

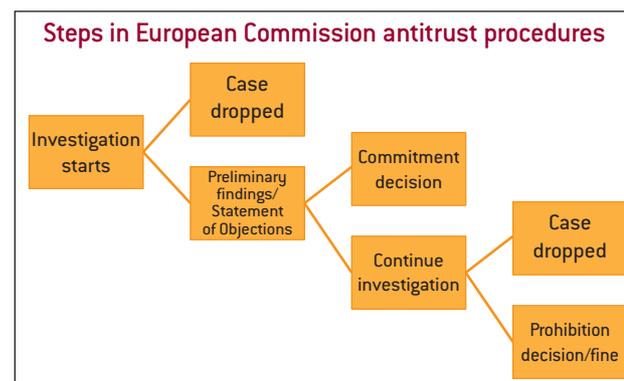
COMMITMENTS OR PROHIBITION? THE EU ANTITRUST DILEMMA

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THE ISSUE Excluding cartels, most investigations into suspected infringements of European Union competition law are resolved with ‘commitment decisions’. The European Commission drops the case in exchange for a commitment from the company under investigation to implement measures to stop the presumed anti-competitive behaviour. Commitment decisions are considered speedier than formal sanctions (prohibition decisions) in restoring normal competitive market conditions. They have a cost, however: commitments are voluntary and are unlikely to be subject to judicial review. This reduces the European Commission’s incentive to build a robust case. Because commitment decisions do not establish any legal precedent, they provide for little guidance on the interpretation of the law.

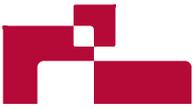
POLICY CHALLENGE

The European Commission relies increasingly on commitment decisions. More transparency on the substance of allegations, and the establishment of a higher number of legal precedents, are however necessary. This applies in particular to cases that tackle antitrust issues in new areas, such as markets for digital goods, in which companies might find it difficult to assess if a certain behaviour constitutes a violation of competition



Source: Bruegel.

rules. To ensure greater transparency and mitigate some of the drawbacks of commitment decisions, while retaining their main benefits, the full detail of the objections addressed by the European Commission to defendants should be published.



1. We examine cases involving anti-competitive agreements (prohibited by Article 101 of the Treaty on the Functioning of the European Union), excluding cartels, and abuse-of-dominance (Article 102). Cartels are subject to different procedures, entail fines and do not pose the same dilemmas as other antitrust offences, because settling companies are formally sanctioned.

2. Source: European Commission commitment decisions (29) and prohibition decisions (18). Other types of decision are excluded.

3. Council Regulation No 1/2003 of 16 December 2002. The Regulation entered into force on 1 May 2004.

4. See Alexander Italianer, Director General of the European Commission's Competition Directorate-General, speech of 11 December 2013 at the CRA Competition Conference, available at http://ec.europa.eu/competition/speeches/text/sp2013_11_en.pdf.

EXCLUDING CARTELS¹, 62 percent (29 out of 47) of European Commission antitrust decisions from May 2004 to December 2013 did not formally sanction an antitrust violation². After a first assessment of the case, the Commission confronts the companies suspected of infringing the rules with its preliminary findings. The investigation may then continue and result in a prohibition decision, which compels the company to stop its abusive behaviour and pay a potentially hefty fine. Most notably, the Microsoft I and Intel cases resulted in prohibition decisions. Alternatively, the company can offer to stop its behaviour and make a number of commitments. If those commitments address the Commission's preliminary concerns, the Commission might make those commitments binding and stop its investigation with no further consequences for the companies involved, which admit no wrongdoing.

Commitment decisions have been common for the majority of antitrust cases investigated in the last decade. Of abuse-of-dominance cases, which are prohibited under Article 102 of the Treaty on the Functioning of the European Union (TFEU), 75 percent (18 out of 24) were resolved with commitment decisions. Under the current competition commissioner Joaquín Almunia, only one Article 102 prohibition decision was taken, compared to 10 commitment decisions. Figure 1 shows the trend in decisions since May 2004, when commitment decisions were formally introduced in European Union regulation³.

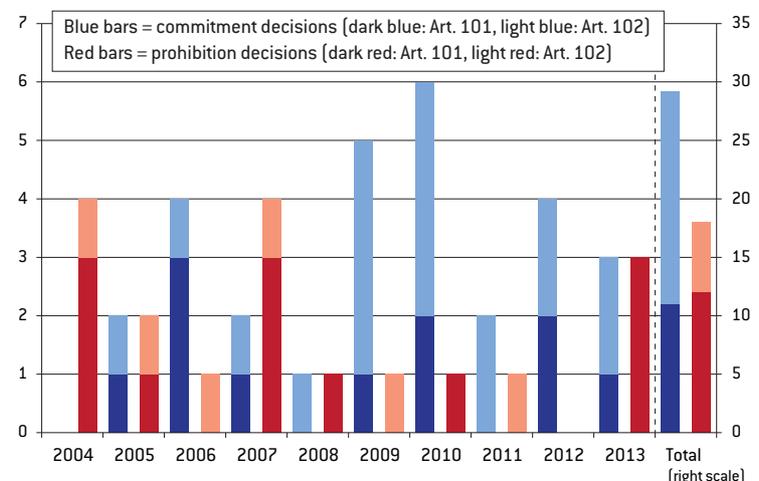
Commitment decisions are often used to respond rapidly to abuses that are causing significant harm to consumers and risk hampering the development of a market if not quickly stopped. However, commitment decisions come at cost: they are based on a preliminary assessment of the concerns and they do not formally identify any infringement. Since the companies involved admit no wrongdoing and the decision is very unlikely to be challenged in court, the European Commission publishes very little information about its theory of harm in the commitment decision. Indeed, this is implicitly part of the deal: the absence of a clear identification of the concerns minimises the risk of private actions for damages against the companies, and it also limits the Commission's exposure to potential external criticism.

Commitment decisions, therefore, offer little guidance to the market on how similar scenarios might be assessed by the Commission in

the future. Problems might be temporarily solved, but there is little guarantee that they will not re-emerge in the long term. Commitment decisions treat the symptoms but do not cure the illness.

The Commission seems to be aware of this trade-off. It has said that prohibition decisions are made whenever there is a significant need for 'deterrence, punishment and legal precedent'⁴. However, this claim is not fully supported by the facts. Few prohibition decisions have been adopted in novel areas of intervention for which legal guidance is much needed. This can be most clearly seen in cases of patent abuse in standard setting, notoriously a difficult area of intervention for antitrust. These cases concern how the adoption of a standard can enable holders of essential patents to extract unfair rents from licensees of the standardised technology (see Mariniello, 2013, for an analysis). This involves the interpretation of

Figure 1: European Commission antitrust decisions* (May 2004 – Dec 2013)



Source: Bruegel based on DG Competition case search tool. Note: * excluding cartels. Article 101 TFEU prohibits anti-competitive agreements, Article 102 TFEU prohibits abuse of dominance. See footnote 1.



concepts such as ‘fairness’ and ‘reasonableness,’ which is particularly tricky in antitrust and on which no consensus exists amongst scholars. Yet, after seven years of investigations (including topical cases, such as Rambus, Qualcomm and ICom⁵) the Commission has not adopted any decision with precedent value. The current cases involving Samsung and Google-Motorola deal with the very same issues, but the likelihood that the two cases will be settled through commitment decisions is high⁶. Therefore, no clarification of the approach of the Commission in this area is to be expected any time soon⁷.

Other areas which would significantly benefit from legal guidance likewise lack strong legal precedents. Commitment decisions have been taken in the air transport (eg oneworld and Star cases), energy (eg EON gas market foreclosure cases) and new media (eg ebooks case) sectors, to mention a few, although new tools or novel theories of harm were underlying the Commission’s reasoning. It is possible that two of the most significant and controversial cases recently investigated by the European Commission, Google (search engine case) and Gazprom, will also be settled through commitment decisions⁸.

In this Policy Brief, I describe the institutional background behind commitment and prohibition decisions, discuss benefits and costs for each form of decision and report figures on decisions in the last nine years of antitrust enforcement in the EU. I conclude

by proposing an amendment to the current regulation that would increase transparency in commitment decisions.

INSTITUTIONAL BACKGROUND

A specific procedure for commitment decisions was formally introduced a decade ago by Council Regulation 1/2003 in the context of the modernisation of EU antitrust law. Before then, settlements of antitrust proceedings were few and had an informal and unstructured nature (the vast majority of cases resulted in prohibitions with or without a fine)⁹.

Under the current rules, an investigation for a suspected breach of EU competition law might lead to the adoption of a prohibition decision¹⁰ (see the figure on the front page for a simple illustration of the process). That decision identifies the infringement, stops the anticompetitive behaviour, might impose remedies and could entail a fine of up to 10 percent of the guilty company’s global turnover. Before taking such a decision, the Commission must address the company with its preliminary concerns in a ‘Statement of Objections’. The company can then attempt to dispel the concerns by bringing up new arguments or evidence during the hearing process. The subsequent investigation phase might result in the Commission dropping the case if new evidence points to no infringement, although this is very uncommon¹¹.

To avoid the adoption of a prohibition decision, the company under investigation can instead propose a set of commitments that, if

deemed to address the concerns that have been preliminarily identified can be rendered binding by the Commission with a decision pursuant to Article 9 of Council Regulation 1/2003 (an Article 9 decision). For example, in the IBM case the Commission was concerned that IBM would supply its competitors with mainframe computers at an unreasonably high price. The case was resolved through an Article 9 decision under which IBM committed to make spare parts and technical information swiftly available at a fair price to independent mainframe maintainers.

The Commission has the power to enforce Article 9 decisions: if the company is found to not comply with the commitments, it can be fined up to 10 percent of its global turnover¹². The commitment decision can be appealed before the EU courts, which can question the proportionality of the commitments or whether the Commission’s assessment was manifestly incorrect. However, as companies enter voluntarily into commitment agreements, appeals are highly unlikely (Wils, 2008). Kellerbauer (2011) notes that no appeal has ever been filed by parties addressed by a commitment decision; very few appeals were filed by third parties.

THE TRADE-OFF: COMMITMENTS VERSUS PROHIBITION

From a social welfare perspective there are two key reasons why violations of competition laws should be pursued by antitrust authorities: (a) to restore and preserve the correct functioning of the market when competition is

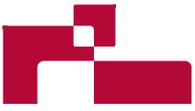
5. Case information can be retrieved at <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

6. Samsung submitted its commitment proposal to the Commission in September 2013; Google already settled a proceeding in the United States for behaviour similar to that alleged by the Commission. See <http://www.ftc.gov/news-events/press-releases/2013/07/ftc-finalizes-settlement-google-motorola-mobility-case>.

7. To make a simple comparison, the commitment decision in Rambus is 17 pages long, four of which are dedicated to the ‘Practices raising concerns’. The Intel prohibition is 518 pages long, with 225 pages dedicated to an analysis of how Intel has abused its dominant position.

8. Google has already submitted three commitment proposals to the Commission in the course of proceedings for alleged abuse of its search engine.

9. The new procedure was inspired by the US, where settlements have a long tradition and represent the most common scenario (see Georgiev, 2007).



10. Articles 7 and 23 of Council Regulation 1/2003.

11. This has only happened in four Article 101 cases: SkyTeam, UK Roaming, Germany Roaming and iTunes.

12. In March 2013, Microsoft was the first company ever fined for non-compliance of an art. 9 decision, see Mariniello (2013) for a commentary: <http://www.bruegel.org/nc/blog/detail/article/1035-microsoft-fined-for-non-compliance-a-game-changer-in-antitrust-settlements/>.

13. See Wagner Von Papp (2012) for example. On a similar note, Wils (2008) warns that antitrust authorities might be tempted to offer a settlement with mild conditions (say, soft commitments) when dealing with weak cases that are more vulnerable to judicial review. The authority could therefore claim that the investigation had a concrete result without running the risk of being quashed in court. Without a soft settlement being available, those cases might instead have been dropped, because of the risk of a prohibition decision being overturned in court.

threatened by harmful behaviour and (b) to minimise the risk that similar violations in other markets would occur in the future. Prohibition decisions respond to both requirements. Commitment decisions in most cases respond only to the first, though they might do it more efficiently. Table 1 summarises the benefits of both types of decisions for the Commission and the companies under investigation.

(a) Protect competition

Prohibition decisions arguably yield a more accurate identification of competition concerns, since more evidence is collected after the hearing process. Most importantly, prohibition decisions are naturally exposed to *ex-post* judicial examination: defendants can (and often do) appeal decisions before the EU courts. This places a significant pressure on the Commission, which could be censured if its assessment is

deemed wrong by the court. Prohibition decisions therefore maximise the incentive to accurately identify the concerns and pinpoint the best solution. Conversely, the prospect of a prohibition decision might lead the Commission to drop a weak case, if it believes that it would not pass the court's review.

Commitment decisions on the other hand, come at an earlier stage in the process, when the investigation is not yet finalised. Commitment decisions provide less of an incentive for accuracy in the assessment because the likelihood that an Article 9 decision will end up in court is close to zero. Paradoxically, the Commission might have a greater incentive to adopt a commitment decision in cases for which there might be a greater need to establish a legal precedent through a prohibition decision. The more novel the theory of harm, the greater the risk of annulment by

the EU courts, and the lower the attractiveness of prohibition decisions. This risk is well acknowledged in the literature¹³.

The key benefit of a commitment decision is arguably to provide a quicker response to an ongoing infringement. An analysis of the Commission's decisions generally confirms this but also suggests more caution. The time from the opening of a proceeding to the adoption of the decision is on average 17 percent longer for prohibition decisions than commitment decisions: 28.5 versus 24.3 months. This changes though if decisions are categorised according to the nature of the infringement (Figure 2 on the next page). Commitment decisions are particularly popular in abuse of dominance cases (breaches of Article 102 of the EU Treaty). However, in these cases, commitment decisions have taken on average longer than prohibition decisions: 26 months

Table 1: The commitment versus prohibition decision trade-off

	Antitrust authority	Defendant
Objective	Maximises consumer surplus	Maximises own profits
Benefits of commitment decision	Potentially faster procedure – earlier end to consumer harm; Reduced administrative costs – greater efficiency; Can craft remedies to open markets and reduce likelihood of future infringements; Can market-test remedies to better address the concerns.	Avoid fines; Defendant can propose remedies; Stops legal costs and ongoing bad publicity; Limit risk of action for damages.
Benefits of prohibition	Deeper assessment – lower likelihood of errors; Increase Commission's accountability through exposure to judicial review; Establish a legal precedent – guidance for future assessments; Increase deterrence through fines; Fairness: allow follow-on private action.	New evidence or deeper assessment might lead to the case being dropped (no prohibition); Remedies may be less cumbersome than commitment decisions; Longer period before prohibition – can still enjoy illegal profits if any; Easier access to court for appeal – judicial review.

Source: Bruegel.



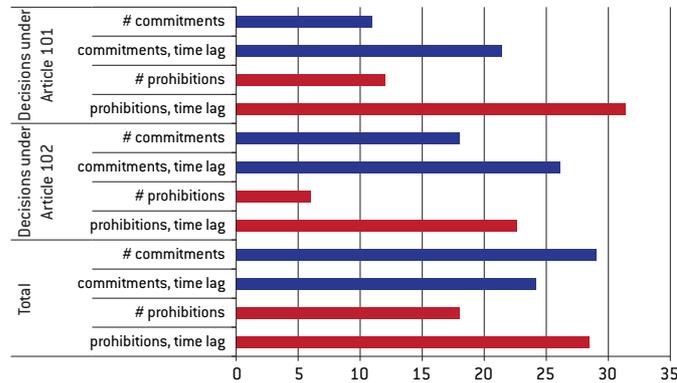
against 22.7 months. That is: cases resulting in commitment decisions have been 15 percent slower than prohibitions. While this surprising result could be due to the lack of statistically significant figures (there have been only six Article 102 prohibition decisions since May 2004, and it cannot be excluded that a prohibition was adopted in those cases exactly because it was believed that they would not require a long investigation), it nevertheless suggests that the greater speed normally attributed to commitment decisions is not to be taken for granted.

Reducing the investigation period might allow a budget-constrained antitrust authority to allocate resources to pursue a greater number of potentially harmful cases. Most importantly, particularly in dynamic industries (such as ICT), timing can be critical. A settlement allows quick identification (albeit preliminary) of the issue and the introduction of a correction in the market in order to restore normal competition almost immediately. One should expect, therefore, commitment decisions to be particularly popular in rapidly evolving sectors. An analysis of the Commission's decisions, however, seems to refute that idea. Only 24 percent of commitment decisions since 2004 applied to highly dynamic sectors compared to 61 percent of prohibition decisions¹⁴.

(b) Ensure deterrence

The second reason for pursuing violations of competition law is to deter bad behaviour. Prohibition

Figure 2: Length of European Commission antitrust proceedings



Source: Bruegel based on DG Competition case search tool. Note: The time lag is defined as the average length (in months) between the date of the opening of proceedings and the date of the prohibition/commitment decision. Sample period: commitment and prohibition decisions from May 2004 to December 2013.

decisions identify the infringement and clarify the application of competition law. By creating a legal precedent that can be challenged before the courts, prohibition decisions help companies anticipate how the Commission will in the future assess certain behaviours. Prohibition decisions entail significant costs for infringers, most notably pecuniary sanctions, but they also increase expected legal expenses and the likelihood of follow-on damage claims by victims of the infringement. Prohibition decisions fully express the dissuasive power of antitrust action.

Commitment decisions, by contrast, do not sanction any infringement and include no admission of wrongdoing by the investigated companies. The scant detail reported in decisions gives little guidance on future behaviour to companies. Moreover, if the commitments are limited to stopping the infringement, they allow companies to keep the illegal profits from the period of the infringement. Little

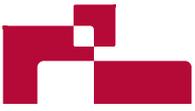
deterrence can therefore come from commitment decisions¹⁵.

Such an effect can be mitigated by the design of remedies that not only stop the harmful behaviour and restore competition, as it is normally the case in prohibition decisions; additional remedies can also be imposed to reduce the risk of future violations. Such 'proactive' remedies could entail the opening of the market to favour entry of new competitors and to increase competition. For example, in some past cases in the energy sector, the Commission required the dominant company to divest significant assets for capacity generation and favour competitors' new investment¹⁶. In principle, remedies should be proportionate to the infringement and therefore one could expect the remedies ultimately imposed through commitment and prohibition decisions to be the same. However, given the voluntary nature of the commitments, it would be more difficult for the committing party to challenge the decision in court; this *de facto* grants more

14. 'Highly dynamic sectors' are defined based on the Eurostat grouping 'High tech manufacturing or high tech services and financial services'.

15. See Choné et al (2014). Some authors identify a negative and significant impact of investigations on company share prices (for example, Langus and Motta, 2007; Guenster and Van Dijk, 2011), whether or not a fine is levied. The most likely explanation for this is that investors suddenly realise that the current level of profits is overestimated in that it includes rents resulting from an illegal behaviour which will likely cease.

16. The E.ON case, for example: http://europa.eu/rapid/press-release_IP-10-494_en.htm.



leeway to the Commission to extract stricter conditions¹⁷. From the Commission's perspective, proactive remedies can be a useful tool. Despite the criticism of proactive remedies in the legal literature (see Georgiev, 2007, for example), they might be justifiable on economic grounds. Proactive remedies allow the Commission to offer the elimination of a fine in exchange for remedies that can affect market structure, increase competition and therefore potentially lead to higher welfare levels for consumers.

CONCLUSIONS AND WAY FORWARD

Table 2 indicates that there has been a significant shift in the European Commission's policy choice of instrument for tackling antitrust violations. During Mario Monti's period as competition commissioner, after the entry into force of Council Regulation 1/2003, four cases were closed with a prohibition decision but no commitment decision was taken¹⁸. Under Neelie Kroes, about 50 percent more commitment decisions than prohibition decisions were taken. Under current commissioner Almunia, the ratio

has ramped-up to three commitment decisions for each prohibition decision.

This increased use of commitment decisions is not necessarily problematic in itself. As discussed in the previous section, the choice of one or the other instrument could well be justified by the associated expected benefits¹⁹. However, independently of whether this policy is based on the correct premises, the currently extensive use of commitment decisions calls for a refinement of the rules governing them.

If it is indeed the case that for most ongoing investigations, commitment decisions are more suitable for addressing the Commission's concerns, the underlying institutional framework should be improved to mitigate drawbacks and retain benefits. Such a refinement would all the more be needed if commitment decisions could sometimes be used to avoid judicial review when the theory of harm is not solid enough.

The main drawback of commitment decisions is the absence of a clear identification of the antitrust violation. Not only does this imply that no guidance is provided to companies, it also significantly limits the accountability of antitrust authorities. With no *ex-post* legal review, the incentive for accurate and extensive assessment of the case at hand is limited.

It is therefore possible that commitment decisions are taken not only when there is a need for a swift implementation of the remedies but also when cases are discovered to be too weak to stand up in court. Cases based

'It is possible that commitment decisions are taken when cases are discovered to be too weak to stand up in court.'

on weaker economic evidence are likely to be settled on a 'win-win' basis: the defendant avoids the risk of a fine; the Commission avoids showing up empty handed after a lengthy investigation or, worse, taking an incorrect decision that would be quashed by the court. This approach however does not mitigate the harm to a plethora of losers. Affected consumers and third parties are forced to trust the Commission's judgement that their concerns have been resolved, with little means to double check (they may appeal the decision but because they have little information on the strength of the Commission's arguments, such appeals are often judged too risky and not worth the legal costs). Markets gain nothing, and are no clearer on the definition of anti- and pro-competitive behaviours. More generally, citizens are given

17. The European Union Court of Justice has clearly indicated that even though the principle of proportionality of remedies is valid under commitment and prohibition procedures, the application of the principle differs depending of the nature of the provision. See judgment of the Court (Grand Chamber), 29 June 2010, European Commission v Alrosa Company Ltd., C-441/07, paragraph 47.

18. While this might be because of the backload of cases initiated during the previous antitrust regime, it should be noted that Council Regulation 1/2003 was adopted in December 2002 and it was at the time known that it would enter into force 17 months later.

19. Almunia said on 8 March 2013: "Why do we take many Article 9 decisions? One reason is that we too prefer to conclude cases swiftly when this brings the most benefits to the markets". See http://europa.eu/rapid/press-release_SPEECH-13-210_en.htm.

Table 2: European Commission antitrust decisions per commissioner

Commissioner	Number of commitments	Number of prohibitions	Ratio (commitments/prohibitions)
Monti*	0	4	0
Kroes	14	9	1.56
Almunia	15	5	3

Source: Bruegel based on DG Competition case search tool. Note: Cases are attributed to the commissioner in charge at the time of the commitment decision or prohibition decision, according to the starting and final date of their mandates: Monti, from the entry into force of the new regulation for antitrust proceeding in May 2004 to 30 October 2004; Kroes, 22 November 2004 to 9 February 2010; Almunia, 9 February 2010 to present. * Decisions under Monti cover a period of only six months.



little information on which to judge the efficiency of the Commission's actions.

Currently, commitment decisions do not spell out the full detail of the theory of harm that led the Commission to believe that the behaviour implemented by the company is harmful for consumers. The substance of allegations is not examined in depth and no detailed description of the practice leading to the infringement or the rationale behind

'Commitment decisions do not spell out the full detail of the theory of harm, and allegations are not analysed in depth.'

the remedies is reported (Wagner Von-Papp, 2012). For decisions published since May 2004, the average length of commitment decisions is 21 pages compared to 160 for prohibition decisions²⁰.

The key reason why detailed information is not disclosed in commitment decisions is that none of the affected parties has an interest in doing so. With a short decision, the companies avoid disclosing information on their business, do not provide information that could trigger claims for damages and avoid bad publicity. The Commission avoids exposing its reasoning to potential external criticism. Because there are incentives for minimal disclosure of information, only a change in the law can foster transparency.

A fundamental refinement of the institutional mechanism should therefore entail a significant increase in transparency on the part of the Commission and a systematic exposure of commitment

decisions to potential judicial review. The most straightforward way to obtain such an effect is to legally require the Commission to publish the details of its assessments that result in commitment decisions.

In cases that result in commitment decisions, Article 9 of Council Regulation 1/2003 already appears to imply the existence of a specific infringement (albeit preliminarily identified). Commitments are accepted where

there exists a need for "an infringement to be brought to an end"²¹. The article could be amended to require the commitment decision to spell out how such an infringement has been identified. The published commitment decision could resemble a non-confidential version of a Statement of Objections²².

One major objection to such a proposal would be that commitment decisions come at a preliminary stage of the Commission assessment. Therefore the Commission might be reluctant to disclose the details of an assessment that is still not finalised. However, commitment decisions introduce remedies on the basis of the preliminary assessment with concrete consequences for markets. Therefore, *de facto*, commitment decisions imply the acceptance of the infringement, except that no ex-

'There should be more transparency and exposure of commitment decisions to potential judicial review.'

post judicial reviews currently take place.

Moreover, if the defendant is not coerced or 'bluffed' into the commitments and is given the tools to fully assess the strength of the Commission's objections (including full access to the Commission's file – see Wils, 2008, for a detailed discussion), one could safely assume that the defendant's voluntary offering of commitments fairly complements the information considered during the preliminary assessment, mitigating the need for further investigation.

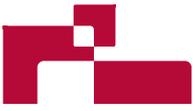
This proposed amendment to the Regulation would nevertheless reduce the incentives for the Commission and the parties under investigation to converge on a commitment decision. Both parties would find commitment decisions less appealing, because the decision would naturally be more exposed to judicial review (particularly by third parties,

which would have the information needed to challenge the substance of the Commission's decision) and defendants would be exposed to potential damage claims. However, the proposal would not eliminate the incentive for the Commission and the defendant to settle. The major benefits of commitment decisions would be retained: for the Commission, the procedure could still be faster than for prohibition decisions, and remedies would be put in place earlier to restore the

20. Bruegel estimates. Sample: decisions in English published between May 2004 and December 2013 (42 decisions in total). Pages are counted from the page 1 to the Commissioner's signature (eg: annexes are excluded).

21. Council Regulation 1/2003, art. 9(1).

22. Wagner Von-Papp (2012) has a milder but similar proposal: for the European Commission to publish the details of the theory of harm that led to the preliminary finding of an infringement. Such a decision should then be challengeable before court if erroneous as a matter of law.



correct functioning of the market. Likewise, the defendant would be spared a fine and would save on legal expenses.

An increase in the transparency of commitment decisions would establish a balance between incentives: weak cases should be dropped, while commitment decisions should be based on

arguments and evidence that are solid enough to provide clear guidance to markets on the application of competition law. Given the importance that commitment decisions have assumed in antitrust proceedings, their impact on consumers and markets is substantial and a consideration of how they can be improved is necessary. This should be a top

priority on the competition policy agenda of the forthcoming new EU administration.

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