA.pdf, [last accessed 27/3-2019].

[8] Agreement amending Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice, [2004], available at

commitment decisions within the EU pillar,[9] the EFTA Surveillance Authority (the ESA) has only issued one commitment decision so far.[10] Compared to the Commission, commitment decisions have thus not gained the same position within the ESA's enforcement of Articles 53 and 54 of the Agreement on the European Economic Area (the EEA Agreement or the EEA). This may be partially explained by the low amount of competition cases allocated to the ESA according to Articles 55 and 56 EEA. [11] In addition, it is important not to forget the low amount of cases handled by ESA in general, only exercising enforcement authority in the three small EEA EFTA countries of Norway, Iceland and Liechtenstein.[12] Accordingly, it is just a matter of time before commitments will take a more prominent place also within the EEA EFTA pillar.[13]

In the following, I will examine the role of commitment decisions in the design of the enforcement system, with a particular focus on the impact on private enforcement. As the topic indicates, there are two main Parts. The first Part deals with the application of commitment decisions according to EU and EEA competition law. This entails an elaboration and assessment of the set of rules found on this instrument according, notably, to Regulation 1/2003 and the SCA. The second Part deals with the relationship between commitment decisions and private enforcement. The analyses of the second Part are limited to damages actions.

---

https://www.efta.int/sites/default/files/documents/legal-texts/the-surveillance-and-court-agreement/amendments/agreements-amending-protocol-4/Agreement-amending-Protocol-4-2004-09-24.pdf [last accessed 27/3-2019].

[9] Wils WPJ, "Ten Years of Commitment Decisions under Article 9 of Regulation 1/2003: too Much of a Good Thing?", Paper presented at New Frontiers of Antitrust, Concurrences Journal 6th International Conference "New Frontiers of Antitrust", available at https://ssrn.com/abstract=2617580 [last accessed 21/3-2019] [2015]

[10] EFTA Surveillance Authority Decision of 17 September 2008 pursuant to Article 9, Chapter II of Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice in a case concerning Liechtensteinische Kraftwerke Anstalt and Telecom Liechtenstein AG [2009] Case No: 61291.

[11] For more about this, see Gjendemsjø R, i Arnesen F et al., "Agreement on the European Economin Area. A Commentary", C.H. Beck/Hart/Nomos/Universitetsforlaget [2018].

[12] See the archive for ESA's competition cases at http://www.eftasurv.int/competition/competition-cases/competition-cases-archive/ [last accessed 27/3-2019].

[13] Little is found on the topic within Norwegian competition law literature. Commitment decisions are regulated in Article 12 (3) of the Norwegian Competition Act, but the provision has never been used. An overview of relevant works: Hjelmeng E, Competition law remedies: Striving for coherence or finding new ways?, 50 Common Market Law Review, Issue 4 [2013], pp. 1007–1037. Hjelmeng E, Håndhevelse av konkurransereglene ; er ad hoc-løsninger veien å gå?, Magma, Årg. 16, nr. 8 [2013], pp. 63-72. Hjelmeng E, Arbeidsnotat nr.13/11: Bindende tilsagn i konkurransesaker - forordning 1 art.9 og relevansen for konkurranseretten [2011], ISSN 1503-2140 (13). Kolstad O et. al., "Norsk konkurranserett bind II. Prosess og sanksjoner", Universitetsforlaget [2006].

PART I

2. Commitment Decisions as a Public Enforcement Instrument within EU and EEA Competition Law

2.1 Enforcement Competences of the Competition Authorities

Commitments decisions are part of the public administrative enforcement of EU and EEA Competition law by the Commission and the ESA. It is not for this article to go into details about the division of enforcement competences between the Commission and the ESA when it comes to the competition law provisions within the internal market.[14] A few remarks are, however, in order to provide a basic understanding of the enforcement division between the EEA EFTA pillar and the EU pillar of the competition rules within the internal market.

The situation is complicated when it comes to the decentralised enforcement of Articles 53 and 54 EEA. As far as the public enforcement of the competition rules is concerned, the EEA Agreement is based on the so-called two-pillar model: Enforcement in the EEA EFTA States is entrusted to the independent ESA,[15] whereas enforcement in the EU Member States falls to the Commission. Detailed and rather complex rules on the division of competences between ESA and the Commission are laid down in Articles 56 and 57 EEA and Protocols 21–24.[16] In short, the Commission deals with all infringements of the EEA competition rules which have an appreciable effect on trade between EU Member States, whilst ESA is left to deal with cases where only trade between EEA EFTA States is affected or where the effects on intra-EU trade are not appreciable.[17] As for enforcement against public authorities, however, ESA has exclusive jurisdiction to take action against any EEA EFTA State that enacts or maintains in force measures that are contrary to Articles 53 and/or 54 EEA.[18]

---

[14] For a more detailed analysis of the divisions of competence, see Gjendemsjø R, i Arnesen F et. al., [2018]. See also the Norwegian Report by Franklin C, Fredriksen HH and Barlund IMH, in Bándi G et al., *Private Enforcement and Collective Redress in European Competition Law*, Wolters Kluwer Law & Business [2016], pp. 665-691.
[15] See Article 108 EEA.
[16] See e.g. Gjendemsjø R, in Arnesen F et al., [2018], pp. 559-560. F. Büchel and X. Lewis, "The EFTA Surveillance Authority", in: C. Baudenbacher (ed), *The Handbook of EEA Law*, Springer 2016, 113-138, at p. 121.
[17] Article 55 (1) EEA and Protocol 23 provide ESA with the right and, if need be, an obligation to participate in the Commission's investigations in "mixed" cases (i.e. cases which affect both the EFTA States and the EU Member States).
[18] See Article 109 EEA.

The two-pillar structure of the EEA does not hinder decentralised public enforcement of Articles 53 and 54 EEA per se.[19] Unfortunately, however, the Commission has taken the view that Articles 55 and 56 EEA divide the public enforcement of Articles 53 and 54 EEA exclusively between the ESA and itself.[20] This means that even if made part of the EEA Agreement, as a result of the Commission's view, Regulation 1/2003 was rendered largely inoperative under EEA law.[21] In order to assure decentralised public enforcement of EEA competition law within the EFTA pillar, as within the EU pillar, the relevant parts of Regulation 1/2003 were thus not only made part of the EEA Agreement, but also taken into Protocol 4 of the SCA.[22] Decentralised enforcement by the NCAs in the EEA EFTA States accordingly has its legal basis in the SCA and not Regulation 1/2003 as part of the EEA Agreement. The Commission has never commented on the circumvention of its understanding of Article 56 EEA, but it tacitly accepts national competition authorities (NCAs) within the EEA EFTA pillar, including that of the Norwegian Competition Authority, to enforce Articles 53 and 54 EEA, together with their national competition laws.[23]

The circumvention does not solve the issues arising within the cross-pillar enforcement. As a result of the Commission's refusal to accept decentralised enforcement as a matter of EEA law, neither the competition authorities of the EEA EFTA States nor the ESA are treated on an equal footing with the authorities of EU Member States in the European Competition Network.[24] Thus, the unilaterally established decentralised enforcement of Articles 53 and 54 EEA in the EFTA pillar is hampered by the NCAs of the EEA EFTA States' lack of authority to request their colleagues in the EU to carry out inspections on

[19] Gjendemsjø R, i Arnesen F et. al., [2018], pp. 562-563.
[20] For more on this debate, see *ibid*, as well as the Norwegian Report by Franklin C, Fredriksen HH and Barlund IMH, in Bándi G et al., [2016], pp. 665-691 with further references.
[21] The Regulation was incorporated into the EEA Agreement by the EEA Joint Committee's decision 130/2004 of 24 September 2004, but the key part of it – the decentralised enforcement of EU competition law through the national competition authorities – is rendered inoperative in the EU-pillar as a consequence of the Commission's interpretation of Article 56 EEA.
[22] The protocol may be found at http://www.efta.int/legal-texts/the-surveillance-and-court-agreement.
[23] See Article 5 of Protocol 4 of the SCA.
[24] See Article 1A of Protocol 23 of the EEA Agreement, which allows for participation in meetings of the European Competition Network for the purposes of discussion of general policy issues only.

their behalf, as well as their lack of access to confidential information already held by NCAs of most of the EU Member States.[25]

Accordingly, the non-recognition by the Commission not only creates challenges for the public enforcement of the competition rules, but also that of private enforcement, which I will return to in Part II. In the following, I will focus on the enforcement by the Commission and the ESA, and not the national enforcers. The aim of the analyses is ultimately to provide an answer to the question of when commitment decisions should be applied to be in line with the public interest in enforcing Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), and the mirroring provisions of Articles 53 and 54 of the Agreement on the European Economic Area (EEA).[26]

2.2 The Commitment Procedure

When the ESA or the Commission decides to pursue a case for possible breaches of the competition rules, they are likely to follow one of two procedures:

They will either seek to establish an infringement of the competition rules in order to require the undertaking concerned to stop the infringement, impose remedies and/or impose fines. This is what I refer to as the traditional or infringement procedure, and is regulated in Article 7 of Regulation 1/2003 and Article 7 SCA respectively.

The second procedure is the commitment procedure, which allows undertakings to offer commitments to meet the anti-competitive concerns of the Commission or the ESA,

---

[25] As acknowledged by the Ministry of Trade, Industry and Fisheries in its Consultation Paper on the implementation of Directive 2014/104/EU into Norwegian law (*Forslag til endringer i konkurranseloven – gjennomføring i norsk rett av direktiv 2014/104/EU om privat håndheving av EU/EØS-konkurransereglene*), Oslo 11 December 2015, p. 8. The Consultation Paper relies heavily on an extensive report prepared by E. Hjelmeng, I. Ørstavik and E. Østerud, *Utredning av rettsspørsmål knyttet til gjennomføring i norsk rett av Parlaments- og Rådsdirektiv 2014/104/EU*, Oslo 19 December 2014 (available in Norwegian only). The only exception being the formal, legally binding Nordic agreement in competition cases, entered into in 2001, which enables the NCAs of Norway, Iceland, Sweden and Denmark to exchange confidential information regarding mergers, cartels and abuses of dominant positions. Agreement between Denmark, Iceland and Norway concerning cooperation in matters of competition, signed on 16 March 2001. Sweden acceded to the convention in an agreement on amendments, signed on 9 April 2003. A new agreement was entered into by the Nordic Competition Authorities in September 2017. The agreement is largely a continuation of the agreement of 2001, but entails amongst others the removal of a requirement of consent when passing on confidential information. The agreement is being ratified these days, awaiting approval by the Norwegian Parliament, see the Norwegian Ministry on Trade's Proposition 92 LS, available at https://www.regjeringen.no/contentassets/63a78f3fbf444dc79b5f0d0276a0a9e2/no/pdfs/prp201820190092000ddpdfs.pdf [last accessed 16/4-2019].

[26] For an overview after 20 years of experience, see J. Temple Lang, "Competition Law", in: C. Baudenbacher (ed.), *The Handbook of EEA Law*, Springer 2016, pp. 523-545.

without the establishment of an infringement. Article 9 (1) of Regulation 1/2003 establishes that:

> "Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission."

The corresponding provision of the ESA's competence is found in Article 9 (1) SCA. Commitments are offered by the undertakings to meet the concerns expressed by the Commission or the ESA concerning the competition in a market. Such decisions allow the Commission and the ESA to formally conclude investigations into alleged breaches of the competition rules without any findings of an infringement. Rather, they impose binding commitments on the undertakings concerned to modify their market behaviour or make structural changes. Commitments may thus both be behavioural and structural, and it is up to the Authorities' discretion whether these are accepted or not.[27] However, they cannot force an undertaking to offer commitments. This is why I refer to this as more of a "semi-public" enforcement instrument; both the undertaking, as well as the Commission or the ESA, must consent to such a decision, providing the enforcement mechanisms with a private contractual feature as well. As I will return to later, however, the Commission and the ESA have a stronger position in these negotiations, which may be eligible for abuse.[28]

The Commission and the ESA may also impose structural or behavioural remedies according to Article 7 of Regulation 1/2003, but as I will return to below,[29] these relate to bringing an infringement effectively to an end, as opposed to the commitments targeting their concerns in the preliminary assessment before ever reaching an infringement stage.[30]

---

[27] Antitrust: commitment decisions – frequently asked questions, [2013], Press release by the Commission, available at http://europa.eu/rapid/press-release_MEMO-13-189_en.htm [last accessed 21/3-2019].
[28] See subchapter 2.3.
[29] See subchapter 2.3.
[30] Judgment of 29 June 2010, *Commission v Alrosa Company Ltd.*, C-441/07 P, EU:C:2010:377.

One example of a commitment could be a behavioural one, where an undertaking commits to provide or reduce its supplies or purchases of goods to one or several customers in a market, to avoid risks of abuse of a dominant position.[31] Most of the commitment decisions by the Commission so far have been behavioural, which entails that undertakings are subject to certain terms when offering their services or goods in a market.[32] Hence, a commitment procedure involves neither an admission of guilt by the undertaking involved, nor a formal finding of a competition violation.[33] This is different from other formalised out-of-court procedures of the Commission and the ESA, such as the cartel settlement procedure, which is always based on a prohibition decision and therefore involves both an admission of guilt, as well as a formal infringement, in return for a 10% reduction in the fine.[34] Commitment decisions are often not available for cartels, which I will return to later.[35]

Further, Article 9 (2) of Regulation 1/2003 and Article 9 (2) SCA create a formal framework for when the Commission and the ESA may reopen a proceeding initially finalised with a commitment decision. A reopening may take place where there either has been a material change in any of the facts on which the decision was based, where the undertakings concerned act contrary to their commitments; or where the decision was based on incomplete, incorrect or misleading information provided by the parties. Note that a commitment decision may also contain more specific review clauses.

The Commission and the ESA seek to monitor the market it has been involved in to follow how the competitive situation evolves. It is, however, often other market players that report non-compliance.[36] Where the commitment decision is adopted for a specified period, the Commission or the ESA may re-assess the competitive situation on the

[31] See, for example, Judgment of 29 June 2010, *Commission v Alrosa Company Ltd.*, C-441/07 P, EU:C:2010:377, paras. 18-26.
[32] Commitment Decisions in Antitrust Cases - Note by the European Union, [2016], DAF/COMP/WD(2016)22, p. 6. See, for example, Commission Decision of 16.12.2009 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement, Case COMP/C-3/39.530 – Microsoft (tying), OJ C 120, 26.4.2013, p. 15–16 (Summary).
[33] Nazzini R, [2016], p. 40.
[34] 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 [2008] OJ L 171/3.
[35] For now, see recital 13 of Regulation 1/2003.
[36] See subchapter 3.1.

markets when the period expires in order to assess whether measures are still necessary.[37]

This monitoring takes us to Articles 23 (1) (c) and 24 (2) (c) of Regulation 1/2003. The corresponding provisions are found in Articles 23 (2) (c) and 24 (c) SCA. These provisions provide the Commission and the ESA with the competence to impose monetary sanctions in the event of non-compliance.[38] If an undertaking does not comply with its commitments, the same fining rules as those for infringements of the competition rules apply. This means that the Commission can impose a fine of up to ten per cent of the undertaking's annual turnover. Non-compliance is thus initially fined in the same manner as a proven violation of the competition rules. The same goes for periodic penalty payments. Up to five per cent of the average daily turnover applies in the event of non-compliance until the undertaking complies with its commitments. With regard to the level of the fines' threshold for infringement of the competition rules, it is worth mentioning that the recently adopted ECN+ Directive stipulates the same level in Article 15 (1) in chapter V on fines and periodic penalty payments, only as a minimum threshold for the maximum amount of fines NCAs can issue.[39]

Lastly, it is important to note that the Commission and the ESA may at any time during the negotiations of commitments, decide to continue formal proceedings pursuant to the infringement procedure before a commitment decision is adopted. After the commitment

[37] For more about the review procedures, see Antitrust: commitment decisions – frequently asked questions, [2013], Press release by the Commission, available at http://europa.eu/rapid/press-release_MEMO-13-189_en.htm [last accessed 21/3-2019].

[38] Microsoft suffered fines of EUR 561 million for non-compliance with browser choice commitments back in 2013, see Commission Decision of 6.3.2013 addressed to Microsoft Corporation relating to a proceeding on the imposition of a fine pursuant to Article 23(2)(c) of Council Regulation (EC) No 1/2003 for failure to comply with a commitment made binding by a Commission decision pursuant to Article 9 of Council Regulation (EC) No 1/2003 Case AT.39530 – Microsoft (Tying), OJ C 120, 26.4.2013, p. 15–16 (Summary). About these provisions and other case examples, see Whish R and Bailey D, *Competition Law*, 8th edition, Oxford University Press [2015], pp. 272-273 with further references.

[39] 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 [2019] OJ L 11, 14.1.2019, p. 3–33. As with the Damages Directive, which I will return to under part II, it is uncertain if – and if so when, how and with what adaptations – the ECN+ Directive will be made part of the EEA Agreement as long as the three EFTA States – their National Competition Authorities (NCAs) and courts included – are prevented from participating on an equal footing with the EU Member States in the decentralised public enforcement of the common EU and EEA competition rules.

decision is adopted, they may also, as already explained, decide to re-open the investigation, with a view to adopting a prohibition decision.[40]

2.3 Enforcement Objectives – Advantages and Disadvantages

In the seminal *Alrosa* case on trade in the rough diamond industry, the ECJ stated about commitment decisions that:

> "This is a new mechanism introduced by Regulation No 1/2003 which is intended to […] provide a more rapid solution to the competition problems identified by the Commission, instead of proceeding by making a formal finding of an infringement. More particularly, Article 9 of the regulation is based on considerations of procedural economy, and enables undertakings to participate fully in the procedure, by putting forward the solutions which appear to them to be the most appropriate and capable of addressing the Commission's concerns".[41]

What can be drawn from this citation is that commitment decisions promote procedural efficiency and save resources for the authorities by rapidly finding targeted solutions to the identified competition problems in the market concerned. As touched upon already, the commitment procedure further presents itself as more consensual than an infringement procedure in that the parties**,** that is the Competition Authority and the undertaking(s)**,** agree upon solutions to the expressed concerns of the former.[42]

The enforcement objectives of a commitment procedure may also be seen as the advantages of such a procedure, compared to a standard infringement procedure. However, an infringement procedure imposing monetary sanctions presumably creates higher deterrence and, if taken to court, legal precedents.[43]

Commitments also arguably have both a specific and general deterrent effect, though. Specific deterrence targets the undertaking subject to reactions, whereas general

[40] Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, [2011], OJ C 308/6 , para. 125. Kerse C and Khan N, [2012], p. 377 with further references.
[41] Judgment of 29 June 2010, *Commission v Alrosa Company Ltd.*, C-441/07 P, EU:C:2010:377, para. 35.
[42] See also Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, [2011], OJ C 308/6 , point 4.
[43] Wagner-von Papp F., "Best and Even Better Practices in Commitment Procedures after *Alrosa*: the Dangers of Abandoning the "Struggle for Competition Law"", 49 Common Market Law Review No. 3 [2012], p. 964.

deterrence targets other undertakings' future behaviour.[44] The undertaking subject to commitments is deterred from committing similar behaviours again. For other undertakings, observing that such behaviour is handled through commitments, may also deter them from entering into similar activities.[45]

Further, the traditional infringement procedure may be perceived as fairer than the commitment procedure.[46] The generous use of commitment decisions by the Commission since the introduction may reinforce such a perception.[47] This is likely to reflect negatively on the Commission, either because it is criticised for settling a case because it was too weak to survive the infringement procedure, questioning the premises for the commitments in the first place.[48] Or because the Commission took the "easy way out", but should have used more capacity and resources, which would have led to the establishment of an infringement and the imposition of sanctions.[49] "Efficiency" may in this regard be considered as an opponent to "justice", where pursuing the infringement procedure relates to a sense that justice is being done. Not only through the assurance that something anti-competitive actually has been going on, but also through the sanctioning of a severe crime.

In addition, justice may be perceived as better achieved through the establishment of an infringement likely to assist claimants in follow-on damages actions.[50] I will return to this in Part II.

There is a risk that**,** faced with the alternative of long and costly infringement proceedings**,** undertakings may offer commitments that go beyond what is proportionate

[44] Hodges C, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics*, Hart Publishing [2015], p. 89.
[45] In Whish R and Bailey D, [2015], p. 272 it is also emphasised how fines for non-compliance "... impress on firms that give commitments under Article 9 the importance of complying with them."
[46] Schweitzer H and Bay Matteo, "Commitments and settlements - benefits and risks", 23rd St.Gallen International Competition Law Forum (ICF) 2016. Available at SSRN: https://ssrn.com/abstract=2763792 [last accessed 22/3-2019] [2016], pp. 5-6.
[47] Commitment Decisions in Antitrust Cases - Note by the European Union, [2016], DAF/COMP/WD(2016)22, p. 6. See also Wils WPJ, [2015].
[48] Dunne N., "Antitrust and the Making og European Tort Law", 36 Oxford Journal of Legal Studies [2016], pp.366-399, p. 437.
[49] About advantages and disadvantages with commitment procedures, see N. Dunne, [2014], pp. 432-442.
[50] Wils WPJ, [2006], p. 7. Wagner-von Papp F., [2012], pp. 948-949.

and necessary.[51] At the same time it is, however, important to bear in mind that these commitments are entered into voluntarily. The ECJ expressed in the case of *Alrosa* that:

> "Undertakings which offer commitments on the basis of Article 9 of Regulation No 1/2003 consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the regulation after a thorough examination. On the other hand, the closure of the infringement proceedings brought against those undertakings allows them to avoid a finding of an infringement of competition law and a possible fine".[52]

From this quote, what is seen is that a remedy that would be disproportionate under the infringement procedure can still be acceptable under the commitment procedure. The ECJ set aside the General Court's ruling, which had argued that the same proportionality test applied under both procedures.[53] As already explained, however, the aim of the structural or behavioural remedies according to the infringement procedure is to end the infringement, whereas commitments are offered to meet the concerns of the Commission or the ESA before ever reaching an infringement stage.[54] There is thus no reason why the same proportionality test should apply within the two procedures. This was also emphasised by the ECJ in *Alrosa* stating that:

> "Those two provisions of Regulation No 1/2003 [i.e. articles 7 and 9] pursue different objectives, one of them aiming to put an end to the infringement that has been found to exist and the other aiming to address the Commission's concerns following its preliminary assessment.
>
> There is therefore no reason why the measure which could possibly be imposed in the context of Article 7 of Regulation No 1/2003 should have to serve as a reference for the purpose of assessing the extent of the commitments accepted under Article 9 of the regulation, or why anything going beyond that measure should automatically be regarded as disproportionate. Even though decisions adopted under each of those provisions are in either case subject to the principle of proportionality, the application of that principle nonetheless differs according to which of those provisions is concerned."[55]

---

[51] Dunne N., [2016], p. 437.
[52] Judgment of 29 June 2010, *Commission v Alrosa Company Ltd.*, C-441/07 P, EU:C:2010:377, para. 48.
[53] Judgment of 11 July 2007, Alrosa v Commission, T-170/06, EU:T:2007:220, para. 101.
[54] See subchapter 2.4.
[55] Judgment of 29 June 2010, *Commission v Alrosa Company Ltd.*, C-441/07 P, EU:C:2010:377.

This seems to allow for a rather expansive approach by the Commission and the ESA in their commitment procedure,[56] contributing to understanding the generous use of this instrument by the Commission.[57] The approach has been reaffirmed in subsequent case law.[58]

This hands-off approach by the ECJ in *Alrosa* could be criticised for creating legal uncertainty for the undertakings concerned in several ways. We have already established that the nature of commitment decisions, as opposed to infringement decisions, is eligible to make undertakings choose commitments. This means that the odds are, almost at the outset, that there will be fewer infringement decisions eligible for judicial review.

Together with the limited judicial review of commitment decisions, this in turn is eligible to create legal uncertainty about what the laws are. When faced with little guidance as to the laws at stake, chances are that undertakings will find it safer to choose commitment decisions. This in turn, means that undertakings will look to the Commission's or the ESA's practice on commitment decisions. This will provide the Commission and the ESA with an even broader discretion in setting the terms for enforcing the competition rules, at the expense of a clear legal framework for the undertakings to follow.[59]

Another more fundamental issue that arises from such a strong position of the Commission and the ESA, as already touched upon above when referring to their stronger bargaining position,[60] is the risk that the Commission's and the ESA's incentives to settle a case diverge from the public interest in assuring the objective of undistorted competition. This would be the case if the Commission or the ESA closed complex cases through the commitment procedure because this was more convenient in

[56] To assure the overall aim of the EEA Agreement of an integrated internal market, in line with the principle of homogeneity, both the EFTA Court as well as national courts of the EFTA States have always sought to interpret and apply Articles 53 and 54 EEA in line with the case-law of the European Court of Justice (ECJ) on Articles 101 and 102 TFEU. Importantly, this approach is also followed by the ECJ and the General Court (GC) in cases in which it falls to them to enforce EEA competition law against undertakings from the EU Member States.
[57] For statistics, see Commitment Decisions in Antitrust Cases - Note by the European Union, [2016], DAF/COMP/WD(2016)22, p. 6.
[58] Judgment of 12 December 2018, Groupe Canal v Commission, T-873/16, EU:T:2018:904.
[59] Wagner-von Papp F., [2012], p. 931. Dunne N., [2016], pp. 435-436.
[60] See subchapter 2.4.

cases raising novel legal issues, cases that are evidentially weak or based on legally thin theories of antitrust harm.[61] They would then take advantage of the fact that undertakings are easily persuaded to accept commitments. To the extreme, they could be using fines to threaten undertakings to accept groundless commitments. The commitment procedure could then be criticised for being illegitimate, unrepresentative, and undermining transparency, legal certainty and the purpose of the enforcement rules.[62]

Possible ways to meet these risks could, in my opinion, be to open up for a stricter judicial review of commitments. In addition, further constraints could be imposed for when commitments are allowed for. I will return to this under the last question of Part I.

Wary of the pitfalls of this instrument, it is important to emphasise that it can be expedient to handle cases through this procedure. Not every case needs to end with an infringement decision. A Competition Authority must decide how to make the best use of the limited resources available to it.[63] The traditional procedure is more time consuming and takes many resources, and hence cannot compete with the economic and procedural efficiencies of commitment decisions. This is almost self-explanatory, as it is quicker and cheaper to settle a case than to litigate it fully through the Commission's or the ESA's administrative decision-making procedure. In addition, seeing as the parties have agreed to the commitments, chances of subsequent appeals before the EFTA Court or the EU courts are low.

What is thus most valuable with commitment decisions is that for the public authorities**,** the market problems underlying the competition investigation may be remedied more quickly. As already established from the *Alrosa* case, the commitment procedure is valuable insofar as it seeks to provide specific answers to competition problems, as opposed to the traditional approach of merely prohibiting and sanctioning the anticompetitive infringement.[64] More fundamentally, this means that the underlying

[61] About the optimal use of commitment decisions, see Wils WPJ, [2006], pp. 6-10.
[62] Wagner-von Papp F., [2012], p. 931.
[63] Wils WPJ, [2006], p. 8.
[64] Judgment of 29 June 2010, *Commission v Alrosa Company Ltd.*, C-441/07 P, EU:C:2010:377, para. 35.

objective behind the competition rules of undistorted competition may be obtained more quickly because the commitments specifically target the issues in the market.

From the undertakings point of view, there will always be the risk that the undertakings could have been better off had the case gone through the traditional procedure. By its nature, a commitment decision is a compromise. But by choosing commitments, undertakings do arguably have more control over the situation, managing the risks. The undertakings may themselves initiate the commitment discussions and decide what type of commitments they are willing to offer.[65] This as opposed to being subject to unilateral imposition of monetary sanctions according to the traditional procedure.[66]

Further, an infringement decision by public enforcers in one jurisdiction may also encourage further enforcement in other jurisdictions. Undertakings are more likely to avoid this when accepting commitments. Additionally, the undertaking avoids being subject to an infringement decision claimants may rely on in follow-on private damages actions.

Finally, the reputational damage is limited as the Commission and the ESA only raise concerns and do not establish an infringement.

To sum up, when comparing commitment decisions with prohibition decisions, commitment decisions may entail enforcement gains through earlier and more effective termination of potential infringements and administrative cost savings. This, however, may come at the cost of losing other enforcement gains which a traditional procedure could assure, such as clarification of the law, stronger deterrence, disgorgement of illegal gains and punishment, and, as I will return to later, facilitation of follow-on actions for compensation.

[65] Commitment Decisions in Antitrust Cases - Note by the European Union, [2016], DAF/COMP/WD(2016)22, p. 6.
[66] This is seen through the different stages of the commitment procedure outlined in the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, [2011], OJ C 308/6 , pp. 26-28.

2.4 Application of Commitment Decisions

From the advantages and disadvantages with such an instrument arises the question of when commitment decisions should be applied to be in line with the public interest in enforcing Articles 101 and 102. This is more specifically a question of when the public interest in how the authorities shall enforce the competition rules is better served by correcting market failures than by punishing antitrust violators.

As a starting point, recital 13 of Regulation 1/2003 states that: "Commitment decisions are not appropriate in cases where the Commission intends to impose a fine". In the Best Practices Notice this is specified by the Commission to mean that the commitment procedure does not apply to secret cartels that fall under the Leniency Notice.[67] A possible understanding of the exclusion of secret cartels is that these constitute object restrictions that often per se trigger fines, and are per se thus not amendable through future commitments.[68] Important to mention in this regard, however, is that the legal weight attributed to both recitals, as well as notices, is of little importance.[69] Recitals still serve as guidelines for the interpretation and understanding of the law,[70] and in lack of other legal guidance, I still refer to these when seeking to clarify under what circumstances a commitment procedure may apply.[71]

[67] Ibid, para. 116.
[68] Commitment Decisions in Antitrust Cases - Note by the European Union, [2016], DAF/COMP/WD(2016)22, p. 6.
[69] Judgment of 13 July 1989, *Casa Fleischhandel v BALM*, C-215/88, EU:C:1989:331, para. 31. About prepatory works' role in the interpretation of EU law, see Lenaerts K and Gutierrez-Fons JA, "To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice", 20 Columbia Journal of European Law [2014], pp. 3-61, pp. 23-31.
[70] Judgment of 13 July 1989, *Casa Fleischhandel v BALM*, C-215/88, EU:C:1989:331, para. 31. About preparatory works' role in the interpretation of EU law, see Lenaerts K and Gutierrez-Fons JA, "To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice", 20 Columbia Journal of European Law [2014], pp. 3-61, pp. 23-31.
[71] An interesting curiosity to mention in terms of the EFTA EEA dimension is that recital 13 is, together with the whole of Regulation 1/2003, made part of the EEA Agreement, but not the SCA.[71] It could thus be questioned whether NCAs within the EFTA EEA may refer to recital 13 of Regulation 1/2003 in order to shed light on the application of Article 9 in protocol 4, chapter 2 of the SCA. In light of the principle of homogeneity, the answer to this question must in my view be affirmative, in order to assure a uniform enforcement of the competition rules within the internal market. Another curiosity to mention in this regard is that the EFTA court only has authority to interpret and clarify the provisions of the EEA Agreement, and not the SCA. This means that when an NCA applies, for example, article 9 SCA, initially it cannot file a preliminary question to the EFTA Court about the understanding of the rules of the SCA.

Other than excluding secret cartels, I have found little guidance on how the Commission and the ESA decide on cases that are suitable for commitment decisions.[72] Based on the assumption that cases eligible for fines are excluded, commitment decisions should also be unavailable in cases involving other serious breaches of Articles 101 or 102.[73] I have, however, not succeeded in finding anything about the necessary severity threshold. That the Commission and the ESA are free to change from a commitment to an infringement procedure seems, however, in my opinion, difficult to reconcile with a rule that commitments are not available in cases eligible for fines.[74]

In the *Google* case, the commitments offered were not accepted by the Commission, and Google was found to have infringed Article 102 on abuse of a dominant position, subject to severe fines. Conversely, in the *Gazprom* case the undertaking escaped an infringement procedure and fines because the Commission accepted the commitments offered. In my view, the outcome of these cases did not seem to depend on whether the Commission had an intention or not to impose a fine.[75] Rather, they illustrate that in cases where the commitments offered are not fit to deal with the issues in the market under scrutiny, an Article 9 decision is excluded. Whether or not an intention could be identified at the beginning of the investigations seemed therefore subordinate and not decisive for the outcome.

That a commitment procedure is non-applicable in certain types of cases is, in my view, thus questionable. Both legally and based on the practice of the Commission, the choice between an infringement or commitment procedure rests largely on the circumstances

[72] Note, however, that there have been commitment decisions under Article 101 TFEU in non-cartel cases, such as the Commission Decisions of 12 December 2012 and 25 July 2013 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement, Case COMP/39.847/*E-Books*, OJ C 73, 13.3.2013, p. 17–20 and OJ C 378, 24.12.2013, p. 25–28 (Summaries).

[73] See also Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, [2011], OJ C 308/6 , point 4.

[74] For more about this issue, see Voss K, "Between Enforcement and Regulation", Stockholm University [2019], pp. 142-144 with further references.

[75] Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service - Factsheet, [2017], Press release by the Commission, available at http://europa.eu/rapid/press-release_MEMO-17-1785_en.htm [last accessed 21/3-2019]. Antitrust: Commission imposes binding obligations on Gazprom to enable free flow of gas at competitive prices in Central and Eastern European gas markets, [2018], Press release by the Commission, available at http://europa.eu/rapid/press-release_IP-18-3921_en.htm [last accessed 21/3-2019]. Commission Decision of 24.5.2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) and Article 54 of the EEA Agreement. Case AT.39816 – Upstream Gas Supplies in Central and Eastern Europe, C [2018] 3106 final.

of each case. I have, however, identified a few factors the Commission relies on when assessing whether or not it is appropriate to accept commitments. The same factors are likely to be guiding for the ESA's discretion.

These are firstly the nature of the suspected infringement. As already mentioned, certain behaviours cannot be improved or changed through commitments. The adoption of a commitment decision is more appropriate when the primary target is future behaviour rather than punishing for past behaviour.[76]

Secondly, the nature of the commitments offered and their ability to rapidly solve the competition concerns. More specifically, this means that the Commission and the ESA must verify in light of the principle of proportionality whether the commitments would be sufficient to address the identified competition concerns. Remember that case-law has established that the Commission and the ESA have wide powers here.[77] Still, commitment decisions should only be used in cases where the benefit of an earlier termination of the infringement and the saving of costs outweigh the benefits of an infringement procedure. This entails a weighing between the importance of procedural and monetary efficiency versus the need for clarifying the law, creating more deterrence, achieving disgorgement of illicit gains, punishment, and facilitation of follow-on damages actions. The Commission and the ESA will thus also take into consideration the interests of third parties, which I will return to later.[78]

In procedures that are likely to drag out, for instance because they are difficult to litigate successfully according to the standard procedure, it may be in line with the public interest to choose a commitment procedure. Complex cases may, conversely, be found to belong to the traditional procedure due to the effect of legal precedents. In addition, where the prohibited conduct reoccurs, commitments may be considered more fit to change the situation, as they constitute targeted actions to deal with the anti-competitive threats, rather than merely a prohibition with sanctions.

[76] Commitment Decisions in Antitrust Cases - Note by the European Union, [2016], DAF/COMP/WD(2016)22.
[77] Judgment of 29 June 2010, *Commission v Alrosa Company Ltd.*, C-441/07 P, EU:C:2010:377, para. 48.
[78] See subchapter 3.1.

Lastly, as commitment decisions allow for rapid improvements in a market, they are notably important in markets that are in the process of liberalisation, such as the energy sector, and markets that require prompt intervention. Note, however, that the sector in itself is not decisive for the choice between an infringement or commitment procedure. Commitments may initially be issued in any sector.[79]

Based on these considerations, commitment decisions are arguably more appropriate in cases where a speedy procedure is of the essence and there is a need for quick solutions to the fast-evolving anti-competitive threats at hand. The need to punish past behaviour would, in these cases, be inferior to correcting future behaviour. Conversely, in cases dealing with complex and novel issues, a traditional infringement decision is more appropriate, as well as cases where remedies would be substantially limited to a promise to comply with the law, rather than the need for structural or behavioural changes.

Even if I have identified some factors, to reduce the risk of excessive or wrongful application of commitment decisions, I find that more guidance is needed within the regulatory framework.[80]

[79] Commitment Decisions in Antitrust Cases - Note by the European Union, [2016], DAF/COMP/WD(2016)22.
[80] See alsoWagner-von Papp F., [2012] on this matter, with further references.

PART II

3. The Relationship to Private Enforcement

3.1 Actions for Damages

In Part II, I seek to answer two paramount questions. The first is whether commitment decisions impede the right to compensation for infringements of the competition rules. An important point to be made in that regard is that commitment decisions do not establish an infringement that claimants can rely upon in follow-on damages claims.

The second question is whether private individuals have a right to compensation for an undertaking's failure to comply with commitment decisions, and whether the full effectiveness of Articles 101 and 102 TFEU and Articles 53 and 54 EEA require such an enforcement.

In the seminal case of *Crehan* it was established that individuals have a right to compensation for infringements of the competition rules.[81] This later led to the adoption of the Damages Directive in 2014.[82] This directive harmonises some of the rules on damages actions throughout Member States for infringements of the competition rules. This right entails that individuals can claim damages for infringements of Articles 101 and 102 in front of national courts, following mainly one of two types of procedures, which I will explain below.

The incorporation of the Damages Directive into the EEA Agreement brought the problems caused by the Commission's interpretation of Article 56 explained earlier to the attention of the Contracting Parties once again. The EEA EFTA states clearly hoped that the Commission would change its view,[83] thereby enabling full and symmetrical decentralized enforcement of EEA competition law throughout the EEA and full participation of the NCAs of the EFTA States and ESA in an "EEA-wide" European Competition Network.[84] However, the Damages Directive has not yet become part of

[81] Judgment of 20 September 2001, *Courage Ltd. v. Crehan*, C-453/99, EU:C:2001:465.
[82] Directive of the European Parliament and of the Council 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 [2014] OJ L 349/1.
[83] See the Consultation Paper (fn. 14 above), at p. 17.
[84] The Consultation Paper on the implementation of the Damages Directive into Norwegian law suggested that the government was prepared to use the directive as leverage to secure this, see the Norwegian Ministry of Trade,

the EEA Agreement, and it thus remains uncertain if – and if so when, how and with what adaptations – the Damages Directive will be made part of the EEA Agreement. The underlying issue is thus not only whether the three EFTA States – their National Competition Authorities (NCAs) and courts included – should be allowed to participate on an equal footing with the EU Member States in the decentralised public enforcement of the common EU/EEA competition rules. The discussion also has a side to whether the EEA EFTA states can participate in the facilitation of the private enforcement according to the Damages Directive.[85]

In order to assure the right to compensation, a claimant can either file a so-called stand-alone damages action. This means that it is up to the claimant to prove that there has been an infringement of the competition rules, before proving the losses suffered, causation and liability (the latter most often not contested in these types of cases).

Or it follows from Article 16 (1) of Regulation 1/2003 that a national court may not decide on a case "running counter" to a Commission decision. This means that infringement decisions by the Commission are binding for national courts. This binding effect of the Commission's decisions is roughly explained by the division of powers between the national courts on the one hand, and the Commission and the EU courts on the other.[86] It is only the EU courts, and not the national courts, that have exclusive jurisdiction to review the legality of the Commission's decisions.[87] For claimants this means that they can file so-called follow-on damages actions from the infringement decisions already established by the Commission.[88]

Industry and Fisheries' Consultation Paper on the implementation of Directive 2014/104/EU into Norwegian law (*Forslag til endringer i konkurranseloven – gjennomføring i norsk rett av direktiv 2014/104/EU om privat håndheving av EU/EØS-konkurransereglene*), Oslo 11 December 2015. p. 14, where the Ministry deems full "cross-pillar" effect as an essential precondition for both the (legal) EEA-relevance and the (political) acceptability of the Damages Directive.

[85] A key question is whether the NCAs of the EFTA States and the EFTA Surveillance Authority (ESA) will be given full membership in the European Competition Network. The outcome of the discussion may be important not only to the EEA, but also to Switzerland and other non-Member States. Depending on the outcome of the everlasting Brexit, it may even prove relevant to the UK as well.

[86] Judgment of 14 December 2000, *Masterfoods v Commission*, C-344/98, EU:C:2000:689, para. 45. Judgment of 6 November 2012, *Europese Gemeenschap v Otis NV and Others*, C-199/11, EU:C:2012:684, para. 54.

[87] Derived from the obligation of sincere cooperation. See also Judgment of 6 November 2012, *Europese Gemeenschap v Otis NV and Others*, C-199/11, EU:C:2012:684, paras. 52-53.

[88] In Judgment of 14 December 2000, Masterfoods v Commission, C-344/98, EU:C:2000:689, para. 52, the ECJ ruled that "[…] when national courts rule on agreements or practices which are already the subject of a Commision decision they cannot take decisions running counter to that of the Commission, even if the latter's decision conflicts

The corresponding provision is found in Article 16 of Chapter 2 in Protocol 4 of the SCA, regulating the binding effect of a decision by the ESA on national courts and NCAs. The Damages Directive regulates the binding effect of national infringement decisions inter – and intra state. Note that because of the Damages Directive's unresolved status within the EEA EFTA pillar, the following considerations merely apply to the EU pillar. It suffices to say that the non-recognition by the Commission of the decentralised enforcement within the EEA EFTA pillar initially prevents national courts within the EU pillar from putting any emphasis on decisions by NCAs from Norway, Iceland or Liechtenstein in a damages suit.[89]

Article 9 (1) of the Damages Directive states that:

> "Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law."

The provision thus allows claimants to rely on infringement decisions by their own national competition authority (NCA) in follow-on actions in front of their national courts. In recital 34 of the Damages Directive, it is stated that the "*deemed to be irrefutably established*" of a decision by an NCA intra-state of Article 9 (1) should cover "*[…] only the nature of the infringement and its material, personal, temporal and territorial scope*". To me, it is unclear whether this pinpoints a different practical effect in a follow-on damages action than a Commission decision, seeing as there has been a need to specify this.[90]

When it concerns an infringement decision of an NCA in another Member State than where the damages claim is brought, however, Article 9 (2) states that

> "Member States shall ensure that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as at least *prima facie evidence* that an infringement

with a decision given by a national court of first instance". See also Judgment of 6 November 2012, Europese Gemeenschap v Otis NV and Others, C-199/11, EU:C:2012:684.

[89] Gjendemsjø R, i Arnesen F et. al., [2018], p. 562.

[90] For more about this, see Van Nuffel P, the Institutional Report in Bándi G et al., [2016], pp. 187-258, p. 236 and pp. 241-242.

of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties" (my emphasis).

The provision merely allows the decision to serve as "*prima facie evidence*". Interesting to note is that in the White Paper, the Commission suggested that an infringement decision should have direct effect in another Member State:

> "(n)ational courts that have to rule in actions for damages on practices under Articles (101 and 102) on which an NCA in the ECN has already given a final decision finding an infringement of those articles, or on which a review court has given a final judgment upholding the NCA decision or itself finding an infringement, cannot take decisions running counter to any such decision or ruling."[91]

In the withdrawn Directive of 2009, this was actually provided for in Article 12, where it was stated that

> "Where national courts rule, in actions for damages, on agreements, decisions or practices under Article 81 or 82 of the Treaty which are already the subject of a final infringement decision by a national competition authority or by a review court, Member States shall ensure that the national courts cannot take decisions running counter to such infringement decision. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty."[92]

The direct-effect suggestion did, however, not make it to the Damages Directive, as Member States were not willing to give up their sovereignty.[93] In my view, it was unfortunate that such a suggestion did not go through. Such a binding effect would have facilitated claimants' access to evidence, as well as avoiding confusions around the meaning of "*prima facie evidence*", which I elaborate below. There is a need to clarify the prima facie value inter-state. This issue is interesting because it highlights the difficulties a claimant may face when seeking access to this type of evidence in another Member State.

According to Article 9 (2), a decision "*may*" be presented in another Member State's court as "*at least*" prima facie evidence. My understanding is that the provision sets a lower threshold of the evidentiary value of a decision of another NCA. The provision

[91] White Paper on Damages actions for breach of the EC antritrust rules, [2008], COM(2008) 165 final.
[92] See also recital 20 of the Proposal for a Council Directive on rules governing damages actions for infringements of Articles 81 and 82 of the Treaty [2009], Commission Internal, appendix III of Barlund IMH, [2019].
[93] Van Nuffel P, the Institutional Report, in Bándi G et al., [2016], pp. 187-258, p. 241.

does not, however, stand in the way of national courts placing greater emphasis on this type of decision. Interesting to note in this regard is that according to German law, more specifically Article 33 (4) of their German Competition Act, courts are bound not only by the decisions of the Bundeskartellamt, but also by decisions of NCAs in other Member States establishing an infringement for the purpose of damages actions.[94]

Seeing as the preparatory works opted for a binding effect, there is little, if any, guidance as to what a prima facie value actually entails. In recital 35 of the Directive, it is nonetheless stated that *"[t]he finding [of an infringement] can be assessed as appropriate, along with any other evidence adduced by the parties*". In my view, this statement may indicate that a decision of another Member State merely becomes part of the evidence backing up the claim like any other evidence. The wording "*prima facie*" does, however and the way I see it, bind the national court to a certain degree as to how much emphasis it is obliged to put on such a decision. How much emphasis is, however, unclear. For this reason, there is in my opinion a need for more guidance on the application of Article 9 (2).[95]

Returning to the binding effect of a Commission or an ESA infringement decision, this arguably increases the chances of a successful claim**,** as the claimant only needs to prove causation and the harm suffered. Private claimants seeking damages due to for example losses suffered from a cartel infringement established by the Commission or the ESA, may thus according to these rules rely on this decision in front of a court, filing a follow-on damages action. This means that the claimant does not have to convince the court that there has been a cartel. Instead, the claimant "only" needs to prove causation and

[94] *German Act against Restraints of Competition*, [2014 (revised version)] 69528506v1. Note that this provision existed before Article 9 of the Damages Directive. Article 9 of the Damages Directive has not altered this rule, see Brinker I, the National Report of Germany, in Bándi G et al., [2016], pp. 461-495, p. 484 under question 42. See also Davis P, Nebbia P and Lianos I, [2015], p. 282.

[95] In practice, the instances where a cross-border full evidentiary effect would be useful may be rather limited, as infringements found by NCAs or national review courts may often be infringements with domestic effects. But in cases where national infringement decisions cover cross-border conduct, a full evidentiary effect would have been useful as claimants would have been encouraged to file suits in a court of choice, rather than merely perhaps looking to file suit in the Member State where the decision was taken see Van Nuffel P, the Institutional Report,vin Bándi G et al., [2016], pp. 187-258, p. 243.

the harm suffered. In that way the private enforcement in front of national courts is assisted by the public enforcement of the Commission and the ESA.[96]

As already touched upon several times, commitment decisions do not entail the establishment of an infringement. This means that these cannot be relied upon in the same manner as a follow-on damages action from an infringement decision. Based on this, it can already at this point be argued that commitment decisions reduce claimants chances of successful damages claims by preventing the establishment of infringement decisions claimants can rely on in front of national courts.

Recitals 13 and 22 of Regulation 1/2003 emphasise, however, that commitment decisions do not prevent NCAs nor national courts from enforcing Article 101 and 102 TFEU, and article 53 and 54 EEA, further.[97] It could be argued that when an undertaking commits to amend its behaviour through a commitment procedure, this does not rule out the possibility of there having been an infringement. Following such a line of reasoning, the argument is that a commitment decision merely entails the obligation to carry out certain behavioural and/or structural changes. It shall thus not be considered a guarantee for there having been no infringement, since this has not been proved under the commitment procedure. Based on this reasoning, an undertaking having accepted commitments to the Commission is thus not protected from proceedings by other public enforcement authorities seeking to establish an infringement, such as NCAs. Nor are they protected from private enforcement initiatives, such as private damages actions.[98]

This would further entail that if a national court after the adoption of a commitment decision by the Commission or the ESA, decides that there has been an infringement, this finding does not undermine the effect of the commitment decision. Nor is it "running counter" to the Commission or the ESA commitment decision according to Article 16 of Regulation 1/2003, or the corresponding Article 16 of Chapter 2 in Protocol 4 of the SCA. This would mean that, in theory, an undertaking may both be subject to

[96] Directive of the European Parliament and of the Council 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 [2014] OJ L 349/1, recitals 3 and 7.
[97] See subchapter 2.4 about recital's legal weight.
[98] Wils WPJ, [2006], pp. 20-21.

commitments accepted by the Commission or the ESA, as well as damages actions for having infringed the competition rules.

Whether this is the correct understanding or not largely depends on the questions of what impact the commitments imposed actually have: Do commitments have to remove all the concerns raised by the Commission, that is eliminate them? Or do the commitments only need to reduce the concerns to the extent that they are no longer an enforcement priority by the Commission or the ESA? Based on the latter view, there will still be something left to enforce for both NCAs, as well as claimants.[99] If national proceedings are brought under the former view, however, there could be a conflict with Article 16 of Regulation 1/2003 or Article 16 of Chapter 2 in Protocol 4 of the SCA. It would have to be proved to what extent the commitments eliminated the concerns, and to what extent possible infringements remained.

In the case of *Gasorba*, concerning a request for a preliminary ruling from the Spanish Supreme Court on the interpretation of article 16 of Regulation 1/2003, the ECJ confirmed that commitments do not exclude further national enforcement by stating that:

> "Since, as provided for in Article 9(1) of Regulation No 1/2003, read in the light of recital 13 of that regulation, the Commission may carry out a mere 'preliminary assessment' of the competition situation, without the commitment decision taken on the basis of that article subsequently establishing whether there has been or still is an infringement, it cannot be precluded that a national court may conclude that the practice which is the subject of the commitment decision infringes Article 101 TFEU and that, in so doing, it proposes, unlike the Commission, finding that an infringement of that article has been committed."[100]

Still, national enforcement after a commitment decision is in my view unlikely. There are several reasons for this:

First of all, if the Commission or the ESA decides to pursue a commitment procedure instead of a traditional procedure based on the facts of the case, it is highly unlikely that a private litigant would be better informed. Access to information for suffering third

[99] Wagner-von Papp F., [2012], p. 953.
[100] Judgment of 23 November 2017, *Gasorba SL and Others v Repsol Comercial de Productos Petrolíferos SA*, C-547/6, EU:C:2017:891, para. 26.

parties is an obstacle to private enforcement of the competition rules in general,[101] and I cannot see that these situations would be any different.[102]

If they should inhabit such information though, a more likely scenario would be to comment on the proposed commitments before the Commission adopts its formal decision according to Article 27 (4) of Regulation 1/2003. Before adopting commitments, the Commission always conduct a market test of the offered commitments in accordance with Article 27(4) of Regulation 1/2003. A Market Test Notice is published in the Official Journal of the European Union with a summary of the case and the main content of the commitments. Interested third parties are invited to submit their observations within a fixed time limit of not less than one month. Their responses are of particular importance as they facilitate the evaluation by the Commission that the offered commitments are suitable and proportionate to address the identified competition concerns.[103] If a third party is opposed to the case being finalised through a commitment decision, or want stronger commitments, it may file a complaint to the Commission if it is able to demonstrate a "legitimate interest", see Article 7 (2) of Regulation 1/2003.[104] Note that the corresponding procedures are found in Article 27 (4) and Article 7 (2) of Chapter 2 in Protocol 4 of the SCA.

Further, it is unlikely that an NCA would get involved after a commitment decision by the Commission or the ESA. If the Commission or the ESA have already dealt with the case, it is unlikely that this would become an enforcement priority of an NCA, who probably already would have voiced its concerns, for example, in the Advisory Committee.[105] Article 6 (3) of Protocol 23 of the EEA Agreement establishes that

> "Each surveillance authority and the States falling within its competence shall be entitled to be present in the Advisory Committees of the other surveillance authority and to express their views therein; they shall not have, however, the right to vote."

[101] Barlund IMH, *A Legal Analysis of Leniency in the Interaction of Public and Private Cartel Enforcement*, PhD, University of Bergen [2019], chapter 9.
[102] Wagner-von Papp F., [2012], pp. 953-954.
[103] Commitment Decisions in Antitrust Cases - Note by the European Union, [2016], DAF/COMP/WD(2016)22
[104] See also Wils WPJ, [2006], p. 14.
[105] See also ibid, p. 21.

The Commission, together with the EU Member States, and the ESA, together with the EFTA States, thus have a right to be present in the Advisory Committees of each other. They can express their views, but do not have a right to vote.

3.2 Should there be a Right to Compensation for Failure to Comply with Commitments?

Having confirmed that commitment decisions reduce the chances of successful damages claims for infringements of the competition rules, I wish to raise one final question of whether there is a right to compensation for an undertaking's failure to comply with its commitments.

A distinction must be drawn between seeking damages for infringements of the substantive competition rules, as opposed to third parties seeking damages due to an undertaking's failure to comply with the commitments agreed to. Whereas the ECJ has established the right to compensation for infringements of Articles 101 and 102 in the seminal case of *Crehan*, there is little found on the right to compensation for failure to comply with commitments.[106] Even if this seems to be encouraged in some preparatory works and guidelines,[107] it is not clearly stated in binding secondary law. Nor has the ECJ dealt with this question.

This depends on whether individuals**,** in a similar manner as for infringements of the competition rules**,** can derive a right to compensation from a failure to comply with commitment decisions. This would entail that failure to comply with commitment decisions have direct effect in front of national courts. Either it would be up to the national authorities to assess whether there has been a failure to comply based on a stand-alone action by the claimant, or the Commission or the ESA would already have established this, meaning that the claimant can rely on this in a follow-on damages

[106] See, however, Hjelmeng E., Arbeidsnotat nr.13/11: Bindende tilsagn i konkurransesaker - forordning 1 art.9 og relevansen for konkurranseretten [2011], ISSN 1503-2140 (13), point 4.4.4 (only available in Norwegian)..
[107] Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 ("Regulation implementing Articles 81 and 82 of the Treaty"), [2000], OJ C 365E , p. 284–296. Commitment decisions (Article 9 of Council Regulation 1/2003 providing for a modernised framework for antitrust scrutiny of company behaviour) [2004], MEMO/04/217.

action. As with the right to compensation due to infringements of the competition rules, it would thus be possible to argue that the full effectiveness of Articles 101 and 102 would not be assured if the right to compensation for failure to comply with commitments is not secured.[108]

I am sceptical to the establishment of a right to compensation for failure to comply with commitment decisions. I recognise that private parties may have an interest in the undertaking complying with its commitments. The question in my opinion is, however, whether this interest should be provided protection through damages actions.

In this regard it could be argued that failure to comply with a commitment decision is already enforced with monetary sanctions or the possibility to reopen the procedure by the Commission or the ESA. Adding to this, the Commission and the ESA, through their dialogue with the undertakings, are arguably better equipped to deal with this. Important to emphasise in this regard is that third parties have access to comment on the proposed commitments before the Commission or the ESA adopt their formal decision according to Article 27 (4) of Regulation 1/2003 or Article 27 (4) of Chapter 2 in Protocol 4 of the SCA. If a third party is opposed to the case being finalised through a commitment decision, or wants stronger commitments, it may file a complaint to the Commission or the ESA as established earlier. [109]

In addition, the right to compensation for actual infringements of the competition rules is already assured through third parties being able to file their claims if they have suffered losses according to the Damages Directive. I acknowledge, however, that this argument is somewhat contradictory, as we already have established that commitment decisions have a negative impact on the filing of these damages actions. Further, a failure to comply does not necessarily entail an infringement of the competition rules. A claim based on the former may relate to another anti-competitive behaviour.

Nonetheless, what weighs the most here is, in my view, that if undertakings risk not only sanctions by the Commission or the ESA for non-compliance, but also damages claims,

[108] Directive of the European Parliament and of the Council 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 [2014] OJ L 349/1, recital 3.
[109] See subchapter 3.1.

this may undermine the commitment institute. As explained earlier, the commitment procedure is considered more attractive in the eyes of the undertakings, as a commitment decision is most likely in the way of a follow-on damages action.[110] If undertakings are deterred from offering commitments, there will be fewer offers of structural and/or behavioural improvements in those cases not suitable for the traditional procedure. This is likely to create worse market conditions and, in the end, weaker competition.

4. Conclusion

To sum up, what we have seen is that commitment decisions are here to stay. Over a relatively short amount of time, they have become an important part of the public enforcement of the competition rules within the internal market. There are still, however, important aspects of the commitment procedure that need to be clarified. This notably concerns what types of cases this procedure is meant to target. More guidance is needed here to ensure legal certainty.

I have further established that widespread use of commitment decisions effectively hinders private enforcement of competition infringements through damages claims. Clarifications are, however, also in order when it comes to the relationship between a commitment decision of the Commission or the ESA and national enforcers' access to proceed with infringement procedures. This also goes for the enforcement of NCA's cross-border and cross-pillar decisions.

We have seen that the non-recognition of decentralised enforcement within the EEA EFTA pillar by the Commission creates several challenges, both within the public and private enforcement of the competition rules within the internal market. In my view, a mutual recognition would be better for all contractual parties to the EEA, as it would assure uniform enforcement of the competition rules, promoting the overall aim of an integrated market.

Lastly, an access to file damages actions for failure to comply with commitments is, in my opinion, not advisable.

[110] See subchapter 2.3.