

COMMITMENT DECISIONS AND THIRD PARTY RIGHTS

Andreina SCOGNAMIGLIO

INDEX

- 1. INTRODUCTION**
- 2. COMMITMENT DECISIONS BETWEEN THE EUROPEAN MODEL AND THE NATIONAL LEVEL**
- 3. POSSIBLE INCOMPATIBILITIES BETWEEN COMMITMENT DECISIONS AND THIRD PARTY RIGHTS**
- 4. POSSIBLE MEANINGS OF THE MODES OF CLOSURE TO PROCEEDINGS WITHOUT VERIFICATION OF A VIOLATION. THE ABSENCE OF VERIFICATION AS A SUMMARY PROCEEDING OR AS A PRIMA FACIE CASE OF UNLAWFUL ANTITRUST BEHAVIOR**
- 5. CRITIQUE OF THE NOTION OF A PRIMA FACIE VERIFICATION OF A VIOLATION OF ANTITRUST REGULATIONS FOR PURPOSES OF ISSUING A DECISION PURSUANT TO ART. 14-TER**
- 6. IDENTITY OF THE FUNCTION EXERCISED BY THE AUTHORITY IN CASES DISCIPLINED BY ART. 14-TER COMPARED TO THE TYPICAL ANTITRUST FUNCTION CONFIRMS THE INSUFFICIENCY OF A PRIMA FACIE VERIFICATION FOR PURPOSES OF ISSUING A LEGITIMATE COMMITMENT DECISION**
- 7. THE DIFFERENT SUMMARY PROCEEDINGS. ABSENCE OF VERIFICATION OF A VIOLATION AND EXERCISE OF THE ANTITRUST FUNCTION: POSSIBLE CONTRADICTIONS**
- 8. POSSIBLE USES AND LIMITS TO THE USE BY A CIVIL COURT OF DOCUMENTS COLLECTED IN PROCEEDINGS CONDUCTED PURSUANT TO ART. 14-TER**

**9. FULFILLMENT AND NON-FULFILLMENT OF COMMITMENTS:
ADMINISTRATIVE AND CIVIL PROTECTION OF THIRD PARTY
RIGHTS**

1. INTRODUCTION

Although the protection of competition has developed in Europe, mainly in forms of administrative law and oversight by a public authority, it is well known that since 1973, but especially in the last decade, the European Commission has expressed its belief that private actions can play an important role in the protection of competition and have played a central role in fostering private enforcement of antitrust regulations.

It is equally well known that until now in Europe, private actions for damages have mainly taken a complementary role with respect to the public authority's activity of verification and sanction of violations of competition regulations. European law has also favored this approach¹ believing that the prospect of compensation for damages to third parties has greater deterrent effect than the prospect of having to pay an administrative penalty².

In the same context, however, new instruments of the public authority's actions aimed to protect competition, such as commitment decisions, leniency programs and settlement, have nonetheless sprung up.

At first glance, one may observe that the common characteristic of all these new instruments consists in the cooperative atmosphere between the public authority and the companies.

¹ For example providing a binding effect on the civil courts of the Commission's final decisions, by virtue of article 16 of the Regulation 1/2003.

² See R. PARDOLESI, *Complementarietà irrisolte: presidio pubblico del mercato e azioni private di danno*, in *Mercato, concorrenza, regole*, 2011, 463 et seq, who stresses the negative consequences of this approach.

In commitments decisions, cooperation between the public authority and companies under investigation leads to a mutually agreed upon solution, although still issued in the form of an administrative decision. The administrative decision, making agreed upon binding commitments, puts an end to the antitrust infringement identified by the public authority, without any payment of a fine.

Considering their characteristics, commitment decisions respond the public's interest in a speedy resolution of the antitrust violation³. As well, the leniency program and settlement respond to the public's interest in discovering unlawful agreements that are otherwise difficult to detect and prove.

The delicate balance of the interests involved and the fact that the public interest requires the use of such instruments is the reason why the issue of civil claims for damages, as will be discussed in this paper, poses different problems than the case where antitrust proceedings are concluded with a decision that enjoins a violation and orders payment of a fine.

³ For the rationale of the discipline of commitments decisions see ECJ (Grand Chamber) 29 June 2010, case C-447/07 *EU Commission v. Alrosa Company Ltd* and Regional Administrative Court of Lazio, Sec. I, 7 April 2008, No. 2902, para. 3.1, of the argument, where Italian administrative judges stress that commitment decisions meet both the interest of a company to avoid a full finding of a violation and thereby imposition of a steep fine, and the interest of the public to achieve real improvement in the market more quickly than it could be possible by following the ordinary proceedings.

2. COMMITMENT DECISIONS BETWEEN THE EUROPEAN MODEL AND THE NATIONAL LEVEL

Commitment decisions were introduced to Italian antitrust law by D.L. 4 July 2006, No. 223. Article 14 of the so-called Liberalization Decree (*Decreto sulle liberalizzazioni*) indeed inserted art. 14-ter, entitled “Commitments”, into Ch. II of the Italian Antitrust Act 287/1990, dedicated to the “powers of the Italian Antitrust Authority (*Autorita’ Garante della Concorrenza e del Mercato* – AGCM) with respect to anti-competitive agreements and abuse of dominant position⁴”.

⁴ Article 14 of D.L. 4 July 2006, No. 223 (converted into L. 4 August 2006, No. 248) has provided the Italian Antitrust Authority (*Autorita’ Garante della Concorrenza e del Mercato* – AGCM) with the power to issue commitment decisions. National competition authorities (NCA) already had the power to adopt such decisions by virtue of arts. 101 and 102 of the TFEU and art. 5 of EC Reg. 1/2003 (art. 5). The content of commitment decisions, however, was specified in art. 9 of EC Reg. 1/2003 (art. 9), only with reference to the European Commission (Commission). Before the 2006 amendment to Italian law, the lack of a legal basis in domestic law had raised doubts about the applicability of the NCA’s procedures, when operating as decentralized bodies of the European Community and, *a fortiori*, when operating in solely national spheres, see E. GUERRI, *L’applicazione del diritto antitrust in Italia dopo il regolamento CE 1/2003*, Torino, 2005, 135 et seq. This question has been resolved in a positive way by the Italian Consiglio di Stato (CdS), sec. VI, 8 February 2008, No. 424 and 20 February 2008, Nos. 595 and 597, www.giustizia-amministrativa.it. The above-mentioned decisions state that only the powers expressly foreseen by art. 5 may be exercised by the AGCM even in absence of a National legal provision. On the other hand, the AGCM would not be entitled to take any further measures provided for in art. 7, et seq. of EC Reg. 1/2003 (art. 7), which refers only to the Commission. In particular, it cannot impose a fine, since art. 5 specifies that antitrust authorities of the Member States may take a decision “imposing fines [...] provided for in their national law”. This interpretation is supported by F. CINTIOLI, *Le nuove misure riparatorie del danno alla concorrenza. Impegni e misure cautelari [New remedies against antitrust infringements]*, in *Giur. comm.*, 2008, I, 118, who notes that “prior to the entry into force of the 2006 Act, the rule of law, strengthened by art. 5, discouraged the acceptance of commitments because the AGCM did not have any power to punish the company for non-compliance”. Article 14-ter, which gives the AGCM the power to close the procedure where “appropriate commitments have been made to cease the anti-competitive behavior investigated”, represents a significant innovation. By virtue of the express provision of law, commitment decisions can also be issued when the AGCM

The type of power regulated by art. 14-ter of L. 287/1990 (14-ter), is therefore recent. This type of power is, however, well known in its substantive and procedural aspects, since it corresponds almost exactly to the model already regulated by art. 9 of EC Reg. 1/2003 (art. 9), with reference to the decision-making powers of the European Commission⁵ (Commission).

When the AGCM, upon request by the investigated companies, opts for⁶ application of art. 14-ter, the antitrust proceeding is anticipatorily closed and, under Italian

is acting exclusively in its capacity as a National authority and the decision to accept commitments is, in any case, accompanied by “a necessary power to impose penalties for non-compliance”. With all doubts about a possible conflict with the principle of legality being resolved to the contrary, the AGCM has extensively used the new power.

⁵ See M. LIBERTINI, *Le decisioni “patteggiate” nei procedimenti per illeciti antitrust*, in *Giorn. Dir. Amm.*, 2006, 1284 says that the type of power regulated by art. 14-ter corresponds exactly to the one regulated by art. 9. It must also be noted that art. 9 formalizes the usual procedure already followed by the Commission. In its Fourteenth Report on Competition Policy (1984), the Commission addressed the advantages of an informal resolution of antitrust cases where there is acceptance of commitments by the investigated company and a suspension of a fine that would otherwise be imposed by the Commission. This kind of settlement is appropriate for both parties. The advantage, achieved by the investigated company, consists in avoiding the payment of a fine and exposure to negative advertisement due to the violation of antitrust regulations. The advantage to the Commission is the possibility to rapidly conclude the inquiry. The legitimacy of this practice has been confirmed by the European Court of Justice (ECJ) in its decision of 17 November 1987, C-142 e 156/84, *Philip Morris*. With the enactment of EC Reg. 1/2003, the insufficiencies of the practice, especially due to the lack of binding effect of the commitment and the absence of third party participation in proceedings, have been redressed. On art. 9, compare with J. TEMPLE LANG, *Commitment decisions under Regulation 1/2993. Legal aspects of a new kind of competition decision*, in *European competition law review*, 2003, 347 and M. FURSE, *The decision to commit: some pointers from the US*, in *European competition law review*, 2004, 5 et seq.; C. J. COOK, *Commitment decisions: the law and practice under Article 9*, in *World Competition*, 2006, 206; P. MENGOZZI, *Decisioni con impegni e diritto comunitario*, in *I nuovi strumenti di tutela antitrust*, edited by F. CINTIOLI - G. OLIVIERI, Milano, 2007, p. 1 et seq.

⁶ European and Italian judges hold that the Commission or NCA is entitled to decide whether to apply the procedure regulated by art. 9 and art. 14-ter. Compare with European Court of First Instance, T. 177/04, *Easy jet airline v. European Commission* and CdS, Sec. VI, 424/2008, cit., and Regional Administrative Court of Lazio, sec. I, 4 December 2007, Nos. 12457 e 12460, case *Pannelli truciolari*. The same point of view is adopted by M.

law, the closure occurs without substantively addressing the violation. By rendering a final decision in this manner, the AGCM limits itself to ordering the investigated companies to make mandatory corrective measures to the market trends. Remedies should be adequate to decrease the anti-competitive behavior being challenged by the AGCM (compare with art. 14-ter)⁷.

When circumstances change, where commitments are not fulfilled, or when the final decision is taken on the basis of incomplete, incorrect or misleading information, the AGCM can reopen the procedure *sua sponte*⁸, in order to impose the typical injunctive measures and sanctions.

LIBERTINI, *Le decisioni "patteggiate"*, cit., 1288 and, *La decisione di chiusura dei procedimenti per illeciti antitrust a seguito di impegni delle imprese interessate*, in *I nuovi strumenti della tutela antitrust*, cit., 23 et seq., F. CINTIOLI, *Le nuove misure riparatorie*, cit. 117; A. PERA, *Le decisioni con impegni tra diritto comunitario e diritto nazionale*, in *Poteri e garanzie nel diritto antitrust*, edited by G. BRUZZONE, Bologna, 2008, 76 et seq. According to the most common interpretation, the criterion followed by the public authority is dependent on the severity of the violation. When serious violations are present, it would be preferable to avoid application of commitment decisions because waiving the sanction would deprive the AGCM's decision of its deterrent effect. On this argument, see Regional Administrative Court of Lazio, 12457/2007, cit. and CdS, Sec. VI, No. 424/2008. In the scholarship: L. DI VIA, *Le decisioni in materia di impegni nella prassi decisionale dell'Autorità garante*, in *Mercato concorrenza, regole*, 2007, 233; F. CINTIOLI, *op. loc. cit.*; A. PERA, *op. loc. cit.*. A dissenting opinion is expressed by M. LIBERTINI, *op. loc. cit.*, The Author stresses that the AGCM should rather verify whether the commitments actually involve a *quid plus* compared to the natural conclusion of the proceedings. In particular, the advantage that a commitment decision may offer to the public would be in its applicability to situations where the infraction has not yet been committed. Conversely, if the violation has already been committed in fact, beyond any reasonable doubt, and if the legal qualification of the fact is just as certain "no additional elements can be added by commitments". In this case, the negotiated solution would be inappropriate and it would be preferable that the AGCM pursue the proceedings and impose sanctions, including a fine.

⁷ Under art. 9, remedies must rather be proportionate to the concerns expressed by the Commission in its preliminary evaluation.

⁸ Compare R. MASTROIANNI, *op. cit.*, pg. 33 underlines a difference between EC Reg. 1/2003 and the Italian law. According to arts. 5 and 9, the Commission and NCAs can reopen the proceeding for the assessment of an antitrust

The procedure, which must be followed by the AGCM to adopt a commitment decision, is regulated by the Bulletin (*Circolare – Communication*) on the Procedures to Apply art. 14-ter, adopted by the AGCM on 12 October 2006, amended on 9 February 2011 and 17 September 2012⁹.

Pursuant to the Bulletin, cited above, the investigated businesses may submit a provisional version of commitments to the AGCM and request a hearing before the final commitment decision issues. In addition, the AGCM can reject the commitments that are late, because they have been offered beyond the time allowed, useless, because the disputed conduct causes a serious violation of the competition rules, or “plainly unfounded”¹⁰. Otherwise, the AGCM may declare that the commitments are “acceptable”.

“Acceptable” commitments are published on AGCM newsletter and website¹¹. The publication permits third parties to be informed of the declaration of acceptance and submit

violation both on their own initiative and on request by third parties, while art. 14-ter, literally refers only to a power exercised by the AGCM *ex officio*. In my opinion, the fact that art. 14-ter refers only to an initiative of the AGCM doesn’t exclude the possibility of third parties lodging a complaint on which the AGCM is obliged to issue a decision. The possibility of third parties lodging a complaint is the immediate consequence of this recognition of the value of their interests in antitrust proceedings.

⁹ AGCM Decision 12 October 2006, No. 16015, which adopted the proceedings to apply art. 14-ter was amended by Decision 9 February 2011, No. 22089 and by Decision 17 September 2012, No. 23863. The procedure for application of art. 9 and EC Reg. 1/2003 is regulated by art. 27 of EC Reg. 1/2003.

¹⁰ “The word “unfounded” used in Bulletin 12 October 2006 (see pt. 10, of the current version of 17 September 2012) is incorrect, says M. LIBERTINI, *La decisione di chiusura*, cit., p. 21, but the significance is clear. Commitments can be rejected if they are impossible, irrelevant or clearly insufficient. In the praxis, the finding of the AGCM concerns the adequacy of the mutually agreed upon solution to the seriousness of the infringement more than to the content of the commitments”.

¹¹ According to art. 27 of EC Reg. 1/2003 (art. 27), a brief declaration of facts and commitments submitted by investigators must be published in order to allow third parties to intervene.

comments, within thirty days (market test)¹². The investigated companies involved respond to third party comments and may, eventually, amend the proposed commitments.

So, the proceeding can be divided into two adversarial phases. In the first phase, the proceeding is between the investigated companies and the AGCM. In the second phase, the proceeding is open to third party intervention. The aim of this procedure, according to the rationale of the AGCM, is to reach a final solution acceptable to investigated companies and also adequate to restore the correct trend to the market.

3. POSSIBLE INCOMPATIBILITIES BETWEEN COMMITMENT DECISIONS AND THIRD PARTY RIGHTS

The AGCM has extensively used this power to make decisions accepting commitments, especially from 2006 to 2011, and it has adopted commitment decisions much more frequently than the Commission¹³.

¹² See CdS, Sec. VI, 30 May 2011, No. 3230, that stresses that market test cannot be avoided. The infringement of the rule under which the market test is mandatory gives rise to a procedural defect that invalidates the final decision.

¹³ In this period, 64% of investigations initiated by the AGCM have been concluded with a decision adopted on the basis of art. 14-ter. During this same period, decisions adopted by the Commission on the basis of art. 9 were about 30% of the total cases heard by the Commission. For a quantitative and qualitative analysis of Italy in comparison with EU tendencies, see A. GIANNACCARI - C. LANDI, *Antitrust? No grazie abbiamo altri impegni, in Mercato, concorrenza, regole*, 2012, 231 et seq. That the AGCM utilizes art. 14-ter is not by chance, but by reasoned choice based on antitrust policies. The reasons are expressed in *Relazione annuale sull'attività svolta* (2006). Here President Catricalà clarifies that “extensive use of the instrument provided by art. 14-ter is consistent

This is probably the reason why the Italian system provides an interesting point of debate, both as regards its case law and its scholarship¹⁴.

One might also note that it is not easy to find a common thread on the viability of commitment decisions in the case law or scholarship. This is not surprising. The law is recent. In addition, one should also consider that negotiated proceedings, of which commitment decisions are one type¹⁵, are an ambiguous figure, not completely clear in their structure, effects, nor as to which legal discipline is applicable¹⁶.

It is precisely this ambiguity that makes a more detailed study of this figure interesting. The issue most opportune to discuss is the relationship between commitment decisions and the protection of third parties (competing businesses and consumers).

with the basic decision in favor of an intervention more strongly oriented to achieve the good performance of the market, rather than the investigation and prosecution of antitrust infringements”.

¹⁴ The reason for which the AGCM adopts commitment decisions more frequently than the Commission has strongly encouraged Italian authors to accurately investigate the phenomenon. See M. LIBERTINI, *Il “private enforcement” e le sanzioni amministrative*, in *Concorrenza e mercato*, 2007, 369; A. POLICE, *I “nuovi” poteri dell’Autorità Garante della Concorrenza e le prospettive in termini di tutela giurisdizionale*, in *I nuovi strumenti di tutela antitrust*, cit., 98; F. CINTIOLI, *Le nuove misure riparatorie*, cit., 127; A. PERA, *Le decisioni con impegni tra diritto comunitario e diritto nazionale*, in *Poteri e garanzie nel diritto antitrust*, Bologna, 2009, 110; and more recently, A. PERA - G. CODACCI PISANELLI, *Decisioni con impegni e private enforcement nel diritto antitrust*, in *Mercato, concorrenza, regole*, 2012, 69; A. NOCE, *Antitrust e regolazione nelle decisioni con impegni in materia di energia*, therein, 333; A. GIANNACCARI - C. LANDI, *Antitrust? No grazie*, cit., Some Authors point out that Italian studies cannot fail to take into account the European regulation, because art. 14-ter expressly refers to it, see P. FATTORI - M. TODINO, *La disciplina della concorrenza*, cit., 433.

¹⁵ Negotiated proceedings are regulated by art. 11 of L. 8 August 1990, No. 241. *Infra* paragraph 8.

¹⁶ Negotiated proceedings have been regulated only since 1990, by art. 11 of L. 8 August 1990, No. 241. Since then studies on this discipline have been initiated. So far, the scholarship has discussed only the issue of admissibility of this type of procedure. In general, on negotiated proceedings, see E. BRUTI LIBERATI, *Accordi pubblici*. In *Enc. Dir., Agg.*, Milano, 2001, 19 et seq.

This specific aspect has not yet been fully studied in the scholarship nor has it been submitted to judicial examination. Yet it is the pivotal point of a number of thorny issues raised by commitment decisions.

The question of judicial protection against damage to third parties must be studied separately depending on whether the damages derive from the conduct of the investigated company before or after the issuance of the commitment decision.

Where damages arise from pre-issuance conduct, the problem is whether the commitment decision can be used in a civil proceeding by a third party claiming damages as direct evidence of violation of antitrust regulations.

Where damages arise from post-issuance conduct, one must ask whether third parties can file suit against the investigated company for damages deriving from the legitimate execution of its obligations¹⁷, or for damages deriving from failure to execute the same, or request the investigated company to cease and desist the damaging conduct¹⁸. In the event a third party suffers damages as a result of the investigated company's failure to execute its obligations, the third party may seek either damages or the fulfillment (execution) of the obligations.

The first question is apparently clarified in art. 14-*ter*, which states that “within three months from starting the investigation for a violation of arts. 2 and 3 of this Act or arts. 81 and 82 of the EC Treaty (now arts. 101 and 102 of the TFEU), companies can submit commitments sufficient to correct the investigated or contested anti-competitive

¹⁷ See A. POLICE, *I nuovi poteri*, cit., 98. The author wonders whether third parties have standing to act against a commitment decision; whether they can claim damages caused by the commitment decision and if, in this case, they must ask for damages against the investigators executing commitments, or against the authority that made the commitments mandatory for the investigators.

¹⁸ See M. LIBERTINI, *Il “private enforcement”*, cit., 369, addresses the question whether third parties are entitled to seek a mandate ordering fulfillment of the commitments assumed by businesses party to a commitment decision.

behavior. The AGCM assessing the suitability of the commitments may, within the limits established by Community law, make the commitments mandatory for submitting companies and close the proceeding without declaring the infringement”.

In this short phrase, “without declaring the violation”, lies the answer to the question posed above. The statement that the AGCM does not declare the infringement seems appropriate in order to avoid any connection between a commitment decision adopted under art. 14-*ter*, and a civil complaint filed to protect against unlawful antitrust behavior.

This interpretation is also supported by the belief that the legislative intent in drafting the precise discipline would be to improve the attractiveness of commitment decisions¹⁹, which are often very burdensome for investigated companies²⁰, which prefer a commitment decision primarily just to avoid a formal finding of a violation; and this, even more than avoiding the imposition of a fine.

According to this view, the major advantage to investigated companies of resolving an investigation by this procedure (a type of negotiated settlement without a declaration of infringement), is the absolute uselessness of the administrative decision and investigation when faced by third party plaintiffs whose aim is to bring a civil judicial action seeking damages.

A widespread interpretation of the relationship between public and private enforcement of antitrust rules practices a type of schematic distinction, as follows. On the one hand, an administrative decision finding a violation of antitrust regulations and

¹⁹ See M. BOCCACCIO – A. SAJA, *La modernizzazione dell’antitrust*, in *Mercato, concorrenza, regole*, 2002, 298 et seq.

²⁰ See M. LIBERTINI, *La decisione di chiusura*, cit., 13, fn. 3, who emphasizes that often the commitments made by an investigated company when pursuing resolution pursuant to art. 14-*ter* procedures are very burdensome.

imposing a fine is absolutely binding on a civil judge in a subsequent lawsuit for damages. Therefore, a civil judge cannot in any way deviate from the findings and assessments carried out by the AGCM when the court issues its decision based on the same facts²¹. On the other hand, a commitment decision (which does not declare a violation), and the investigation conducted therefore by administrative investigators, is absolutely useless in a civil judicial proceeding for damages²².

It should be noted at this point that, some research contests the binding value of antitrust decisions on civil judges.²³ This, in order to sustain that the administrative

²¹ According to the principle laid down by the ECJ, 14 December 2000, C-344/98 *Masterfood c.*, art. 16, sec.1, EC Reg. 1/2003 stipulates a binding effect of decisions adopted by the Commission on national court rulings on agreements, decisions and practices addressing issues between private parties that have already been ruled upon by the Commission under arts. 101 and 102 of TFEU. Many Member States have agreed with this principle and have recognized the binding effect of decisions issued by the AGCM on the protection of competition on national judges. In Germany this can be seen by the introduction of L. 7 *GWB Novelle* of 7 July 2005 and in the United Kingdom by the *Enterprise act* of 2002, which modified sec. 58 of the *Competition Act* of 1998. Instead, in Italy and in France a civil judge, before whom a case for restitution of damages may be brought, is not formally constrained by an administrative order finding an antitrust violation and imposing sanctions. On the relationship between administrative decisions and judicial action for damages, see: A. SCOGNAMIGLIO, *Concorrenza e coordinazione delle tutele nel diritto antitrust*, Vol. I – II, Campobasso, 2009; compare R. NAZZINI, *Concurrent proceedings in competition law. Procedure, evidence and remedies*, Oxford University Press, 2005; A. KOMNINOS, *EC private antitrust enforcement. Decentralised application of ec competition law by national courts*, UK, 2008; M. NEGRI, *Giurisprudenza e amministrazione nella tutela della concorrenza*, Torino, 2006; AA.VV., *Poteri e garanzie nel diritto antitrust*, a cura di G. BRUZZONE, Bologna, 2008.

²² Similarly, A. PERA, *Le decisioni con impegni tra diritto nazionale e diritto comunitario*, in *Poteri e garanzie*, cit., 76, et seq. The author concludes that the choice to adopt a commitment decision must also take into consideration that this option makes it extremely difficult for injured parties to take action seeking compensation. In this way, not only is the direct deterrent effect of the penalty sacrificed, but also the indirect deterrent effect stemming from fear of having to pay damages to injured third parties.

²³ It must be noticed that in Italian law a binding effect is due only to a specific category of administrative decisions and consists of a preclusive effect whereby another decision-making authority and courts are constrained in their interpretation of the facts and must defer to and consider as definitively established any fact ascertained by

decision has a weight comparable to that of a piece of evidence that cannot control a civil judge's unfettered right to assess and judge anew whether there lies unlawful antitrust behavior²⁴. This thesis leads us to consider in a different way the relationship between commitment decisions and civil actions for damages. The question is why a commitment decision cannot assume even the limited value of a piece of evidence in a civil proceeding for damages.

4. POSSIBLE MEANINGS OF THE MODES OF CLOSURE TO PROCEEDINGS WITHOUT VERIFICATION OF A VIOLATION. THE ABSENCE OF VERIFICATION AS A SUMMARY PROCEEDING OR AS A PRIMA FACIE CASE OF UNLAWFUL ANTITRUST BEHAVIOR

In Italian antitrust law, the absence of any binding and probative value of commitment decision finds its basis in the provision of art. 14-*ter*, sec. 1. According to art. 14-*ter*, sec. 1, when the AGCM opts for a commitment decision, the antitrust proceeding is closed without an assessment of a violation of antitrust regulations.

a lower or lateral decision-making authority, unless the finding is overturned through the appropriate administrative review channels.

²⁴ See A. SCOGNAMIGLIO, *Concorrenza e coordinazione delle tutele nel diritto antitrust*, cit., P. BIAVATI, *Il diritto processuale e la tutela dei diritti in materia di concorrenza*, in *Riv. trim. dir. proc. civ.*, 2007, I, 97, et seq. See also, G. MUSCOLO, *Criteri di applicazione degli articoli 81 e 82 nella controversie tra privati: il ruolo dei giudici nazionali*, in *Poteri e garanzie nel diritto antitrust*, cit., 228.

One must however observe that the provision under which, in proceedings governed by art. 14-*ter*, the antitrust procedure is closed without a finding of a violation of competition rules is quite ambiguous.

The first question which the interpretation of art. 14-*ter* poses can be expressed in these terms: What exactly does the provision not requiring a finding of a violation where a commitment decision is adopted mean?

According to an initial reading of art. 14-*ter*, sec. 1, the absence of a finding would appear to make it possible for the AGCM to adopt a decision making binding commitments “without in any way having obtained any level of certainty, let alone proof beyond a reasonable doubt, that a violation of antitrust regulations has been committed”²⁵.

In other words, the expression in art. 14-*ter* can be understood to mean that the AGCM would be allowed to close a proceeding based on its finding of pure chance or a likelihood that a violation of antitrust rules has occurred.

Using a distinction of procedural law, it could be observed that this interpretation considers the absence of a formal finding of a violation under art. 14-*ter*, in terms of summary (in the sense of a tenuous or not a thorough) judgment that a violation has occurred.

Using a distinction of procedural law, one might consider the absence of a formal finding of a violation under art. 14-*ter*, to equate to a summary assessment of such violation, that is without argument on the evidence before the administrative board.²⁶

²⁵ M. LIBERTINI, *Le decisioni patteggiate*, cit. 1288.

²⁶ For the various meanings of a summary judgment in procedural law, see *infra* paragraph 6.

To support the interpretation that commitment decisions can be adopted on the basis of a shallow and prima facie assessment of a breach of competition rules, it could be argued that art. 14-ter, subsec. 1 requires solely that commitments “be such as to eliminate the anti-competitive behavior alleged in the initial phase of the proceeding”.

Furthermore, art. 14-ter, prescribes a short term of three months, within which the investigated companies shall submit their commitments²⁷.

The first proposition, above, seems to imply the idea that, in the negotiation procedure, a violation of antitrust regulations should be summarily found, similar to the assessment made in the initial phase of a formal investigation.

Moreover, the prescription of a short term for the submission of commitments can also be read as a manifestation of the law’s intent to prioritize the interest of time (rapidity) to conclude the procedure, at the expense of thoroughness and accuracy of the findings.

The specific intention of the rule limiting the term of the investigation required for the adoption of a commitment decision at an early stage in the proceedings, seems to emerge from Reg. 1/2003, to which art. 14-ter expressly refers.

²⁷ On the question of whether the provision of a short-set term is compatible with European regulations, which do not have it, see M. LIBERTINI, *Le decisioni “patteggiate”*, 2006, cit.,1286, and. *Le decisioni di chiusura*, 16, et seq.; R. MASTROIANNI, *Osservazioni sul sistema italiano di applicazione decentrata del diritto comunitario della concorrenza*, cit., 33; F. CINTIOLI, *Le nuove misure riparatorie del danno alla concorrenza*, cit., 119; A. PERA, *Le decisioni con impegni tra diritto comunitario e diritto nazionale*, cit.102. See also the following noted case law: Regional Administrative Court of First Instance, Lazio, Sec. I, 7 April 2008, No. 2902; Id., 25 February 2010, No. 3077; Id., 9 May 2011, No. 3964, where administrative judges argue that the short term of three months does not have a mandatory value, but only the value of soliciting the submission of commitments Despite the views expressed against the forecast of a short set period of three months, this prediction was confirmed in resolution AGCM, No. 23863/2012.

According to art. 9.1 of Reg. 1/2003, the commitments, offered by an investigated company, must be sufficient to “meet the concerns expressed to the company by the Commission in its preliminary assessments”. Here, too, the prudence of the language used reinforces the idea that, a full finding of a violation is not necessary in order to legitimate a commitment decision.

The same idea seems to be further confirmed by recital 13 of Reg. 1/2003. The provision stresses the inappropriateness of a commitment decision when “the Commission intends to impose a fine” and the Commission’s intention to impose a fine is objectively justifiable, i.e. when it is certain that there has been a violation.

In other words, once an antitrust authority has completed its investigation and verified the violation of antitrust regulations, the negotiation procedure, with a final commitment decision, would no longer be viable and the Commission as well as the NCA could not do anything other than order the investigated companies to cease the violation and pay a fine.

The point of view holding that a commitment decision can be adopted based on only a shallow and *prima facie* estimation that a violation of antitrust regulations has occurred, seems to be shared by the ECJ in *EU Commission v. Alrosa Company Ltd*²⁸.

²⁸ See ECJ (Grand Chamber) 29 June 2010, case C-447/07 *EU Commission v. Alrosa Company Ltd*. In 2002, De Beers and Alrosa, respectively, in the number one and number two positions in the world market for the production and supply of rough diamonds, notified the Commission of an agreement to seek approval or an exemption under Reg. 17 of 6 February 1962, the first regulation implementing arts. 82 and 83 of the Treaty. The notified agreement established that, during the next five years, Alrosa would have sold natural rough diamonds produced in Russia to De Beers for a value of USD 800 million a year, while de Beers would have undertaken to buy those diamonds from Alrosa. The amount of USD 800 million, established in accordance with the market prices as of the date on which the agreement was entered into, accounted for about one half of Alrosa’s annual production and for the entire production exported outside the Community of Independent States. In its statement of objections, the Commission intuited that the agreement would have a negative impact on the diamond market. On the one hand it would have, in fact, eliminated any possible competition from the Russian company, while De

In the opinion of the ECJ, art. 9 is based on considerations of procedural economy²⁹. The specific aim of the mechanisms provided for in art. 9, is to allow for quick resolution of the concerns expressed by the Commission to the investigated companies in its preliminary investigation. More particularly, art. 9 makes a “quick fix” of the case possible; thus enabling investigated companies to participate fully in the procedure, by suggesting the solutions that appear to them to be the most appropriate and capable of addressing the Commission’s concerns.

Even though decisions adopted under art. 9 are subject to the principle of proportionality, which is a general principle of European Union law applicable to decisions taken by the Commission in its capacity as an antitrust authority, the purpose and content of

Beers would have been placed in a position to abuse its dominant position, allowing it, in essence, to determine the quantity, quality, and price of diamonds to be distributed on the market. After rejecting the commitments offered jointly by the two companies, the Commission accepted the commitments proposed by De Beers individually that provided for a progressive reduction in sales of rough diamonds by Alrosa to De Beers. Following the action brought by Alrosa, the Court of First Instance ruled that the contested decision was void pursuant to the principle of proportionality, which is applicable in all cases where an institution has coercive powers over individuals, which requires the least restrictive method of intervention of an individual and/or businesses’s freedom. According to principle of proportionality the Commission should more closely evaluate alternative solutions, in particular the commitments offered jointly by the two companies. The ECJ decision in *Alrosa* is commented on by G. FONDERICO in *Il caso “Alrosa” e la proporzionalità nelle decisioni con impegni*, in *Giornale di diritto amministrativo*, 3/2011; M. KELLERBAUER, *Playground instead of playpen: the Court of Justice of the European Union’s Alrosa Judgement on art. 9 of Reg. 1/2003*, *European competition law review*, 2011, Vol. 32; M. MESSINA - J.CA.HO, *Re-establishing the orthodoxy of commitment decisions under art. 9 of Regulation 1/2003*, *European Law Review*, 2011, Vol. 36. For a comparison between the ECJ decision and the decision of the European Court of First Instance, on the same case, see: M. SIRAGUSA, *Le decisioni con impegni*, in *20 anni di antitrust*, 2012, pg. 3 and A. SCOGNAMIGLIO, *Gli impegni sui diamanti dividono i giudici europei*, in www.apertacontrada.it 10/2010. Compare: C. LEONE, *Gli impegni nel procedimento antitrust*, Milano, 2012, pg. 43.

²⁹ ECJ (Grand Chamber), 29 June 2010, case C-447/07, pt. 35 of the arguments in support thereof.

the principle of proportionality differs depending on whether it is considered in relation to art. 7 or art. 9.

Highlighting the consensual nature of the new decisional instrument, regulated by art. 9, as a mechanism designed to resolve speedily antitrust issues in cooperation with the economic operators concerned, the ECJ has acknowledged that the commitments suggested by the investigated companies may go beyond what the Commission could itself impose on them in a decision adopted pursuant to art. 7, and would not, therefore, automatically be regarded as a violation of the principle of proportionality³⁰.

In this context, the Commission is not required to seek out less onerous or more moderate solutions than the commitments suggested to it; but its decisions, adopted pursuant to art. 9, are subject to a judicial review limited to the ascertainment of whether the Commission committed manifest error in its finding or whether its conclusions were obviously unfounded.

The interpretation expressed above, validates the absence of any binding effect of the administrative commitment decision in respect of a civil action for damages. It's obvious that a mere summary finding, adopted by an administrative authority, is not in any way to be honored by the courts.

But the premise from which the conclusion follows, namely the sufficiency of a superficial investigation of a violation of antitrust regulations for the purpose of taking a commitment decision, is not acceptable according to the alternative interpretation that

³⁰ Here, the ECJ joins fully the opinion of Advocate General Kokott, of 17 September 2009. At pt. 60, one reads: "The general interest in finding an optimum solution from the point of view of speed and procedural economy justifies restricting the choice of possible measures in the context of art. 9. Investigated companies that knowingly and willingly offer commitments accept that their concessions may go beyond what the Commission itself might have imposed on them following a thorough examination in a decision under art. 7. In return, with the termination of the antitrust proceedings initiated against them, they are quickly given legal certainty and can avoid the finding of a violation of antitrust regulations that would be detrimental to them, and a possible fine".

requires a more strict compliance with the principle of proportionality where a commitment decision is adopted.

5. CRITIQUE OF THE NOTION OF A PRIMA FACIE VERIFICATION OF A VIOLATION OF ANTITRUST REGULATIONS FOR PURPOSES OF ISSUING A DECISION PURSUANT TO ART. 14-TER

In the same case, the European Court of First Instance³¹ adopted opposite conclusions. According to the Court, since the principle of proportionality constitutes a general principle of Community law³², the Commission is obliged to comply with that principle also when it adopts decisions under art. 9³³. The European Court of First Instance stressed that it would be contrary to the scheme of Reg. 1/2003 to take a commitment

³¹ European Court of First Instance, 11 July 2007, T-170/06, *Alosa v. European Commission*, www.eu.curia.int.

³² The principle of proportionality requires that the measures adopted by Community institutions must not exceed what is appropriate and necessary for attaining the objective pursued. See European Court of First Instance, 19 June 1997, T-260/94, *Air Inter v. Commission*, pt. 144; *Id.*, 23 October 2003, T-60/98, *Van den Bergh Foods v Commission*, pt. 201. It also requires that, when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. See ECJ, 11 July 1989, C- 265/87, *Schröder Hs Kraftfutter &Co KG v. Hauptzollamt Gronau*, pt. 21; *Id.*, 9 March 2006, Case C-174/05 *Zuid-Hollandse Milieufederatie and Natuur en Milieu v. College von Beroep*, pt. 28.

³³ The European Court of First Instance recognizes to the Commission a margin of discretion in the choice of whether to adopt a decision under art. 9 or follow the procedure laid down in art. 7. Nevertheless, the existence of that margin of discretion as to the choice of procedure to be followed does not relieve the Commission of the obligation to comply with the principle of proportionality when it decides to order commitments offered under art. 9, sec. 1, as binding.

decision pursuant to art. 9, that if taken pursuant art. 7 would be regarded as a violation of the principle of proportionality.

It is true that in applying art. 9, sec. 1, the Commission is not required formally to establish the existence of an antitrust violation, as moreover, recital 13 of the Preamble indicates; but it must nonetheless establish the bases of the antitrust violation that would justify its action envisaging the adoption of a decision under arts. 101 and 102 of the Treaty on the Functioning of the European Union (2010) (TFEU), and which allow it to require the investigated companies to comply with certain commitments. This presupposes an analysis of the market and an identification of the violation envisaged that are less definitive than those required for the application of art. 7, sec. 1 – although, they should nonetheless, be sufficient to allow an analysis of the appropriateness of the commitment.

The voluntary nature of the commitments cannot relieve the Commission of the need to establish the reality of the antitrust concerns that justified its action nor to comply with the principle of proportionality, because it is the Commission’s decision that makes those commitments binding. The fact that an investigated company considers, for its own reasons, that it is appropriate at a particular time to suggest certain commitments does not in and of itself mean that those commitments are necessary.

In actions filed by third parties against commitment decisions, Italian administrative judges have adopted a point of view similar to that adopted by the European Court of First Instance, in the above-cited case.

Applying this reasoning to the interpretation of commitment decisions, the Regional Administrative Court of Lazio³⁴ held that in proceedings pursuant to art. 14-ter, a thorough investigation of the facts and a careful assessment of the suitability of the

³⁴ Actions filed against AGCM always lie within the jurisdiction of the Regional Administrative Court of Lazio, as a court of first instance.

commitments is necessary, even if these were accepted by the investigated companies³⁵. The AGCM, indeed, cannot go beyond what is necessary in order to correct the violation.

Even before the principle of proportionality, Italian administrative judges based their holdings on the rule of law. Since the AGCM is entitled by law only to impose measures apt to end the antitrust violation, that which exceeds such measures is beyond the powers granted to the AGCM by law³⁶.

In several cases, the Administrative Court of Lazio and the Italian Consiglio di Stato (CdS) verified whether the measures made binding by commitment decisions adopted by the AGCM, were appropriate and necessary to end the abuse that had been identified in the preliminary investigation. The Courts held that commitment decisions enforcing commitments whose effects go beyond what was appropriate and necessary to remedy the breach of the regular competition market were illegitimate and had to be overturned³⁷.

³⁵ See Regional Administrative Court of Lazio, 7 April 2008, No. 2902.

³⁶ See CdS, sec. VI, 8 February 2008, No. 423; *Id.*, 2 March 2004, No. 926 in *Foro it.*, 205, 6; Regional Administrative Court of Lazio, sec. I, 30 November 2005, No. 12726.

³⁷ See Regional Administrative Court of Lazio, 8 May 2009, No. 4994; *Id.*, 8 May 2009, No. 5005; CdS, 19 November 2009, No. 7307. On this case law, see V. CERULLI IRELLI, “*Consenso*” ed “*autorità*” negli atti delle Autorità preposte alla tutela della concorrenza e del mercato, in *20 anni di antitrust*, edited by C. RABITTI BEDOGNI - P. IANNUCCI, Torino, 2010, 329.

6. IDENTITY OF THE FUNCTION EXERCISED BY THE AUTHORITY IN CASES DISCIPLINED BY ART. 14-TER COMPARED TO THE TYPICAL ANTITRUST FUNCTION CONFIRMS THE INSUFFICIENCY OF A PRIMA FACIE VERIFICATION FOR PURPOSES OF ISSUING A LEGITIMATE COMMITMENT DECISION

There are three reasons that make more persuasive the opinion by which, in spite of its consensual nature, a commitment decision must be preceded by a sufficient finding of facts and must be subject to judicial review for proportionality.

Firstly, one should consider that, in proceedings before antitrust authorities, the balance of power between the parties is clearly unequal³⁸. In order to avoid the bad publicity resulting from a finding of an antitrust violation and to avoid the payment of a fine, companies might propose unnecessary or exaggerated corrective measures that are burdensome to the companies and could even produce negative effects on the market.

Secondly, aside from the principle of proportionality, the power of the AGCM is likely to assume a margin of discretion so broad that it would result in a change to its actually granted powers as an administrative authority. The power of the AGCM in this case would no longer lie only in the investigation and prosecution of the violation, but it would become a substantive regulatory power³⁹.

³⁸ M. SIRAGUSA, *Le decisioni con impegni*, in *20 anni di Antitrust. L'evoluzione della Autorità garante della concorrenza e del mercato*, cit.; G. MORBIDELLI, *Impegni e principio di tipicità degli atti amministrativi*, in *Recenti innovazioni in materia di sanzioni antitrust*, Quaderni Cesifin, Torino, 2008, 3.

³⁹ According to F. CINTIOLI, *Le misure riparatorie*, cit., 133,134 and 138, commitment decisions have a very discretionary nature and the measures imposed should present a nexus with the economic consequences of the challenged behavior (to the point that – stresses the author – it could even be argued that the commitments, made

Thirdly, a commitment decision cannot be considered as mere acceptance on the part of the public of a proposal that has been freely put forward by a negotiating party, but rather it constitutes a binding measure that puts an end to a violation or a potential violation in accordance with the AGCM's power to protect competition, as conferred to it by law.

In other words, the shape of the consensual procedure does not alter the substance of the power exercised. The Commission and national authorities are invested with a public function that finds the parameters of its legitimacy not in the consent expressed by the private party, but in the specific purpose assigned to it by law, which is to ascertain the violation of antitrust regulations and establish proportional remedies⁴⁰.

The reasons expressed above suggest that the power exercised by antitrust authorities is always the same regardless of the type of decision adopted; i.e., both when requiring investigated companies to end the violation of antitrust regulations and impose a fine, and when antitrust authorities adopt a decision making binding those commitments

binding by antitrust decisions, are not subject to any objective limit, beyond the limit of pro-competitive purposes). Contra, see M. LIBERTINI, *Il private enforcement e le sanzioni alternative*, cit., 361, which stresses that an injunction may impose administrative orders on investigated companies aimed at restoring the proper functioning of the market, thus permitting an absolute continuity between the exercise of administrative powers leading to the adoption of a typical antitrust decision and one that leads rather to a commitment decision. P. FATTORI - M. TODINO, *La disciplina della concorrenza*, cit., 439, argues that if the AGCM may impose a *quid pluris* that this would pave the way for a possible deviation from the powers of the AGCM, directing its decisions toward oversight aims essentially beyond its powers. See also A. POLICE, *Tutela della concorrenza e poteri pubblici*, Torino, 2007, 183.

⁴⁰ On the relation between the rule of law and independent authorities, see F. MERUSI, *Sentieri interrotti della legalità*, Bologna, 2007, spec. 70 et seq., and on the relation between the rule of law and negotiations between private parties and administrations, see C. MARZUOLI, *Principio di legalità e attività di diritto privato della pubblica amministrazione*, Milano, 1992, spec. 142 et seq. See also, F. TRIMARCHI BANFI, *Il principio di legalità e l'impiego del diritto privato da parte della pubblica amministrazione*, e G. GRECO, *Il principio di legalità e gli accordi pubblici*, in *Atti del 53rd Convegno di studi amministrativi, "Il principio di legalità nel diritto amministrativo che cambia"*, Milano, 2008.

offered by the investigated companies. Both of these proceedings are aimed at ceasing a violation of antitrust regulations and the corrective measures imposed must serve this purpose and be proportionate thereto.

The difference between the model outlined by art. 14-*ter* as well as art. 9, and the typical antitrust cases is quite limited and simply consists of a speedier closure of a proceeding and a negotiated procedure. The proceeding closure is speedier, because it lacks the formal finding of the violation and the imposition of a fine, and the procedure is negotiated since the contents of the corrective measures result from a negotiation between the parties; nonetheless, commitment decisions must still be accompanied by an assessment of facts adequate to establish appropriate corrective measures.

7. THE DIFFERENT SUMMARY PROCEEDINGS. ABSENCE OF VERIFICATION OF A VIOLATION AND EXERCISE OF THE ANTITRUST FUNCTION: POSSIBLE CONTRADICTIONS

The arguments exposed above confirm that the summary nature of the finding of a violation of antitrust regulations is not the reason why commitment decisions cannot assume any binding or probative value in an action for damages brought before the civil court.

Several notions of summary judgment have developed in the rules of procedure and clear distinctions are made between these various notions.

Alongside the form of summary judgment either for proving or for failure to prove a *prima facie* case⁴¹, which focuses on the judge's preliminary knowledge of the case, there is also summary judgment for a partial view of the facts⁴² and summary judgment of the proceedings⁴³. The first form of these latter two types of summary judgment, refers to the extent of a court's investigation of the facts, the second form focuses on how to complete the process⁴⁴, but certainly more simplified, compared to an ordinary judgment⁴⁵.

⁴¹ In issuing an injunction (in which the court provides the parties limited protection from the normal length of the trial process in order to avoid the complainant's unnecessary suffering of irreparable harm from such) the judge makes a preliminary or superficial judgment on the existence of law in favor of the complainant's position as argued by the complainant, and as to the existence of preventative or dispositive facts as put forward by the defendant – The so-called *fumus boni juris*; thus, determining whether the complainant or defendant prevails.

The judge's investigation has as its objective only those facts that have occurred. The judge could verify in a more complete investigation the likelihood that the facts constitute, impede or amend the law. The judge would not, however, do this as a necessary part of the procedure: The parties' need of summary resolution requires the judge to limit him/herself to an assumption that perhaps the events did occur (a probability or likelihood).

⁴² In issuing an injunction the judge is required to also conduct an investigation other than that which has as its objective the possible danger of serious harm to the complainant before final judgment is reached. If the harm, which requires the injunction, has already occurred, the judge verifies such based on full or actual proof. If the harm has not yet occurred, but is only feared, the judge evaluates the probability that the harm will occur. Here, the judgment is based on probability, not because the verification or proof of the events is preliminary or superficial, but because the verification or proof is incomplete. The judge has only some facts available to him and it is based on these facts that the judge must render a judgment of probability of future events (the harm that the complainant could suffer).

⁴³ The judgment is carried out without regard to the "*scansione*" (succession of phases) dictated by the law. The summary nature; that is, the disconnect from the formality of ordinary judgment affects only the manner in which the trial is carried out – the sequence of the phases and pleadings of the trial. In this case, "summary" does not signify preliminary or superficial verification, but only a different procedural order of the case and, therefore, of the formation of the evidence to the court.

⁴⁴ It is clear that the three types of summary judgment often overlap, in other words all three exist within the same trial, but this is the logical distinction between them.

This civil procedure distinction between the forms of summary judgment, when applied with appropriate adaptations to administrative procedure, can explain more exactly the features of the decisions regulated by art 14-*ter* compared to the typical model of an antitrust proceeding.

When an agreement prohibited by art. 101 TFEU (or by art. 2 of L. 287/1990) is challenged, the difference introduced by art. 14-*ter* to an ordinary proceeding is essentially reduced to a consideration of the extent to which the facts have been proven.

Decisions imposing a fine require a full assessment of the facts. This means that the assessment of facts must take into consideration all of the pieces of the complex circumstances of an alleged violation of antitrust regulations as stated in art. 2, sec. 1, 287/1990 (as well as art. 101TFEU). To be entitled to impose a fine, the AGCM must obtain full evidence of the agreement⁴⁶ and the suitability of the agreement to restore the proper functioning of the market⁴⁷.

⁴⁵ The distinction has already been drawn by G. CHIOVENDA, *Principles of Civil Procedure*, Naples, 1928, p. 202 and has been widely used in current studies of summary proceedings.

⁴⁶ Evidence of the agreement may be provided as direct evidence in both a documentary and testimonial form, and by circumstantial evidence that is precise and concordant, i.e. that is not susceptible to more than one interpretation.

⁴⁷ See CdS, Sec. VI, 7 March 2008, No.1009 and Regional administrative Court of Lazio, sec. I, 13 March 2008, No. 2312 and 20 February 2008, No. 1542. The decisions relied upon clarify that an unlawful agreement, in sense of art. 2, L. 287/1990, exists where the common intention of the parties in relation to a particular behavior is to alter the natural market conditions. It is not essential to demonstrate that the terms of the parties' agreement have actually been implemented on the market before determining that an agreement is in violation of antitrust regulations, nor is it necessary to evaluate the effects that implementation of the agreement would have produced had it been implemented. The qualification of the conduct in terms of whether it violates antitrust regulations, in fact, depends on an objective capable of distorting competition, while the actual existence of negative effects on the market may result in a more severe sanction. See Regional Administrative Court of Lazio, 2312/2008 and 1542/2008.

Commitment decisions may lawfully be taken even where the unlawful agreement has not been proven and may be based upon an assessment limited to the existence of a restrictive effect on the market.

When an alleged violation of art. 3, L. 287/1990 or of art. 102 of the TFEU is challenged, the dominant market position of an investigated company, is the condition both necessary and sufficient, to qualify as abusive behavior that which would otherwise be lawful⁴⁸.

Verification of a dominant position in the relevant market cannot be omitted even where the AGCM intends to adopt a commitment decision. In the absence of these requirements, it would be wholly unjustified to impose corrective measures on behavior that is, in itself lawful and not harmful.

Unlike the cases previously examined (restrictive cartel), the verification required in order to adopt a decision making binding commitments appropriate to correct abuse on the market does not differ from that which must be done to take a decision imposing a fine.

The difference between an ordinary proceeding and a proceeding in which the complaint of market abuse ends with a decision imposing commitments concerns the way in which the proceedings are conducted.

In proceedings governed by 14-ter and the Bulletin of 12 October 2006, the hearing is particularly accurate and involves not only the investigated companies, but also third parties, consulted through the so-called market test. The hearing focuses, however, only on the content of the measures and their attitude to repair the harm to competition. The

⁴⁸ V. MANGINI – G. OLIVIERI, *Diritto antitrust*, III ed., Torino, 2009, pg. 58, et seq.

hearing shall not re-evaluate, indeed, the allegations alleged by the AGCM in its preliminary investigation⁴⁹.

The deviations that this discipline involves from the ordinary way of carrying out a typical antitrust proceeding are clear. In proceedings carried out to take a decision requiring that an infringement be brought to an end and imposing fines, the verification of the alleged facts is subject to a rigorous adversarial process between the parties. In proceedings leading to commitments decisions, the violation of antitrust regulations is evaluated by the AGCM on its own without involvement of the parties.

The reason why, in third party suits for damages resulting from a violation of antitrust regulations, a civil judge can take a decision contrary to a commitment decision adopted by the AGCM is clear. Just as the significance of the provision of art. 14-ter is clear.

In some cases – particularly when the dispute concerns a restrictive agreement – the findings, made by the AGCM in a proceeding leading to a commitment decision, are less broad in comparison to what is required for the adoption of a decision imposing fines. The finding concerns the restrictive effect, which reflects the necessity of remedial measures that are both justified and lawful, but does not concern the conclusion of an actual unlawful agreement. It is therefore evident that the finding of an unlawful agreement, which hasn't taken place in the administrative proceeding cannot even be used in the civil proceeding.

In any case, particularly when an abuse of a dominant position is alleged, the verification of the infringement of antitrust regulations, which the commitments should correct, is not subject to a hearing with the parties. These investigations and judgments, which are attributable to the exclusive appraisal of the AGCM, cannot assume any value in

⁴⁹ Often the investigated company simply responds only to disagree with the Commission's (or the Authority's) preliminary assessment.

the civil process, not even the limited value of evidence; so a court is free to judge a dispute between private parties as it deems appropriate⁵⁰.

8. POSSIBLE USES AND LIMITS TO THE USE BY A CIVIL COURT OF DOCUMENTS COLLECTED IN PROCEEDINGS CONDUCTED PURSUANT TO ART. 14-TER

The foregoing considerations state the reasons for which any binding, or even probative value of a final decision adopted under art. 14-*ter* is properly ruled out in a civil action for damages.

The question that must be answered now is whether the documents collected by the AGCM and, more generally, the pleadings of the administrative investigation, conducted pursuant to art. 14-*ter* may be used as evidence in a civil case for damages.

⁵⁰ Given the AGCM's high technical expertise, the strength of its evaluations could be compared to that extended to scientific evidence as assessed by an expert witness. Even with respect to the so-called scientific evidence provided by persons technically equipped, there remains ample space for evaluation of the evidence by a civil court. Here, in the court's capacity as *peritus peritorum*, it does acknowledge the duty to control, with the help of the parties, if the expert has correctly identified the factual premises from which he began his investigation and whether he adopted a methodology of exact science with correct application thereof, and whether the expert reached conclusions logically consistent with the premises. The concept of scientific evidence and the value of this as evidence, is nonetheless appreciated by a civil court, see M. TARUFFO, *La prova scientifica nel processo civile*, in *Riv. trim. dir. proc. civ.*, 2005, esp. pg. 1090; L. LOMBARDO, *Prova scientifica e osservanza del contraddittorio nel processo civile*, in *Riv. dir. proc.*, 2002, pg. 1117; *Id.*, *La scienza ed il giudice nella ricostruzione del fatto*, *ibid.*, 2007, pg. 49, et seq. For more extensive references, however, return to A. SCOGNAMIGLIO, *Concorrenza e coordinazione*, *cit.*, pg. 246, et seq.

The plaintiff for civil damages has indeed two instruments through which he can obtain documents in the AGCM's possession.

The plaintiff may apply to the AGCM for a copy of the documents, exercising its right to access administrative documents conferred to those who have a significant interest in having knowledge of the contents of a document held by a public administration by art. 22 of L. 8 August 1990, No. 241. Once the plaintiff has obtained the documents, he can provide them as evidence in a civil trial for damages⁵¹.

The plaintiff could also ask the court to obtain documents and information from the AGCM, in the exercise of its powers under arts. 210 and 213 of the Code of Civil Procedure (c.p.c.).

As regards the use of the first instrument, the argument put forward by the AGCM in its early decisions was that art. 13 of the Presidential Decree 30 April 1998, No. 217, which regulates procedure carried out by the AGCM, gives the right of access to those who participate in the administrative proceeding as a complainant or as a concerned third party, (so-called defensive access)⁵², but does not broadly refer to people who are not a party to the proceedings. Therefore, those who are not parties in the proceedings do not have the

⁵¹ Italian law does not prevent the parties from using the documents obtained by the AGCM during the preliminary administrative investigation in the civil suit for damages.

⁵² According to art. 13, sec. 1, parties to the proceedings, in the sense of art. 7, sec. 1 of D.P.R. 30 April 1998, No. 217, have the right to accede to the file. If the documents required contain confidential information of a personal, commercial, industrial or financial nature concerning persons and companies involved in the proceedings, the right of access is permitted, in whole or in part, in so far as it is necessary to ensure the hearing. The documents containing trade secrets are in principle excluded from access, but if they provide evidence of an offense, or essential to the defense of a company, the offices will provide access, in respect of such elements. See CdS, 6 September 2010, No. 6481. Article 14 and Article 13 of Presidential Decree 217/1998 exclude access only to the records that have been classified as confidential by the same Authority.

right to access to the file of the proceeding. In other words, the so-called informative access would be banned in proceedings conducted by the AGCM.

On the basis of this reasoning, in its early decisions the AGCM rejected requests for access, arguing that the interest in knowing the contents of the documents for the purpose of using them in an action for damages is not directly relevant with respect to the administrative proceeding in which the documents were acquired⁵³.

The AGCM then changed its opinion⁵⁴. In a more recent case, the AGCM granted the right of access to a company that had requested the documents in order to bring a civil action for damages against an investigated company that had already been ordered to pay a fine for an illegal agreement.

The correctness of this approach is confirmed by decisions of the CdS⁵⁵ and the Administrative Court of First Instance of Lazio⁵⁶, which state that the question of whether those who were not parties have the right to access the file of proceedings conducted by the AGCM must be resolved according to the general rules laid down by L. 241/1990.

Art. 23 of L.241/1990 gives the AGCM, and other agencies as well, the power to enact its own regulation disciplining the right to access to administrative documents, provided that the regulation follows the general framework of principles laid down by art.

⁵³AGCM, 31 March 2011, No. 23367. This interpretation has been upheld by Administrative Court of First Instance of Lazio, sec. I, 20 July 2009, No. 7136, which states “the legal interests that justify access to administrative documents are only those involved in the administrative proceeding related to which the request for access has been made. Therefore, the AGCM legitimately rejected excess to the documents where the interest is entirely foreign to the object of the administrative power in relation to which the application has been made”.

⁵⁴ AGCM, 21 October 2011, No. 59309.

⁵⁵ CdS, 6 September 2010, n. 6481.

⁵⁶ See Administrative Court of First Instance of Lazio, Sec. I, 10 February 2012, No. 1344

24, sec. 7⁵⁷. Article 24, sec. 7 specifically grants the right to access to persons who need the documents in order to defend their interest in a judicial proceeding.

The Administrative Court of First Instance, in the same decision cited above, stated on the question of whether the circumstance that the documents were acquired in the course of a procedure regulated by art. 14-ter requires the application of stricter rules of confidentiality that the right of access to administrative documents, the use of which is necessary to defend one's own interests in a judicial proceeding, must be balanced against the parties' interest of confidentiality.

The fact that the administrative procedure was conducted in accordance with the provisions of art. 14-ter, does not imply a stricter regime of protection of confidentiality⁵⁸, but not a more relaxed regime, either⁵⁹.

⁵⁷ As amended by art. 16, sec. 1, 11 February 2005, No. 15.

⁵⁸ European case law has also made it clear that refusal to produce the documents after the close of the proceeding cannot be justified on the ground of preserving the climate of trust and cooperation between the Commission and interested parties. See European Court of First Instance, 6 July 2006, T-391/03 and T-70/04, *Yves Franchet & Daniel Byk v. European Commission*; *Id.*, 9 June 2010, T-237/05, *Editions Odile Jacob s.a.s. v. European Commission*.

⁵⁹ "The balancing of the interest involved is necessary because, in antitrust law in particular, any rule that is rigid, either by providing for absolute refusal to grant access to the documents in question or for granting access to those documents as a matter of course, is liable to undermine the effective application of, *inter alia*, art. 101 TFEU and the rights that this provision confers on individuals", see E.C.J., 6 June 2013, C-536/11, *Bundeswettbewerbshorde v. Donau Chemie*. In the same decision the Court of Justice stresses that not even the interest in the effectiveness of a particular antitrust instrument can justify absolute refusal to grant access. Interest in the effectiveness, interest in the production of the documents and interest in confidentiality of the companies involved have to be carefully weighted. The decision properly refers to the leniency program, but the arguments raised by the Court can certainly be extended to decisions with commitments.

A plaintiff in a civil proceeding for damages can obtain the documents from the AGCM that he needs to prove the violation of antitrust regulations by urging the civil court to exercise the power conferred to it by art. 210 c.p.c. A court may also exercise the same power under art. 210 c.p.c. on its own motion, or *ex officio*, in accordance with art. 213 c.p.c.

A minority opinion denies that a court may exercise the powers foreseen by arts. 210 and 213 c.p.c. in order to acquire documents that the party could have procured for himself by exercising the right of access. This opinion expresses concern that in this way the burden of proof in the civil trial could end up being altered⁶⁰.

But this opinion is not acceptable in light of the rationale for the provisions of the Code of Civil Procedure, cited above, which is to strengthen the powers of the judge to search evidence⁶¹ and, at the same time, to reinforce the burden imposed on public

⁶⁰ P. LAZZARA, *Autorità indipendenti e discrezionalità*, Padova, 2001, pg. 459. M. NEGRI, *Giurisdizione e amministrazione nella tutela della concorrenza*, Torino, 2006, pg. 162, criticizes this opinion, stressing that it reflects an outdated view of the burden of proof, based on a formal reading of art. 115, c.p.c. A thorough reading of the Code of Civil Procedure reveals a very significant number of cases in which the civil courts exercise powers of investigation and therefore show the abstractness of the same contrast between the dispositive model and inquisitorial model. See also, E. FABIANI, *I poteri istruttori del giudice civile*, Napoli, 2008, pg. 255, et seq. and pg. 270, et seq. and *Poteri di iniziativa probatoria ufficiosa e possibili modelli di istruttoria*, in www.apertacontrada.it 16/01/2009. In general, the power and duty of the court to exercise its powers of investigation unofficially, see G. VERDE, *Dispositivo (principio)*, in *Enc. Del dir.*, Milano, 1985, Vol. XXXIV, pg. 736, et seq.

Moreover, in the event that the request for documents and information should be directed to a public authority, the doctrine in favor of recognizing a wider use of investigatory powers of offices relies also on the peculiar position of this institution and the opportunity for closer collaboration between bodies belonging to the organization overall, see. F. LUISO, *Richiesta di informazioni presso la pubblica amministrazione*, in *Enc. Del dir.*, Milano, 1989, Vol. XL, pg. 491.

⁶¹ See L. P. COMOGLIO, *Le prove civili*, Torino, 1998, pg. 410, who stresses that the power to request information from the public administration is important component of the judge's active role in the preparatory phase of the

administrations to cooperate with the court⁶². In addition, under art. 111 of the Italian Constitution and the principle of reasonable length of process, it would be unreasonable to require a court to determine whether it was really impossible for the plaintiff to fulfill his burden of proof without access to the administrative documents or whether the plaintiff had taken the special action governed by art. 25 of L. 241/1990 before producing the evidence in court pursuant to art. 210 c.p.c. or a request for information pursuant to art. 213 c.p.c.⁶³.

In conclusion, it is true that the exercise of power under arts. 210 and 213 c.p.c., to request public agency documents and information, is left to the discretion of the court⁶⁴, but a court cannot refuse a motion for access as the plaintiff could have obtained documents anyway through the exercise of the right of access and through the special *actio ad exhibendum*, within the jurisdiction of the administrative courts.

In several cases, the powers provided for by arts. 210 and 213 c.p.c. had indeed been used by civil judges in actions for damages arising from violations of antitrust regulations in order to obtain documents and information from the AGCM⁶⁵.

The problem that now arises is whether the AGCM can refuse a request by the civil judge to provide documents from the investigation that was carried out by the AGCM

hearing of the case, and represents the tendency to broaden the judge's investigating powers. This tendency has the scope to strengthen the judge's research for the truth.

⁶² See F. LUISO, *Richiesta di informazioni*, cit., who refers to the report on the final draft of the code of 1942, which – in explaining the purpose of the rule – states that it introduces “a principle of loyal cooperation between public bodies.”

⁶³ See (ancora) F. LUISO, *Richiesta di informazioni*, cit.

⁶⁴ See Court of Cassazione civile, Sec. II, 15 February 2011, No. 3720.

⁶⁵ See Civil Tribunal of Palermo, 15 July 2011; Civil Court of Appeal of Rome, 8 May 2011; Civil Tribunal of Milan, 20 May 2011.

arguing that the request violates the confidentiality of the proceedings initiated pursuant to art. 14-ter. In other words, the problem is whether the need to protect the efficiency of this particular administrative proceeding may override the duty to comply with the judicial request.

On the level of national law, some have even argued that an administration could decide whether to reply or not to a request for information pursuant to arts. 210 and 213 c.p.c. This interpretation seems to be confirmed in the report on the final draft of the Code of Civil Procedure, which states that “the public body can always refuse the information, where considered harmful to the public interest”. On the one hand, the mere reference to reasons of public interest would be sufficient to warrant the confidentiality of information and the refusal⁶⁶. On the other hand, the broad and elastic expression of public interest could also encompass those reasons that have led the authorities to opt for the conclusion of the negotiated antitrust procedure. The result, which in this way would be achieved, is to set up a special regime of confidentiality to the proceeding culminating in a decision under art. 14-ter.

But, the idea that a request for information may be refused on the basis of vague reasons of public interest and in the exercise of full discretion runs counter to the principle of transparency of the administration as contained in the 1990 Italian Code of Administrative Procedure (c.p.a.). Moreover, such a conclusion is in contrast with the principle of cooperation between judicial and administrative authorities, already implemented by the c.p.a.⁶⁷ and reinforced – only in the antitrust field – by Reg. 1/2003.

The reference to the principles of transparency, disclosure and sincere cooperation between the judiciary and administration justifies the opposite interpretation: reasons of

⁶⁶ See MASSARI, *Esibizione delle prove*, in *Nss.D.I.*, Torino, 1964, Vol. IV, pg. 849. In giurisprudenza, Cass., 18 April 1968, No. 1153 in *Giust. Civ.*, 1968, Vol. I, pg. 1150.

⁶⁷ See F. LUISSO, *Richiesta di informazioni*, cit.

public interest and confidentiality constraints of administrative proceedings cannot justify a refusal to comply with a judicial request.

The court shall carefully balance the differing interests as required by art. 211, sec. 1, c.p.c, which states that the court must “try to reconcile as best as possible the interests of justice with due regard to the rights of the third party”. According to sec. 2 of article 211, the third party may also be summoned to expose his defense and his own reasons in support of his right to confidentiality against the request of documents.

Regarding the probative value of the information and observations acquired by the administration in response to a request ex art. 213 c.p.c., the rule is that these are suitable to provide the court informative integrative elements, but they do not constitute evidence in the proper sense⁶⁸.

Administrative documents, in written form, such as an inspection report, and hearings – as drawn up by a public official – constitute legitimate evidence⁶⁹, with regard to the requirements of art. 2700 c.c. More precisely, these minutes constitute full proof of both the fact that the document originated from the producing public official, the same public official who wrote them, and also full proof of the actions and statements described therein by the this same public official who thereby certifies that they occurred in his presence.

The provision stipulating that documents drawn up by a public official according to special formalities have full probative value is, however, an exception to the principle of independent and unencumbered judicial review, and is not susceptible to application beyond this limited exception. Therefore, the full probative value, as stipulated by art. 2700

⁶⁸ . See L. P. COMOGLIO, *Le prove civili*, cit., pg. 420

⁶⁹ Documents in written form, drawn up by public officials constitute binding proofs on the court, until the falsity of the document has not been proven.

c.c., does not extend beyond the limits specified above; and in particular, does not extend to those parts of the inspection report that consist of inspectors' assessments⁷⁰.

These assessments, even if contained in a document written in accordance with the procedures described above, are not binding on a judge, and are likely to provide to a judge only supplementary informative elements.

9. FULFILLMENT AND NON-FULFILLMENT OF COMMITMENTS: ADMINISTRATIVE AND CIVIL PROTECTION OF THIRD PARTY RIGHTS

The foregoing considerations led to the conclusion that, although a commitment decision does not assume any probative value in the respective civil suit for damages, the documents collected in art. 14-*ter* proceedings can be acquired for evidence in civil proceeding; the limits within which such acquisition is possible have been previously analyzed.

⁷⁰ See E. GALANTI, *Sul valore probatorio del rapporto ispettivo di vigilanza*, nota a Trib. Potenza, 16 February 1998, in *Banca, borsa, titoli di credito*, 2000, II, pg. 67, et seq. and F. MERUSI, *Giustizia amministrativa ed autorità indipendenti*, relazione al convegno "Diritti, interessi e amministrazioni indipendenti", Siena, 30 May – 1 June 2002, in *Annuario 2002 dell'Associazione italiana dei professori di diritto amministrativo*, Milano, 2003, 184, nt. 14.

The problem that now arises is whether (and which kind of) protection is provided to third parties when they are damaged by implementation or by non-fulfillment of commitments.

According to art. 14-*ter*, sec. 1, the final decision of the AGCM has the effect of making the commitments binding on the company that proposed them. According to art. 14-*ter*, sec. 2, when the company fails to fulfill the commitments made binding by the AGCM's decision, the AGCM must impose a fine.

It is thus clear under art. 14-*ter* that the effectiveness of compliance with commitments is ensured by the power of the AGCM to verify that companies comply with the commitments and to impose a fine where the AGCM finds non-fulfillment of commitments.

In other words, art. 14-*ter* provides only administrative remedies⁷¹.

In the absence of an explicit discipline, the question arises whether third parties, damaged by non-compliance with commitments or who have an interest in the fulfillment of particular commitments, are entitled to bring an action before the civil court.

Before addressing the question, it may be useful to clarify the legal nature of the decisions adopted under art. 14-*ter*, in order to identify the general rules applicable to them.

From the point of view of its structure, the procedure governed by art. 14-*ter* can be divided into two separate phases.

The first phase consists of the proposal of commitments formulated by the investigated companies and which the companies themselves are prepared to accept. The

⁷¹In any case, third parties, who have a qualified and personal interest in fulfillment, should be regarded as entitled to file a claim in the administrative court to force the AGCM to make use of its power to verify the fulfillment and to impose a fine on a defaulting company.

second consists in the adoption of the decision of the AGCM that makes commitments binding on the investigated companies.

With regard to the function of art. 14-*ter*, its aim is to achieve the measures most apt to restore the orderly functioning of the market through an agreement between the two parties where such agreement is the content of the AGCM's decision.

The structure and function of art. 14-*ter* lead us to view commitment decisions under the general framework of art. 11 of the Italian General Law on Administrative Procedure, No. 241/1990. In particular, art. 11, sec. 1, which regulates a particular kind of agreement, aimed at determining the content of a dispositive, discretionary administrative act⁷².

Rules applicable to the procedure regulated by art. 14-*ter*, are those provided by art. 11, sec. 1.

The general discipline of art. 11 provides us with two indications: first the agreement between investigated companies and the AGCM is not formally reduced to a contract, which limits the effect of the agreement to only the parties, according to art. 1372 c.c. Secondly, the agreement, even though incorporated by an administrative decision, is

⁷² See M. LIBERTINI, *Le decisini patteggiate*, cit., pg. 128 and A. POLICE, *Tutela della concorrenza e pubblici poteri*, Torino, 2008, 173. In case law, Consiglio di Stato, Sec. VI, 19 November 2009, No. 7307. Compare F. CINTIOLI, *Le nuove misure riparatorie*, cit., pg. 128, et seq.; A. LALLI, *Disciplina della concorrenza e diritto amministrativo*, cit., 258; A. CATRICALA⁷ – A. LALLI, *L'antitrust in Italia*, cit., pg. 110 and P. FATTORI – M. TODINO, *La disciplina della concorrenza*, cit., pg. 443, who stress that a commitment decisions is taken by the AGCM in the exercise of its powers only on the basis of an agreement with the investigated companies. Therefore, decisions regulated by art. 14-*ter*, sec. 1, cannot be regarded as a special kind of the general type of decisions regulated by art. 11, sec. 1, which are genuine public law agreements. This opinion, however, is not acceptable since it does not take into account the structural variety of public law agreements regulated by art. 11, sec. 1. In addition to the agreement between the parties, which substitutes a public decision, art. 11 also regulates a type of interlocutory agreement within the process, the effect of which is precisely to determine the content of the final decision, which is charged only to the public authority.

subject to the principles of the Civil Code relating to contracts, in addition to the provisions contained in art. 14-ter, sec. 1.

Having clarified the applicable legislation, the first scenario that must be examined is where activities conducted by enterprises, even though in accordance with the commitments approved by the AGCM, produce damages to third parties.

The final-agreement however is contained in a document that has the nature of an administrative decision and not of a contract, which limits its effects only to the parties. Since a commitment decision is an administrative order, third parties⁷³, competitors and consumers, damaged by the fulfillment of the commitments, should be given standing to challenge the decision adopted pursuant to art. 14-ter⁷⁴.

With respect to the relationship between third parties and investigated companies, and civil protection of third parties, art. 11 warns that agreements taken pursuant to art. 14-ter are concluded without prejudice to the rights of third parties. The agreement may neither extinguish nor prejudice the rights of third parties.

⁷³ The participation of third parties in the proceeding does not bar their standing to challenge the final measure. See R. VILLATA, *Riflessioni in tema di partecipazione al procedimento e legittimazione processuale*, in *Dir. proc. amm.*, 1992, pg. 170, et seq. and European Court of Justice, 15 October 2009, C-263/08.

⁷⁴ Another question is whether the investigated company, which has proposed commitments, has standing to challenge the final decision of acceptance. A negative response to this question was provided by A. POLICE, *La responsabilità politica e la responsabilità giuridica nel prisma del procedimento amministrativo*, in *www.apertacontrada.it*, 4 May 2009, e *I nuovi poteri dell'Autorità garante della concorrenza e del mercato*, cit., 98, nt. 129 and A. LALLI, *Disciplina della concorrenza*, pg. 261, nt. 98, for which the agreement of the parties, in the process, would imply some kind of waiver to challenge the act. But the standing to contest the decision, including the agreement should instead be admitted, at least with reference to the case of non-conformity of the final decision to the agreement, see M. S. GIANNINI, *Diritto amministrativo*, Milano, 1970, Vol. II, 876, for which such an act is vitiated by misuse of powers. The obligation of full correspondence between the content of the commitments proposed and the decision making them binding and for the standing of the applicant to appeal the decision, in this case see Tar Lazio, sect. I, 19 November 2008, No. 10428, cit.

One possible form of civil protection of the rights of third parties is a civil suit for damages.

The protection of third parties from damages cannot be excluded. Third parties (consumers and business competitors), which, as market players have an interest worthy of protection, are entitled to take civil action against a company if they demonstrate that they have suffered damage as a result of business activities, carried out in fulfillment of commitments⁷⁵. The company must respond under non-contractual liability that extends to the AGCM, as provided for in art. 2055, c.c.⁷⁶.

Instead, it is questionable whether third parties can pursue a civil injunction ordering the cessation of behaviors that are consistent with the commitments approved by the AGCM, but harmful to them. In my opinion, this question must be answered in the negative, considering that commitments are made binding by an order of the AGCM. A decision of a civil court, which inhibits an investigated company's conduct consistent with mandatory commitments, would have a direct impact on the content and effects of the decision of the AGCM, going beyond the limits of the jurisdiction of the civil courts. In other words, a civil action aiming to prohibit an investigated company's conduct that is harmful to third parties, would require preventive action against a decision by the AGCM, which has made the company's conduct mandatory, thus requiring an appeal of the administrative decision to an administrative judge.

⁷⁵ See V. CERULLI IRELLI, *Corso di diritto amministrativo*, Torino, 1994, who acknowledges that a third party adversely affected by an agreement may seek compensation for damages before the civil courts. Compare European Court of First Instance, *Alrosa*, para. 88, finding that only the Commission is liable to third parties for the injurious effects due to a decision ordering commitments, arguing that the Commission "is not in any way required to take into consideration potential third party harm, *a fortiori* to making binding the commitments presented to it by private parties".

⁷⁶ In the event of damage due to a greater number of people, art. 2055, c.c., provides that damages are to be paid to all individual harmed by the commitments.

The latter case, which must be examined, is where activities made binding on investigated companies by a commitment decision are profitable to third parties; that is, where third parties would be advantaged by the fulfillment of the commitments.

Even in this case, administrative protection of third parties by the intervention of either or both the AGCM and Administrative Law Judge (ALJ), is conceivable.

Where an investigated company fails to fulfill commitments that are profitable for third parties, third parties are entitled to seek an injunction from the AGCM against the breaching party, and then to complain to an ALJ pursuant to art. 31, c.p.a., if the AGCM⁷⁷ does not respond⁷⁸.

Article 11, sec. 2, states that the principles of the Civil Code relating to contracts and obligations shall apply to contracts concluded between a public body and a private party, in as far as they are compatible with the rules of public law. In order to answer the question, whether third parties are authorized to act against companies that did not fulfill commitments seeking either fulfillment of the commitments or to be paid for damages caused by the failure to comply, one must refer to the principles of the Civil Code in accordance with art. 11, sec. 2.

Article 1372 of the Civil Code establishes the principle of the effectiveness of a contractual agreement limiting it to only between the contracting parties.

⁷⁷ *Consiglio di Stato*, Sec. VI, 14 June 2004, No. 3865, in *Giur.it*, 2005, pg. 1081, acknowledges the standing of third parties to challenge the decision of the AGCM not to proceed, or its inaction with respect to complaints lodged by an interested third party. On this question, see A. SCOGNAMIGLIO, *La legittimazione del denunciante ad impugnare le delibere di non avvio dell'istruttoria e di archiviazione adottate dall'Autorità*, in *Foro amm.* 1999, 1149 and *Profili della legittimazione a ricorrere avverso gli atti delle Autorità amministrative indipendenti*, *ivi*, 2002, pg. 127.

⁷⁸ As mentioned above, see fn. 24.

According to a widespread interpretation, the proposition of art. 1372, c.c., should be understood so as to exclude the standing of third parties to file suit seeking the fulfillment of obligations assumed by an individual against a public entity.

The courts must often adjudicate cases where there is an urbanistic agreement between a municipality and a private contractor for infrastructure work⁷⁹.

In such cases, the question of third party standing arises with respect to individuals not bound by a contractual obligation to the contractor or municipalities, but who are nonetheless, interested in the implementation of infrastructure work. The issue is whether third parties are entitled to take civil action for fulfillment of commitments directly against a contractor obliged to carry out the infrastructure work according to the agreement concluded with the municipality.

The case law defends the idea that the contract is binding only on the parties to it, and has no effect on third parties, according to art. 1372, c.c. Thus, the standing of third parties to file suit seeking fulfillment of the obligations or damages is denied⁸⁰.

The judicial interpretation given to the provisions of art. 1372, c.c., as discussed above, is to deny the establishment of rights in favor of third parties where a decision is the result of a negotiated procedure conducted in accordance with art. 14-ter. The consequence

⁷⁹ The town-planning agreements, governed by arts. 8, para. 5, and 10, para. 5, of L. 765/1967, and by art. 7, para. 2 and 4, and art. 11 of L. 10/1077, explicitly stipulate that urbanization work shall be carried out by the person who requested the building permit, on the basis of an agreement with the city administration, or even on the basis of a unilateral act of obligation.

⁸⁰ See Cass. Civ., Sec. I, 29 April 1999, No. 4301, in *Giust. Civ.* 2000, I, 855 and Cass. Civ., Sec. II, 11 February 1994, pg. 1384, in *Riv. Giur. urbanistica*, 1995, pg. 91.

is that third parties would not be entitled to seek fulfillment of the commitments or damages for an investigated company's failure to comply⁸¹.

Some authors criticize the judicial interpretation of art. 1372, c.c., and the thesis that this provision limits in such an absolute way the application of the contractual effects only between the parties.

A few of these authors argue that judicial interpretation should be based on the constitutional principle of social solidarity, embodied in art. 2 of the Italian Constitution⁸². The constitutional clause of solidarity makes it possible to overcome the principle of effectiveness of the contract only between its parties and makes it possible to extend the contractual protection to third parties not party to the contract.

The use of the constitutional clause of solidarity leads to a very broad definition of the sphere of third party rights. In fact, it includes in the effects of the contract the duty not to cause damage to a third party.

The use of the constitutional clause of solidarity and identification of collateral obligations to protect third parties beyond the mandatory relationship itself, requires the qualification of an investigated company's responsibility where the company failed to

⁸¹ With reference to commitment decisions, see M. BOCCACCIO – A. SAJA, *La modernizzazione dell'antitrust, Le decisioni con impegni*, cit., pg. 293.

⁸² C. CASTRONOVO, *Obblighi di protezione*, in *Enc. Giur.*, vol. XXI, 7 and, more broadly, *Problema e sistema nel danno da prodotti*, Milano, 1979, 247. The Author stresses that “since solidarity is the constitutional clause that gives legal weight to the position of the parties involved from the effects of an act, is itself and no other rule that determines the spheres in which these effects are realized”.

perform the commitments agreed upon and as a result caused damage to a third party, as a contractual liability, even to third parties, and not as non-contractual liability⁸³.

This has significant implications on the length of the term to take legal action. The point is that, in the case of contractual liability, an investigated company may be required to compensate a third party who can demonstrate a general interest in the performance or breach of commitments. While – as long as one remains on the level of non-contractual liability – the third party claiming damages must prove that the conduct, not in compliance with the commitments, produces a competitive disadvantage against him.

Other authors observe that the provisions of art. 1372, c.c., do not preclude the inclusion of third parties within the mandatory relationship, and does not preclude, as a result, the recognition of third party standing to sue for the performance of obligations arising from a contract⁸⁴.

A contract in favor of third parties, is expressly governed by art. 1411, c.c.⁸⁵, and lies only on the condition responding to an interest worthy of protection, and that addresses a specific and identifiable third party.

A contract in favor of third parties and the discipline thereof can therefore be used by third parties to justify direct enforceability of the obligations arising from decisions with commitments that advantage the third party.

⁸³ C. CASTRONOVO, *Problema e sistema*, cit., pg. 269, et seq.; Cass. Civ. Sec. III, 22 January 1999, No. 589 in *Danno e responsabilità*, 1999, pg. 781.

⁸⁴ See M. LIBERTINI, *Le decisioni patteggiate*, cit. and F. CINTIOLI, *Le nuove misure riparatorie*, cit., pg. 138.

⁸⁵ Under art. 1411, c.c., “*the conclusion of the contract in favor of a third is valid (arts. 1372, 1689, 1773, 1875 and 1920, c.c.), if he has an interest (art. 1174, c.c.). The third purchases the right against the one who entered into the contract as a result of the conclusion of the contract*”.

Commitments are based on the idea of a consensus and are not forced. This allows for great variety in content. This circumstance makes entirely possible the hypothesis that commitments agreed upon between a company and the AGCM immediately produce favorable effects benefiting specific and identifiable third parties; for example, where a company is required to charge a specific price for a specific product or must bargain with a particular subject⁸⁶.

In these cases, nothing interferes with the standing of third parties to take action directly against the company to seek fulfillment of its commitments⁸⁷.

The following solution is preferable. In all cases in which a complex situation must be monitored, or where the interested actors seek to avoid monitoring, it is better to conduct the monitoring on more than one level; that is, on the public, private and social levels⁸⁸.

⁸⁶ See AGCM, 20 May 2007, No. 16871. This decision, adopted under art. 14-*ter*, issued mandatory commitments for the three major telephone companies to stipulate to a contract with their current operator for the provision of access to mobile communication service networks in Italy, that would allow new operators to offer to costumers their own set of Italian mobile communication services.

⁸⁷ Article 11, sec. 5, L. 241/1990 provides for the exclusive jurisdiction of the administrative courts in disputes regarding training, conclusion and execution of the agreements stipulated under art. 14-*ter*. It must be assumed, however, that a third party action for fulfillment of commitments approved by the AGCM does not lie within administrative jurisdiction, but under the jurisdiction of the civil court. Apart from certain limited exceptions, which are specifically justified, administrative jurisdiction necessarily requires that at least one of the parties to the dispute is the public administration. The administrative courts are limited to and have exclusive jurisdiction over disputes between administrative authorities and private parties with whom agreements are made, cf. Regional Administrative Court of Lombardia, Sec. Brescia, September 29, 2005, No. 903. Compare G. REGGIO D'ACI, *Gli accordi amministrativi e al tutela dei terzi: quale giurisdizione?*, found at www.giustamm.it, who asserts exclusive jurisdiction of administrative courts in regard to disputes brought by third parties for fulfillment of obligations deriving from an agreement stipulated under art. 11, L. 241/1990.

⁸⁸ See S. RODOTA', *Disciplina della proprietà e controlli privati nella esecuzione delle convenzioni urbanistiche*, cit., pg. 264.
