

Rights of an Undertaking in Proceedings Regarding Commitment Decisions under Article 9 of Regulation No. 1/2003

by

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CONTENTS

- I. Introduction
- II. Characteristics of commitment decisions
 - 1. Origin of Article 9 of Regulation No. 1/2003
 - 2. Application of Article 9 of Regulation No. 1/2003 by the Commission
 - 3. Types of commitments imposed in commitment decisions
 - 4. Legal consequences of a commitment decision
- III. Rights of an undertaking concerned
 - 1. Status of the ‘undertaking concerned’
 - 2. Right to defend interests and to offer commitments voluntarily
 - 3. Right to a transparent procedure
 - 3.1. Preliminary assessment
 - 3.2. Access to files
 - 4. Rights resulting from principle of legal certainty and legality of the sanction
 - 5. Right to appeal
- IV. Polish perspective
- V. Conclusions

Abstract

The purpose of this article is to present and define the rights of the undertakings concerned, which are parties to commitment decision proceedings, and to discuss whether the rights granted to the undertakings are exercised. As regards commitment decisions the main right of an undertaking/a party to the proceedings is the right to defend its own interests in negotiations with the Commission. Other

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rights, such as the right to a transparent procedure, the rights resulting from the principle of legal certainty and legality of sanctions, and the right to appeal, are also analyzed. The article argues that these rights are not adequately enforced in EU competition law. This is a result of a strong negotiating position of the Commission and the fact that it acts both as a prosecutor and decision-renderer. Additionally, the scope of European courts' review is so narrow that it does not guarantee that an undertaking is protected against offering excessive and unreasonable commitments.

Résumé

Le but de cet article est de présenter et définir les droits des entreprises concernées qui sont les parties de la procédure de décision d'engagement, et d'examiner si ces droits sont exercés. En ce qui concerne la décision d'engagement, le droit de défendre ses propres intérêts dans les négociations avec la Commission est le droit principal d'une entreprise/une partie de la procédure. Les autres droits, comme le droit à la procédure transparente, les droits découlant du principe de la sécurité juridique et de la légalité des sanctions et le droit de faire appel, sont également analysés. L'article fait valoir que ces droits ne sont pas correctement appliqués dans le droit de la concurrence de l'UE. Cela résulte de la forte position de négociation de la Commission et du fait qu'elle agit en tant que procureur et organe de décision. De plus, l'étendue du contrôle effectué par des tribunaux européens est si étroite qu'il ne garantit pas à l'entreprise d'être protégée contre des engagements excessifs et déraisonnables.

Classifications and key words: Rights of an undertaking concerned; commitment decisions; EU competition law; Article 9 of Regulation 1/2003.

I. Introduction

The institution of a commitment decision was established in the European competition law by Article 9 of Regulation 1/2003¹. This provision regulates the former practice of reaching unofficial agreements between the Commission and undertakings. In the course of the commitment decision procedure, in the preliminary phase of case examination the companies voluntarily offer commitments taking into consideration the concerns expressed by the Commission. Pursuant to Article 9 of Regulation 1/2003 the Commission is able to adopt decisions which make those commitments binding on the undertakings concerned. In its decisions the Commission then states that there

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] L 1/1.

are no grounds for action, without concluding whether or not there has been or still is an infringement. This solution makes it possible to quickly eliminate practices which may disrupt competition and is an effective tool from the point of view of procedural efficiency. According to the Commission 'the main advantages of commitment decisions are a swifter change on the market to the benefit of consumers as well as lower administrative costs for the Commission. For the parties subject to the proceedings, faster proceedings and the absence of a finding of an infringement may be attractive'².

The purpose of this article is to describe and define the rights of the undertakings concerned (who are parties) in commitment decisions proceedings, and also to analyse whether the rights granted to the undertakings are exercised. A characteristic feature of commitment decisions and of other settlement decisions which are officially adopted by the Commission³, is that undertakings voluntarily cooperate with the Commission and give up the possibility of questioning the analyses, arguments, decisions, and actions of the competition authority. i.e. the Commission. For the most part an undertaking does not take advantage of the procedural rights it is entitled to, in return for expected benefits such as, for example, the lack of imposition of a penalty. In the case of commitment decisions the main right of an undertaking/party to the proceedings is the right to defend its own interests in negotiations with the Commission, which should safeguard the possibility to make a voluntary offer of commitments.

II. Characteristics of commitment decisions

1. Origin of Article 9 of Regulation No. 1/2003

EC Regulation No. 17, which regulated the application of Articles 81 and 82 of the TEC (now Articles 101 and 102 TFEU), was in effect from 1962 until it was replaced by Regulation 1/2003 of 1 May 2004. It did not include a provision similar to Article 9 making it possible for the Commission to adopt a settlement decision to close an antitrust case. Despite that, the Commission and undertakings did make unofficial agreements. A number

² European Commission, 'Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU', available at http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_articles.pdf, p. 24.

³ There currently exists a settlement procedure in cartel cases under Article 10a of Commission Regulation 773/2004 and the Commission Notice in the conduct of settlement procedures in cartel cases.

of cases, for example *IBM*⁴, ended with an unofficial settlement, with the undertakings agreeing to a compromise satisfactory to the Commission, and the Commission acting on the assumption that it would not achieve anything significantly different if it pursued the case through the official channels⁵. However, such a situation had two basic flaws. First, because of the lack of an official decision undertakings were afraid to reopen the case, and the Commission had no tool with which would ensure that the commitments offered by the undertaking were fulfilled in accordance with the agreement. Second, the practice of making unofficial agreements was not sufficiently clear for third parties interested in the case/settlement, which stood to benefit from the commitments agreed on and had an interest in monitoring their fulfilment, as well as for those groups of entrepreneurs and lawyers who treated the Commission's decisions as guidelines for competition law. Settlements were usually described in the Commission's annual reports regarding competition policy, but without any details⁶. The inclusion of Article 9 in Regulation 1/2003 is aimed at resolving the aforementioned weaknesses. It grants the Commission the power to officially recognize commitments offered by undertakings as binding and obliges the Commission to publish commitment decisions in the Official Journal of the European Union.

2. Application of Article 9 of Regulation 1/2003 by the Commission

Commitment decisions constitute an alternative to infringement decisions, which are based on Article 7 of Regulation 1/2003. Both kinds of decisions are used by the Commission for the enforcement of European antitrust rules. The record of the Commission's practice demonstrates that since Regulation 1/2003 has come into force, Article 9 of the Regulation has been applied by the Commission with increasing frequency. The Commission adopted two commitment decisions in 2008, five in 2009, six in 2010 and two in 2011⁷. Commitment decisions adopted by the Commission so far refer to a variety of matters and address various concerns regarding the application of Articles 101 and 102 TFEU by undertakings. For instance, the *Coca-Cola*⁸, *De Beers*⁹,

⁴ F. Lomholt, 'The 1984 IBM Undertaking, Commission's monitoring and practical effects' (1998) 3 *Competition Policy Newsletter* 7; Commission's XIVth *Report on Competition Policy* 1984, points 94–95.

⁵ A. Jones, B. Sufrin, *EU Competition Law. Text, cases, and Materials*, Oxford 2011, p. 1084.

⁶ W. P.J. Wils, 'Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No 1/2003' (2006) 29(3) *World Competition* 5.

⁷ http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=1

⁸ Case COMP/A.39.116/B2 – *Coca-Cola*.

⁹ Case COMP/38.381/B2 – *De Beers*.

*Distrigaz*¹⁰, and *RWE*¹¹ cases related to concerns over possible exclusionary abuses of dominant position under Article 102 TFEU (previously Article 82 TEC). The two decisions regarding *E.ON*¹² related to concerns over possible exploitative abuses of a dominant position under Article 102 TFEU (previously Article 82 TEC). The Commission has also adopted commitment decisions taking into consideration concerns as to the lack of compliance with Article 102 TFEU, e.g. *DFB*¹³, *FA Premier League*¹⁴, *Cannes Extension Agreement*¹⁵ (horizontal agreements), *Repsol*¹⁶, *Opel*, *Toyota*, *Fiat*, and *Daimler Chrysler*¹⁷ (vertical agreements with exclusivity clauses or conditions of supply to third parties)¹⁸.

Based on an analysis of the commitment decisions adopted by the Commission so far the subject literature¹⁹ has pointed to the sectors in which the Commission's actions, under Article 9 of Regulation 1/2003, could bring about particularly positive effects. These are the sectors of fast-moving technology markets. In such sectors the conditions change so quickly, owing to rapid technological development, that immediate public intervention is often required. Lack of timely intervention could inhibit innovation or be significantly detrimental to consumers and end users. An analysis of the decisions adopted by the Commission so far shows that, in fact, a number of them regard the fast-moving technology markets. The *Microsoft*²⁰, *DRAMs*²¹ and *IBM Maintenance Services*²² cases serve as examples. Additionally, commitment decisions are particularly useful in dealing with market foreclosure issues. This can be

¹⁰ Case COMP/B-1/37966 – *Distrigaz*.

¹¹ Case COMP/39.402 – *RWE Gas Foreclosure*.

¹² Cases COMP/39.388 – *German Electricity Wholesale Market* and COMP/39.389 – *German Electricity Balancing Market*.

¹³ Case COMP/37.214 – *DFB*.

¹⁴ Case COMP/38.173 – *Joint selling of the media rights to the FA Premier League*.

¹⁵ Case COMP/38.681 – *The Cannes Extension Agreement*.

¹⁶ COMP/B1/38.348 – *Repsol CPP*.

¹⁷ Cases Comp/39.140–39.143 – *Daimler Chrysler, Fiat, Toyota and Opel*.

¹⁸ Commission Staff Working Paper accompanying the Communication from the Commission to the European Parliament and Council – Report on the functioning of Regulation No. 1/2003, Brussels, 29.4.2009, SEC(2009) 574 final, p. 32; A. Ezrachi, *EU Competition Law. An Analytical Guide to the Leading Cases*, Oxford, Portland, Oregon 2010, p. 441.

¹⁹ M. Dolmans, T. Graf, D.R. Little, 'Microsoft's browser choice commitments and public interoperability undertaking' (2010) 31(7), *European Competition Law Review* 274; P. Cavicchi, 'The European Commission's discretion as to the adoption of Article 9 commitment decisions: Lessons from Alrosa', Discussion Paper No. 3/11, Institute for European Integration, Europa-Kolleg Hamburg 2011, p. 9.

²⁰ Case COMP/39.530 – *Microsoft (Tying)*.

²¹ Case COMP/38.511 – *DRAMs*.

²² Case COMP/C-3/39692 – *IBM Maintenance Services*.

seen in a number of the Commission's decisions regarding the energy sector. Nevertheless, it should be emphasized that the Commission is never obliged to accept the commitments offered by undertakings. It may always adopt an infringement decision under Article 7 of Regulation 1/2003 if it deems that this will ensure more effective application of Articles 101 and 102 TFEU.

3. Types of commitments imposed in commitment decisions

Prevailing doctrine²³ is right to assume that the commitments imposed by the Commission by agreement under Article 9 of Regulation 1/2003 overlap with the remedies provided for in Article 7 of the Regulation. Under Article 7 of the Regulation the Commission may impose upon undertakings remedies which it has characterized as follows: 'the commitments can be either behavioural or structural'²⁴. Pursuant to this Article, 'structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy'. The Commission applies this provision by analogy when it adopts a commitment decision under Article 9 of Regulation 1/2003. This is borne out by an analysis of the commitment decisions adopted by the Commission so far, where the Commission has imposed mainly behavioural remedies. In its report from 2009 on the application of Articles 81 and 82 TEC²⁵, the Commission declared that only two out of thirteen decisions adopted at that time provided for the implementation of structural commitments (*E.ON*²⁶ and *RWE*²⁷). In 2010, of the six²⁸ commitment decisions adopted only in the case of *ENI* power company did the Commission impose structural commitments. In its statement of objections the Commission stated that this undertaking might have abused its dominant position, within the meaning of Article 102 TFEU, by using an alleged systematic strategy of refusing access to their international gas pipelines used to transfer fuels to Italy. *ENI* committed to sell its shares in companies

²³ W.P.J. Wils, 'Settlements...', p. 15.

²⁴ European Commission, 'Commitment decisions (Article 9 of Council Regulation 1/2003 providing for a modernised framework for antitrust scrutiny of company behaviour)', MEMO/04/217, Brussels, 17 September 2004.

²⁵ Commission Staff Working Paper, Report on the functioning of Regulation No. 1/2003, p. 32.

²⁶ Case COMP/B-/39.388 and 39.389.

²⁷ Case COMP/39.402 – *RWE Gas Foreclosure*.

²⁸ Case COMP/39.317 – *E.ON Gas*; Case COMP/39.386 – *Long-term contracts France*, Case COMP/39351 – *Swedish Interconnectors*; Case COMP/39.398 - *Visa MIF*; Case COMP/39.596 – *BA/AA/IB*.

associated with international gas pipelines to a purchaser, independent of ENI and not associated with it, which, at first glance, raises no concerns as regards competition issues²⁹. In its decision the Commission stated that ENI's commitment to sell its shares and assets in international gas pipelines, which constitutes a structural remedy, was necessary because otherwise the stimuli encouraging a vertically integrated gas undertaking to engage in anti-competition behaviour would not be removed, which would be associated with the risk of further alleged infringement. In 2011 the Commission did not impose the structural commitments.

4. Legal consequences of a commitment decision

A major legal consequence of a commitment decision is that a case is ended without a determination that an undertaking infringed competition law. This is an important benefit for a business entity against which the Commission has commenced proceedings, as it minimizes the risk of third parties filing claims for damages and protects the undertaking against the automatic application of rules regarding repeated infringements³⁰. Pursuant to the Guidelines on the method of setting fines³¹, repeated infringements is an aggravating circumstance and leads to the increase of a fine by 100%.

Commitment decisions, unlike unofficial agreements, grant the Commission the possibility 'upon request or on its own initiative, to reopen the proceedings: (a) where there has been a material change in any of the facts on which the decision was based; (b) where the undertakings concerned act contrary to their commitments; or (c) where the decision was based on incomplete, incorrect or misleading information provided by the parties' [Article 9(2) of Regulation 1/2003]. The Commission may also, under Article 23(2)(c), 'by decision impose fines on undertakings and associations of undertakings which, either intentionally or negligently . . . fail to comply with a commitment made binding by a decision pursuant to Article 9'. Additionally, 'the Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5% of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them: . . . (c) to comply with a commitment made binding by a decision pursuant to Article 9'.

²⁹ Case COMP/39.315 – *ENI*.

³⁰ I. Van Bael, J.-F. Bellis, *Competition Law of the European Community*, Austin, Boston, Chicago, New York 2010, p. 1166.

³¹ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, OJ [2006] C 210/02.

III. Rights of an undertaking concerned

1. Status of the ‘undertaking concerned’

This paper concerns only the rights of the undertakings concerned which offer commitments (Article 9(1) of the Regulation 1/2003). The article does not analyze rights of a interested third-parties undertakings which are affected by a decision passed under Article 9 of Regulation 1/2003. The problem that an undertaking has the status of the undertaking concerned was the subject of a judgment in the *Arlosa* case³². The Court stated that Alrosa did not have the status of the undertaking concerned because it was not a party to proceedings concerning individual commitments, since those commitments were offered by another entity (*De Beers*). The undertaking concerned by the proceedings under Article 9 of Regulation 1/2003 is, therefore, only the entity offering commitments.

2. Right to defend interests and to offer commitments voluntarily

Assuming that negotiations between the Commission and an undertaking are similar to negotiations conducted under civil law, the voluntariness of an agreement between such subjects would seem to be a sufficient guarantee for the protection of their interests³³. However, we agree with the arguments presented in the literature³⁴, that the position of an undertaking, which is a party to proceedings regarding the adoption of a commitment decision, raises some doubts. Above all, even if an undertaking does not feel that it infringed competition law, fears concerning the possible consequences of an infringement decision may cause the undertaking to offer commitments which are requested by the Commission, but which the undertaking does not feel are appropriate to the circumstances. Such fears may concern long and costly antitrust proceedings, possible imposition of fines, and losses resulting from the

³² Case C-441/07 P *European Commission v Alrosa Company Ltd*, ECR [2010] I-05949, para. 88.

³³ In the *Alrosa* case, the Advocate General’s Opinion most clearly reflects this approach – Opinion of Advocate General Kokott of 17 September 2009, Case C-441/07 P (*Commission v Alrosa Company Ltd*), para. 55; F. Wagner-von Papp, ‘Best and even better practices in commitment procedures after Alrosa: The dangers of abandoning the ‘Struggle for Competition Law’’, available at: <http://ssrn.com/abstract=1956627>, p. 6 and following.

³⁴ D. Waelbroeck, ‘Le développement en droit européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions): que va-t-il rester aux juges?’, The Global Competition Law Centre Working Papers Series 01/08, p. 19.

filing of claims for damages by third parties allegedly harmed by infringement, whose path to successful litigation and/or costly negotiation is made easier by the adoption of an infringement decision finding an infringement of European antitrust law. It is worth noting that the fact that the Commission cannot impose a fine on an undertaking in commitment decisions does not mean that, if it adopted a decision in a given case under Article 7, it would not do so. This is demonstrable by the high discretion granted to the Commission as regards the choice to proceed under Article 7 or Article 9 of Regulation 1/2003, and its freedom to evaluate whether the benefits resulting from settlement of a case are greater than those which would result from the imposition of a fine on an undertaking. As J. Temple Lang³⁵ aptly stated: ‘There is no reason why a commitment decision cannot be adopted in a case in which the Commission intended to impose a fine when it sent the statement of objections, but later decided that a fine was not necessary or justified, and the undertaking offered an adequate commitment’. Additionally, according to the judgments of the European Court of Justice (hereafter, Court of Justice), the ‘Commission has a margin of discretion when setting the amount of fines, since fines constitute an instrument of competition policy’³⁶. That margin of discretion extends, *ipso facto*, to deciding on the appropriateness of imposing a fine at all³⁷.

Thus, the Commission may decide at any stage of proceedings that it does not intend to impose a fine. The *Coca-Cola* case may serve as an example of the use of this ‘strategy’³⁸. In the case of similar infringements, that is, agreements with exclusivity clauses, the Commission imposed very high fines³⁹. In commitment decisions, while the Commission cannot impose a fine it may impose on undertakings commitments which exceed the scope of European competition law, which is certainly connected with its strong negotiating position in discussions with undertakings⁴⁰. The Commission’s strong position results in part from the fact that, despite numerous procedural changes regarding the application of Articles 101 and 102 TFEU, the Commission still acts simultaneously as prosecutor and decision-renderer in a given case, and has at its disposal a number of investigating instruments to use against

³⁵ J. Temple Lang, ‘Commitment decisions under Regulation 1/2003: Legal aspects of a new kind of competition decision’ (2003) 24(8) *European Competition Law Review* 347.

³⁶ T-150/89 *Martinelli v Commission*, ECR [1995] II-1165, para. 59.

³⁷ T-213/95 and T-18/96 *SCK and FNK v Commission*, ECR [1997] II-1739, para. 239; C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler and Others v Commission*, ECR [2009] I-7191, para. 112; T-461/07, *Visa Europe Ltd v European Commission*, not yet reported, para. 212.

³⁸ D. Waelbroeck, ‘Le développement en droit européen...’, p. 20.

³⁹ T-203/01 *Michelin*, ECR [2003] II-4071; C-95/04 P *British Airways*, ECR [2007] I-2331.

⁴⁰ M. Sousa Ferro, ‘Committing to commitment decisions – unanswered questions on Article 9 decisions’ (2005) 26(8) *European Competition Law Review* 445–450.

undertakings which, in its opinion, infringe competition law. This situation is widely criticized in the literature⁴¹, in particular as regards its compliance with the provisions of Article 6 of the ECHR, especially in the context of the increasingly strict fines imposed on undertakings by the Commission. This problem is particularly relevant since the coming into effect of the Treaty of Lisbon, which provides for the accession of the European Union to the ECHR. In any case however, as matters stand there is no authority which could, before adopting a decision, objectively assess the commitments offered by an undertaking and accepted as binding, nor is there a mechanism which could prevent the Commission's actions from exceeding the limits of competition law⁴². W. P. J. Wils⁴³ points to a threat arising from the fact that the 'excessive use of commitment decisions relates to the possible temptation for competition authorities, or their staff, to try to obtain desired results beyond the scope of their legal powers'. The lack of distinct control by the Court of Justice to set limits on the discretion granted to the Commission may lead to a situation whereby the application of competition law becomes unclear and is extended to include goals which are not a part of the competition policy, but lead to the exercise of rights provided for in antitrust law for regulatory purposes⁴⁴.

As examples of decisions which the Commission would not have been able to adopt under Article 7 of Regulation 1/2003, but which were adopted under Article 9 and arguably used to achieve regulatory goals, the above-mentioned *ENI* case and the *Alrosa* case are cited in the literature⁴⁵. The latter case concerned the Russian company Alrosa and the Luxembourg company De Beers, which were active on the worldwide market for the production and supply of rough diamonds. De Beers individually offered commitments to the Commission providing for the definitive cessation of all purchases of rough diamonds from Alrosa, effective from 2009. The Commission accepted those commitments in an official commitment decision⁴⁶. The purpose of this decision was to ensure that the Alrosa diamonds are competitive to

⁴¹ G. Di Federico, 'The Impact of the Lisbon Treaty on EU Antitrust Enforcement: Enhancing procedural Guarantees Through Article 6 TEU' (2010) 4 *Il diritto dell'Unione Europea* 805 and following; J. Temple Lang, 'Three Possibilities for Reform of the Procedure of the Commission in Competition Cases under Regulation 1/2003', [in:] C. Baudenbacher (ed.), *Current Developments in European and International Competition Law*, Basel 2011, p. 219 and following.

⁴² J. Temple Lang, *The Use of Competition Law Powers for Regulatory Purposes*, Oxford 2007, p. 2 and following.

⁴³ W. P. J. Wils, 'Settlements...', p. 9.

⁴⁴ J. Temple Lang, *The Use of Competition Law...* p. 2 and following; C. Banasiński, M. Krasnodębska-Tomkiel, 'Zastosowanie środków prawnych prawa antymonopolowego na szczególnych rynkach regulowanych' (2009) 1 *Przegląd Prawa Handlowego* 18–22.

⁴⁵ J. Temple Lang, *The Use of Competition Law...*, p. 2 and following.

⁴⁶ Case COMP/B-2/38.381 – *De Beers*.

the De Beers diamonds. It was a non-precedential limitation on freedom of agreements, the legal consequences of which affect not only an undertaking which is dominant on the market (De Beers), but also its market partner, Alrosa, which does not have such a position on the rough diamonds market.

The present practice regarding the application of Article 9 of Regulation 1/2003 by the Commission should be assessed critically. Despite the approximation of the sector regulation to competition law and the fact that their objective scopes often overlap⁴⁷, they still constitute two different kinds of public intervention which are designed to complement, not to replace, each other. The essence of antitrust law is to protect existing effective competition against practices by undertakings which may limit or completely eliminate it. Competition rules may thus lead to the maintenance of the level of competition present on the market, and not to widening or deepening its extent⁴⁸. Unlike the case of competition law, the essence of sector regulation is not to maintain competition on the market, because such competition does not exist, but to shape future behaviour of undertakings so that such effective competition is achieved. A basic difference is the fact that market analyses made by regulatory authorities must always take into consideration its future development, and imposing a regulatory remedy does not have to be preceded by a declaration of infringement of antitrust law. Regulatory rights are, thus, much more sweeping in importance than the rights under competition law and should be subject to wider limitations than in the case of competition law⁴⁹. In particular, the implementation of a regulatory policy in a given sector should be preceded by a discussion on the purposes of this policy, and selected regulatory obligations should be imposed only following a detailed economic analysis of the relevant market and a determination of the prospects for its development. This allows for the identification of problems on the relevant market related to the lack of effective competition and the imposition of regulatory commitments which are adequate and proportional to an existing situation.

3. Right to a transparent procedure

3.1. Preliminary assessment

In the current legal state the only guarantee that an undertaking offers an adequate commitment is a transparent procedure. In theory the central element of the procedure is a preliminary assessment submitted by the

⁴⁷ T. Skoczny, 'Ochrona konkurencji a prokonkurencyjna regulacja sektorowa' (2004) 3 *Problemy Zarządzania* 20 and following.

⁴⁸ T. Skoczny, 'Ochrona konkurencji a prokonkurencyjna regulacja...', p. 12.

⁴⁹ J. Temple Lang, *The Use of Competition Law...*, p. 3.

Commission. The preliminary assessment, in which the Commission presents its concerns about an undertaking, should enable the undertaking to formulate and present adequate commitments to meet the concerns⁵⁰. In practice however, commitments are negotiated before a preliminary assessment is submitted by the Commission, and this document is usually issued after closing the negotiations between an undertaking and the Commission. This is what occurred in the *Coca-Cola* case⁵¹. Such a procedure is evident and encouraged in the Commission's document on best practices. In the opinion of the Commission, at the first stage of proceedings regarding adoption of a commitment decision, talks about possible solutions should be ended. Only when the Commission is convinced that an undertaking really wants to offer commitments which may effectively alleviate concerns as regards competition, does it issue a preliminary assessment. Addressing a preliminary assessment to an undertaking when the talks about commitments are already closed would seem to constitute a practice not conducive to transparent solutions, but rather one which would allow the Commission to exert pressure on undertakings to incline them to offer unjustified commitments⁵². In such a case, undertakings should refer to a hearing officer⁵³, who is empowered to ensure that undertakings can exercise their procedural rights.

3.2. Access to files

Pursuant to Article 27(2) of Regulation 1/2003 and Articles 15 and 16 of an executive regulation, only the addressees of a statement of objections are granted access to files of the Commission in order to enable them to effectively express their opinions on the preliminary motions of the Commission presented in the notification. The regulatory provisions do not specifically provide that the addressees of a preliminary assessment, prepared by the Commission in proceedings under Article 9 of Regulation 1/2003, have the right of access to case files. Nor is this right contained in an announcement of the Commission on access to case files⁵⁴. The nature of commitment decisions dispels any

⁵⁰ T. K. Giannakopoulos, *Safeguarding Companies' Rights in Competition and Anti-dumping/Anti-subsidies Proceedings*, The Hague, London, New York 2011, p. 263 and following.

⁵¹ O. Armengol, A. Pascual, 'Some reflections on article 9 Commitment decisions in the light of the Coca-Cola case' (2006) 27 (3) *European Competition Law Review* 124–129.

⁵² D. Waelbroeck, 'Le développement en droit européen...', p. 21.

⁵³ Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ [2011] L 275/29, Article 15(1).

⁵⁴ Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No. 139/2004, OJ [2005] C 325/07.

doubts that the case files are one-sided files of an administration body, designed to pre-determine the commitments of an undertaking. This situation is not changed by the fact that, once commitment decisions are adopted, an undertaking cooperates with the Commission. Thus, such an institution should rightly grant access to files to parties to proceedings regarding the adoption of a commitment decision. This right results both from the decisions of European courts⁵⁵ and from Article 41 of Charter of Fundamental Rights, which guarantees to parties the right to good administration. Exercise of the right of access to case files is a basic condition which must be met in order for a party to effectively exercise and defend its interests in administrative proceedings. Without access to case files it is not possible for an undertaking to express its opinion as to legal and factual circumstances which may affect the result of the case, nor to suggest adequate solutions.

4. Rights resulting from principle of legal certainty and legality of the sanction

Issues concerning whether the *ne bis in idem* principle is applicable to commitment decisions, and whether such decisions are binding and to what extent for the courts of Member States and national competition authorities, has never been the subject of a decision of the Court of Justice and arouses controversy in the subject literature⁵⁶. According to recitals 13 and 22 of the Preamble to Regulation 1/2003 ‘commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case’⁵⁷. Additionally, ‘commitment decisions adopted by the Commission do not affect the power of the courts and the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty’⁵⁸.

In the opinion of the Commission, ‘recitals 13 and 22 specify that national authorities may thus in principle adopt a prohibition decision regardless of

⁵⁵ T-30/91 *Solvay SA v Commission*, ECR [1995] II-01775. It is necessary to distinguish between the right of access to the file that relates to the administrative procedures, and the right of access to documents having the character of the rules improving the openness of the process of governance in the EU.

⁵⁶ I. Van Bael, J.-F. Bellis, *Competition Law...*, p. 1166; D. Waelbroeck, ‘Le développement en droit européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions): que va-t-il rester aux juges?’, *The Global Competition Law Centre Working Papers Series 01/08*, p. 10; H. Schweitzer, ‘Commitment Decisions under Article 9 of Regulation 1/2003: The Developing EC Practice and Case Law’ (2008) 22 *EUI Working Papers* 24.

⁵⁷ Regulation 1/2003, recital 13.

⁵⁸ Regulation 1/2003, recital 22.

the Commission's commitment decision concerning the same subject matter. Moreover, Article 16 of Regulation 1/2003, according to which national competition authorities and courts must not adopt decisions that run counter to those adopted by the Commission, does not appear to preclude such a finding. The position could arguably be different where a national competition authority or a national court requires an undertaking to carry out actions that conflict with the commitments made binding by the Commission decision, i.e. where the undertaking could not implement the obligations imposed by national authorities without breaching its commitments'. This opinion of the Commission is shared by some commentators⁵⁹, who believe that national authorities may declare either that there never was, or that there still is, an infringement of competition law by an undertaking, and may award damages. Nevertheless, this does not mean that decisions of national courts and competition authorities may question the binding legal effects of commitment decisions and require undertakings to resort to measures that would infringe upon their commitments offered under Article 9 of Regulation 1/2003. In particular, in a commitment decision the Commission does not conclude whether there has been an infringement or that it has stopped, but only that there is no longer a basis for action, and that a given case does not constitute an enforcement priority for the Commission any more. In the opinion of other authors, the adoption of a commitment decision is a guideline for competition authorities and national courts and a signal that there is no need for further actions. They believe that this is the logical result of Article 16⁶⁰ of Regulation 1/2003, and that the adoption via this Regulation of the decentralized application of European competition law can only be effective in a 'one-stop-shop system'⁶¹. In practice, competition authorities of Member States discontinue proceedings in cases in which the Commission adopts a commitment decision. Nonetheless, an undertaking which is a party to a commitment decision cannot be certain to what extent national authorities take into consideration the commitment decision, e.g. whether proceedings will be discontinued or whether a national competition authority might not decide that an infringement has occurred and impose a fine on an undertaking. This raises doubts as to application of the principle of legality of sanction⁶².

⁵⁹ I. Van Bael, J.-F. Bellis, *Competition Law...*, p. 1166; E. Gippini-Fournier, 'The Modernisation of European Competition Law: First Experiences with Regulation 1/2003', [in:] H. Koeck, M. Karollus (eds.), *The Modernisation of European Competition Law*, FIDE Congress, Linz 2008, pp. 401–404.

⁶⁰ Article 16 codifies the judgment of the Court of Justice in case C-344/98 *Masterfoods*.

⁶¹ H. Schweitzer, 'Commitment...', pp. 24–26; D. Waelbroeck, 'Le développement en droit européen...', p. 10 and following.

⁶² For more on this subject, in the broader context of the decentralized application of EU competition law, see: K. Kowalik-Bańczyk, *Problematyka ochrony praw podstawowych w unijnych*

This principle is closely intertwined with the principle of legal certainty. The latter, according to the decisions of European courts⁶³, has two dimensions. The first refers to the prohibition of retroactive effect⁶³ of law in the European Union. The second is related to the need to ensure that European legislation is transparent. In particular, European legal acts may be binding and enforced if they are published, are clear and intelligible, and the way they are applied is be easy to predict⁶⁴. This requirement that European regulations be precise and their application predictable is emphasized when they impose or authorize an institution to impose penalties or administrative sanctions. In such a case, according to the principle of legality of the sanction, the interested parties must have the possibility to unambiguously identify their rights and obligations in order to undertake adequate actions⁶⁵. As regards proceedings concerning the adoption of a commitment decision, this requirement is not met.

5. Right to appeal

The only decision of the Court of Justice regarding commitment decisions occurred as a result of a complaint lodged not by a party to the proceedings leading to the adoption of the decision, but by an interested third party. Thus, it was not determined if undertakings could appeal against a decision in which the Commission accepted and approved commitments which the undertakings themselves offered. Nevertheless, we cannot reject a solution suggested in the literature⁶⁶, according to which, inasmuch as such decisions constitute public law enforcement, concerned undertakings may appeal them to the Court of Justice. A similar situation occurred in the case of commitments offered by undertakings in return for a consent to a concentration. The Court of Justice clearly declared that such undertakings possessed an active title to appear before the court⁶⁷.

The fact that the commitments offered are voluntary may affect the scope of court review. As is pointed out in the literature⁶⁸, addressees of such decisions find it difficult to appeal against a decision which they accepted,

postępowaniach w sprawach z zakresu ochrony konkurencji, Centrum Europejskie Natolin, Warszawa 2010, p. 62 and following.

⁶³ 84/78 *Tomadini v Amministrazione delle Finanze dello Stato*, ECR [1979] 01801; 325/85 *Ireland v Commission*, ECR [1987] 05041; C-301/97 *Netherlands v Council*, ECR [2001] I-08853.

⁶⁴ D. Chalmers, G. Davies, G. Monti, *The Existing Policy Framework. European Union Law: Cases and Materials*, Cambridge 2010, p. 412.

⁶⁵ T-43/02 *Jungbunzlauer AG v Commission*, ECR [2006] II-03435, paras. 71–73, 75–81.

⁶⁶ H. Schwietzer, 'Commitment...', p. 23.

⁶⁷ C-89/85 *Woodpulp*, ECR [1993] I-01307, para. 181.

⁶⁸ D. Waelbroeck, 'Le développement en droit européen...', p. 23.

as the estoppel principle, confirmed in court decisions⁶⁹, makes it impossible for an undertaking to appeal against solutions which they offered voluntarily (*venire contra factum proprium*), unless a business entity acts under duress. For example, in a case regarding control of concentration, the court of first instance (General Court, or GC) ruled that a complaint of an undertaking may be justified only when ‘the notifying parties were arbitrarily forced by the Commission to propose the corrective measure’⁷⁰. A similar solution may be used by European courts in the case of commitment decisions.

The scope of court control (i.e. review) may also limit the wide discretion at the Commission’s disposal when it adopts decisions in the field of competition law, including commitment decisions, if such decisions involve the Commission making complex economic evaluations. In the *Alrosa* decision⁷¹ the Court of Justice established clear limits to appellate review, revoking the decision of the GC. The Court of Justice concluded that the ‘General Court put forward its own assessment of complex economic circumstances and thus substituted its own assessment for that of the Commission, thereby encroaching on the discretion enjoyed by the Commission instead of reviewing the lawfulness of its assessment’.

In the case of commitment decisions the scope of discretion of the Commission is very broad. In the first place, Regulation 1/2003 does not set forth the cases in which the Commission should adopt commitment decisions. Article 9 of the Regulation provides only 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’. The only guideline in this regard is included in recital 13 of the Preamble to Regulation 1/2003, which says that ‘commitment decisions are not appropriate in cases where the Commission intends to impose a fine’. As a result of the wording of this recital the Commission, forthwith after Regulation 1/2003 came into force, decided that ‘this excludes commitment decisions in hardcore cartel cases’⁷². The Commission confirmed its position in 2010 in a document which established best practices as regards application of Articles 101 and 102 TFEU⁷³. This means that in commitment decisions the Commission may

⁶⁹ C-453/99 *Crehan v Courage Ltd.*, ECR [2001] I-06297.

⁷⁰ T-282/02 *Cementbouw Handel & Industrie BV v Commission*, ECR [2006] II-00319, para. 319; confirmed by ECJ in: C-202/06 P *Cementbouw Handel & Industrie BV v Commission*, ECR [2007] I-12129.

⁷¹ C-441/07 P *Alrosa*, para. 67.

⁷² European Commission, ‘Commitment decisions...’.

⁷³ European Commission, ‘Best Practices...’, p. 23

not impose a fine on an undertaking. A fine can be imposed only when the Commission decides that European competition law was infringed⁷⁴. Based on the wording of recital 13 of the Preamble to Regulation 1/2003, we cannot marginalize the meaning of Article 9 of Regulation 1/2003 and conclude that it may be used by the Commission only to decide in matters regarding less serious infringements of competition law. A basic assumption of the decentralized application of Articles 101 and 102 TFEU, as implemented by Regulation 1/2003, is that the Commission is entrusted with the most important matters from the area of competition law. In paragraph 12 of ‘Best Practices’ the Commission declares that it concentrates ‘its enforcement resources on cases in which it appears likely that an infringement could be found, in particular on cases with the most significant impact on the functioning of competition and risk of consumer harm, as well as on cases which are relevant with a view to defining EU competition policy and/or to ensuring coherent application of Articles 101 and/or 102 TFEU’. Still the literature⁷⁵ is right to emphasize that the Commission, when adopting a commitment decision, should take into consideration the fact that, owing to its nature, not all the same goals can be achieved which could be accomplished by an infringement decision. Decisions adopted pursuant to Article 7 of Regulation 1/2003 are not limited to putting an end to the infringement of competition law, but also may lead to the public stigmatizing of an undertaking guilty of infringement, which also has a preventive effect, and/or depriving an undertaking of illegally gained profits. An infringement decision also facilitates later claims for damages filed by entities which suffered losses as a result of such infringement⁷⁶. However, European law does not contain any guidelines as to when the Commission may accept voluntary commitments of undertakings as binding, leaving complete discretion in this regard to the Commission.

Also control over the proportionality of commitment decisions adopted by the Commission is limited. In the *Alrosa* case the Court of Justice, revoking a GC decision of a different opinion, concluded that, pursuant to Article 9 of Regulation 1/2003 ‘the Commission is not required to make a finding of an infringement, its task being confined to examining, and possibly accepting, the commitments offered by the undertakings (...)’. Application of the principle of proportionality by the Commission in the context of Article 9 of Regulation 1/2003 is confined to verifying that the commitments in question address the concerns the Commission expressed to the undertakings involved and that

⁷⁴ I. Van Bael, J.-F. Bellis, *Competition Law...*, p. 1160.

⁷⁵ W. P. J. Wils, ‘Settlements...’, p. 349.

⁷⁶ W.P. J. Wils, ‘The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles’ (2008) 31(3) *World Competition* 10, available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=456087.

they have not offered less onerous commitments that also address those concerns adequately⁷⁷. The burden of formulating proportional commitments is thus transferred to undertakings, and the Commission's decision accepting those commitments as binding may be challenged only if the 'Commission's assessment is manifestly incorrect'⁷⁸. This surface solution does not address the underlying reality, mainly that the pressures to which undertakings may be subjected during the commitment procedure may induce them to offer disproportionate and too far-reaching commitments⁷⁹. The decision adopted by the GC (court of first instance) in the *Arosa* case seems more justified. According to it, the proportionality of commitment decisions should be examined the same as in the case of decisions adopted under Article 7 of Regulation 1/2003. This means 'that the burdens imposed on undertakings in order to bring an infringement of competition law to an end must not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed'⁸⁰. In the opinion of the GC it does not matter that, in the case of proceedings under Article 9 of Regulation 1/2003, the case concerns only a potential infringement, which was not proved by the Commission. Commitment decisions should be adopted by the Commission only in order to bring the potential infringement of Article 101 or 102 TFEU to an end and use only such means as are proportional and necessary to end the potentiality of such an infringement. A situation, accepted by the Court of Justice, which allows for acceptance by the Commission of commitments more severe for an undertaking, should be viewed critically. Burdensome commitments may lead to unnecessary interference in the market and may affect not only an undertaking, which may well have committed an infringement, but also its competition, thus affecting the market structure. It may lead, for example, to strengthening of competition on the market in the short run, but may inhibit it in the long run or, when an obligation to provide access to a network is imposed, may lead to considerable slowing of an investment in infrastructure or in innovative technological solutions, which in the end may bring negative consequences to consumers and end users. Commitments accepted in a decision may even lead to limiting competition on a given market, if they prohibit undertakings from conducting activities which are permissible under competition law and constitute legitimate business conduct⁸¹.

⁷⁷ C-441/07 P *Arosa*, paras. 40 and 41.

⁷⁸ C-441/07 P *Arosa*, para. 42.

⁷⁹ W.P.J. Wils, 'Settlements...', p. 10.

⁸⁰ T-170/06 *Arosa Company Ltd v Commission*, ECR [2007] II-02601, para. 102.

⁸¹ F. Wagner-von Papp, 'Best and even better'..., p. 19.

IV. Polish perspective

The institution similar to the one established by Article 9 of Regulation 1/2003 was introduced into Polish competition law and has been in force since 1 May 2004⁸². Nowadays it is regulated by Article 12 of the Act of 16 February 2007 on competition and consumer protection⁸³. As follows from the argumentation to the draft of amendments to the competition and consumer protection law⁸⁴, the institution of commitment decisions was introduced into Polish law in order to ‘make actions of the Office more effective – its main task is to protect competition, not to punish undertakings. The President of the Office of Competition and Consumer Protection (UOKiK) may accept commitments of undertakings (at the same time abandoning further proceedings, passing a decision which would declare existence of certain practice, and imposing a penalty) if it is beneficial for competition (in other words, if a certain practice ceases immediately, it is more beneficial for competition than going through proceedings and imposing a penalty on an undertaking)’. The introduction of commitment decision to the Polish legislation also allows to align procedural position of the undertakings before the Polish competition authority and before the Commission⁸⁵.

The literature⁸⁶ describes four stages of the proceedings regarding adoption of a commitment decision. At the first stage antitrust proceedings are instigated and conducted. Some authors⁸⁷ suggest that the initiation of the proceedings makes the existence of the infringement of Polish or European competition rules plausible. Article 12 of the Act on competition and consumer protection provides that an infringement does not have to be proved, its existence must nevertheless be seen as more probable than any other alternative solution⁸⁸. At the second stage of the proceedings the UOKiK President notifies an undertaking of plausibility of the infringement. At the

⁸² Article 11a of the Act on Competition and Consumer protection of 15 December 2000 (Journal of Laws 2000 No. 122, item 1319) as amended by the modification Act of 16 April 2004 (Journal of Laws 2004 No. 93, item 891).

⁸³ Journal of Laws 2007, No. 50, item 331, as amended.

⁸⁴ Diet paper No. 2561 of 20 February 2004.

⁸⁵ T. Koziel, ‘Commitment Decisions under the Polish Competition Act – Enforcement Practice and Future Perspectives’ (2010) 3(3) *YARS* 76.

⁸⁶ K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2008, p. 432 and following.

⁸⁷ C. Banasiński, E. Piontek (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 311.

⁸⁸ A. Gill, M. Swora, ‘Decyzja zobowiązująca jako metoda rozwiązywania sporów w postępowaniu przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów’ (2005) 3 *Kwartalnik Prawa Publicznego* 128.

third stage an undertaking prepares a commitment offer. At the fourth stage of the application of Article 12 of the competition and consumer protection law the UOKiK President passes a commitment decision which obliges an undertaking to fulfil the commitments offered. Thus, basic assumptions of the Polish regulation are clearly modelled on European law solutions. In this regard the doctrine⁸⁹ points out Europeanization of the Polish competition and consumer protection law.

Whereas, as regards rights of undertakings which are parties to proceedings regarding adoption of a commitment decision there are several differences between European and Polish law. Most of all, Polish law does not provide for an undertaking to be notified of possible infringement, or for any form of such a notification. Preliminary assessment was not introduced into Polish law. It does not seem appropriate as lack of a good knowledge of reservations of the UOKiK President about an undertaking makes it impossible for an undertaking to prepare adequate commitments. Additionally, Polish legislation, unlike the European one, does not provide that the competition authority should not issue commitment decisions in hard-core cartel cases. Thus, the UOKiK President has complete discretion as to what types of cases can be closed by passing a commitment decision⁹⁰. Polish law also does not clearly provide what significance a commitment decision of the Polish competition authority has for the competition authorities operating in other Member States and for the Commission. It is clear from the resolution of the Supreme Court that for common courts a commitment decision does not constitute a prejudication. It means that a common court may make its own independent arrangements as regards declaration that a certain practice is limiting for competition⁹¹. This is due to the fact that the decision indicated in Article 12 of the competition and consumer protection law is based on plausibility of the infringement of the competition and consumer protection law, but not on proof. Thus, Polish law, like European law, does not correspond to standards as regards application of the principle of legal certainty, and, in particular, legality of sanctions.

A party to commitment decision proceedings has the possibility to appeal against a decision of the UOKiK President to the Court of Competition and Consumer Protection (SOKiK). The Court has a wide range of possibilities at its disposal as regards control over decisions of the UOKiK President. It has

⁸⁹ K. Mrzygłód, 'Commitment decisions: A Polish perspective' (2010) 3 *Global Antitrust Review* 103.

⁹⁰ D. Miąsik, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, s. 740.

⁹¹ M. Sieradzka, 'Dochodzenie roszczeń za naruszenie unijnych i krajowych reguł konkurencji a kwestie pre Judykjalności rozstrzygnięć organów ochrony konkurencji' (2010) 12 *Przegląd Prawa Handlowego* 47; T. Kozieł, 'Commitment Decisions'..., p. 87.

the same possibilities to resolve a matter as first instance civil courts under the Code of Civil Procedure⁹². Therefore, it may decide as to the essence of the matter and change the decision appealed against in whole or in part. Decisions of the Court may be appealed against as any other civil decision (appeal, complaint, and cassation of decisions passed by a second instance court)⁹³. Proceedings before the Court are conducted pursuant to the Code of Civil Procedure in business lawsuits. Apart from appeals against decisions of the UOKiK President, the Court examines complaints against certain regulatory decisions [of the President of Office of Electronic Communications (UKE), President of Energy Regulatory Office (URE), and President of Railway Transport Office (UTK)]⁹⁴. The solution adopted in Polish law should be assessed positively. Firstly, because the Court of Competition and Consumer Protection is able to decide as to the essence of the matter. It means that it is able not only to revoke a decision appealed against, but also to make changes if it deems it appropriate. Secondly, the Court is a specialist authority, which may draw on its decision-making experience. This is particularly important when passing decisions in cases regarding competition protection, which requires specialist knowledge.

V. Conclusions

In the course of proceedings leading to the adoption of a commitment decision, undertakings are not able to exercise their appropriate rights in order to ensure protection of their interests in negotiations with the European Commission. This is the result of the strong negotiating position of the Commission and the fact that it acts both as a prosecutor and decision-renderer. Additionally, despite the fact that an undertaking concerned has the right to appeal against this decision to the European courts, the scope of such review is so narrow that it does not guarantee that an undertaking is protected against offering too many commitments. As a result, a change in the jurisdictional approach is called for, which would enable effective control (review) by the EU courts as regards the proportionality of commitments imposed by the

⁹² Code of Civil Procedure of 17 November 1964 (Journal of Laws 1964 No. 43, item 296, as amended).

⁹³ The change in the Code of Civil Procedure in this regard was introduced following a decision of the Constitutional Tribunal on incomppliance of Article 479³¹ with the Constitution in the judgment of 12 June 2002 (Journal of Laws 2002 No. 84, item 764); T. Woś, 'Wstęp', [in:] T. Woś (ed.), *Postępowanie sądownoadministracyjne*, Warszawa 2004, p. 23.

⁹⁴ T. Skoczny, *Ochrona konkurencji...*, p. 26.

Commission under Article 9 of Regulation 1/2003. The approach adopted in the Polish antitrust law requiring the UOKiK President to demonstrate the existence of the infringement plausible allows to be more specific about possible infringement. This makes easier to assess the proportionality of the remedies imposed. Moreover, when adopting commitment decisions the Commission, in order to avoid allegations of abuse of discretion, should very carefully, in a self-limiting manner, take into consideration procedural efficiency and legality and in particular it should issue guidelines for the application of Article 9 of Regulation 1/2003. Also, an increase in transparency of procedures is called for (for example, the Commission should not demand from an undertaking to present, even preliminarily, commitments, before it submits a preliminary assessment), as well as an increase in transparency of legal consequences of a commitment decision. Commitment decisions should lead to the unambiguous determination of the rights and obligations of an undertaking. In this connection, the issue to what extent they are binding for national competition authorities and courts should be clearly provided for by European legislation.

The best solution, which would guarantee protection of an undertaking's rights and interests in antitrust proceedings, and not only under Article 9 of Regulation 1/2003, would be to grant the Commission the powers as regards explanatory proceedings concerning facts and law, but not vest it with the power to adopt final decisions. Cases would be brought to the court by the Commission, and the court would issue the first binding decision⁹⁵. In the case of commitment decisions, the Commission would conduct negotiations, but a decision which would make negotiated commitments binding would have to be approved by an independent court, making an objective assessment. Another possible solution, that functions in the Polish competition law, is to create a specialized European court which has broad competences to review decisions of the Commission and to rule on the merits. However, these far-reaching proposed changes would not be possible without amending the Treaties.

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