

**EUROPEAN ANTITRUST COMMITMENTS FROM THE VIEWPOINT OF  
ITALIAN STATUTE LAW**

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This paper focuses on the European antitrust commitments from the viewpoint of Italian statutory law. Firstly, the aforesaid commitments relate to the ongoing debate which

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predominantly characterise antitrust issues: the conflict between authority and freedom. Secondly, this article aims at contributing to the discussion regarding one of the most problematic aspects of this field of interest. This concerns the disputed possibility for undertakings to offer commitments which “exceed” what is necessary to terminate the anti-competitive behaviour subject to investigation. Lastly, the paper will dwell upon the legal nature of the aforesaid instruments and the limits of their application.

## **1. ARTICLE 9 OF REGULATION (EC) NO 1/2003 AND ARTICLE 14 TER OF LAW 241/1990**

Article 9 of Regulation (EC) No 1/2003<sup>2</sup> authorises undertakings to present viable commitments, deemed appropriate to remove the antitrust concerns pointed out in the

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<sup>2</sup> For an in-depth analysis of the commitments under European law see F. WAGNER -VON PAPP, *Best and even better practice in commitment procedures after Alrosa: the dangers of abandoning the “struggle for competition law”*, in *Common Market Law Review*, 2012, p. 929; J. TEMPLE LANG, *Commitment decisions under Regulation 1/2003. Legal aspects of a new kind of competition decision*, in *European competition law review*, 2003, p. 347; M. FURSE, *The decision to commit: some pointers from the US*, in *European competition law review*, 2004, pp. 5 et seq.; C. J. COOK, *Commitment decisions: the law and practice under Article 9*, in *World Competition*, 2006, p. 206. In Italian law, with several references to the European system: M. BOCCACIO and A. SAJA, *La modernizzazione dell’antitrust. La decisione con impegni*, in *Mercato Concorrenza Regole*, 2002, p. 285; C. CAZZELLA, *Proporzionalità e diritti della difesa nei procedimenti per abuso di posizione dominante: la sentenza Alrosa*, in *Giust. Civ.* 2008, p. 293; V. CERULLI IRELLI, *“Consenso” e “Autorità” negli atti delle Autorità preposte alla tutela della concorrenza* in *20 anni di Antitrust, L’evoluzione dell’autorità garante della concorrenza e del mercato*, (edited by) C. RABITTI BEDOGNI and P. BARUCCI, Torino, 2010, p. 325; F. CINTIOLI, *Riflessioni sugli impegni antitrust, sulla funzione amministrativa e sull’art. 11 della legge sul procedimento*, in [www.giustamm.it](http://www.giustamm.it); ID., *Le nuove misure riparatorie del danno alla concorrenza: impegni e misure cautelari*, in *Giur. Comm.*, 2008, p. 109; ID., *Le nuove misure riparatorie del danno alla concorrenza: impegni e misure cautelari*, in *Recenti innovazioni in materia di sanzioni antitrust*; (edited by) F. CINTIOLI e F. DONATI, Torino, 2008, p. 7; L. DE LUCIA-M. MINERVINI, *Le decisioni con impegni nella normativa nazionale a tutela della concorrenza e dei consumatori*, in *Concorrenza, Mercato, Regole*, 2010, p. 510; P. DURET, *Gli accordi “novativi” della procedura: le “decisioni con impegni” nella disciplina antitrust*, in *Gli accordi amministrativi tra consenso, conflitto e condivisione* (edited by) D. CORLETTO, Napoli, 2012. L. DI VIA, *Le decisioni in materia di impegni nella prassi decisionale dell’autorità garante*, in *Mercato Concorrenza Regole*, 2007, p. 233; G. FONDERICO, *Il caso “Alrosa” e la*

preliminary assessment of the antitrust proceedings to the Commission without any time limits.

Undertakings have the right to present corrective measures. This thereby suspends the assessment whose outcome, in case of positive finding, could entail: an order to terminate anti-competitive behaviour; the identification of the steps required to bring such anti-competitive behaviour to an end; and the decision to impose fines.

Provided commitments appear adequate to end the concerns expressed to the parties, the Commission can make such commitments binding, even for a limited period of time. This is achieved through proceedings where the commitment is progressively established through close interaction between the undertaking, the Commission and thir

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*proporzionalità delle decisioni con impegni*, in *Giornale di diritto amministrativo*, 2011, p. 250; G. FAELLA, *Decisioni d'accettazione degli impegni, consent order e consent decree: l'antitrust e i limiti del potere*, XX *Colloquio biennale di diritto comparato*, Università di Ferrara, 2007; F. GHEZZI, *Strumenti e obiettivi dell'enforcement della disciplina delle intese: la recente esperienza italiana*, in *Riv. Soc.*, 2008, p. 1395; let me to refer to C. LEONE, *Gli impegni nei procedimenti antitrust*, Milano, 2012; L. LIBERTINI, *Le decisioni patteggiate nei procedimenti per illeciti antitrust* in *Giornale di diritto amministrativo*, 2006, p. 1283; P. MENGOZZI, *Decisioni con impegni e diritto comunitario*, in *I Nuovi strumenti di tutela antitrust. Misure cautelari, impegni e programmi di clemenza*, (edited by) F. CINTIOLI and G. OLIVIERI, Milano, 2007, p. 1; G. MORBIDELLI, *Impegni e principio di tipicità degli atti amministrativi*, in *Recenti innovazioni in materia di sanzioni antitrust*, cit., p. 1; 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., p. 85; A. PERA, *Le decisioni con impegni tra diritto comunitario e diritto nazionale*, in *Poteri e garanzie nel diritto antitrust, L'esperienza italiana nel sistema della modernizzazione*, (edited by) G. BUZZONE, Bologna, 2008, p. 61; C. RABITTI BEDOGNI, *L'autorità garante nell'ultimo triennio tra crisi economica e nuovi poteri*, in *20 anni di Antitrust. L'evoluzione dell'Autorità garante della concorrenza e del mercato*, (edited by) C. RABITTI BEDOGNI and P. BARUCCI, Torino, 2010, p. 174; A. SCOGNAMIGLIO, *Decisione con impegni e tutela civile dei terzi*, in *Diritto amministrativo*, 2010, p. 503; M. SIRACUSA, *Le decisioni con impegni*, in *20 anni di Antitrust*, cit., p. 385.

parties<sup>3</sup>. The latter can participate in the proceedings by introducing remarks and amendment proposals regarding the commitments during the market test stage.

Therefore, it can be stated that commitment procedures involve the interaction of three players. The undertaking is obviously the first player, as identified by the legislators. The undertakings can stop proceedings shortly after they start, by submitting suitable commitments to the Authority, aimed at terminating the anti-competitive behaviour subject to investigation.

The second player is the Commission. They are called upon not only to assess that the commitments are at least appropriate to terminate the anti-competitive behaviour subject to investigation, but also to re-open the proceedings in cases covered by article 9 of Regulation No 1/2003. These relate to where there has been a material change in any of the facts on which the decision was based; where the undertakings concerned act contrary to their commitments; or where the decision was based on incomplete, incorrect or misleading information provided by the parties.

It appears, based on the reading of the rule, as well as its interpretation by case law, that the power given to the Commission does not refer to finding antitrust regulation infringements which are consequent to the undertakings' behaviour, but to assessing the

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<sup>3</sup> Regarding the participation of third parties there is a special rule (article 27, para. 4 of Regulation No.1 of 2003) which provides that “*where the Commission intends to adopt a decision pursuant to Article 9 or Article 10, it shall publish a concise summary of the case and the main content of the commitments or of the proposed course of action. Interested third parties may submit their observations within a time limit to be fixed by the Commission in its publication and which may not be less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets*”. With regard to the establishment of the commitment during the proceedings it must be noted that while the European rules do not provide for this, it is possible to infer from the practices of the Commission that the acceptance of the commitments is the result of several interlocutory meetings between the undertakings and the Commission. In other words, the commitments presented by the undertakings in the proceedings are amended during those proceedings to facilitate acceptance by the Commission.

suitability of the commitment aimed at solving the alleged anti-competitive issues the Commission identified in the preliminary assessment. In fact, the Court of Justice has clarified<sup>4</sup> that “*the Commission is not required to make a finding of an infringement, its task being confined to examining, and possibly accepting, the commitments offered by the undertakings concerned in the light of the problems identified by it in its preliminary assessment and having regard to the aims pursued. Application of the principle of proportionality by the Commission in the context of Article 9 of Regulation No 1/2003 is confined to verifying that the commitments in question address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately*”.

Article 9 of Regulation No 1/2003 further provides that the Commission acts as guarantor of public interest by assessing, even later, the commitment’s aptness to pursue the actual safeguard of the market.

The other players are all third parties participating in the commitment procedure. They can be categorised in two: a) third parties (often numerous) looking for proceedings that end with extending and broadening the commitment originally proposed by the party; and b) third parties (if any) acting as contractual parties of the undertaking presenting commitments, who, in contrast to (a) desire changes constricting the commitments proposed. As will clearly emerge below the latter third parties’ participation in the commitment procedure is has been quite problematic in relation to applicability of the institution. As a result the General Court<sup>5</sup> and the Court of Justice have reached divergent conclusions.

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<sup>4</sup> Court of Justice, Grand Chamber, decision of 29 June 2010, case C-441/07P, *Alrosa*, in [www.curia.eu.int](http://www.curia.eu.int).

<sup>5</sup> See General Court, 11 July 2007, T-170/06, *Alrosa Company Ltd v Commission*, in [www.curia.eu.int](http://www.curia.eu.int).

Of importance here is that the Italian legislator<sup>6</sup> used Article 9 of Regulation No 1/2003 as a model to enhance the instruments available to the Italian Antitrust Authority [AGCM] in the framework of the antitrust law of 1990. It is thus appropriate to taking both rules into consideration, not only because the Italian legislator has envisaged applying the instrument of commitment decisions “*within the limits of the principles of community law*”, but also because the national dogmatic categories can help to clarify the understanding of the application an instrument that is considered having a “hybrid”<sup>7</sup> character.

Analysing the commitments aims at bring and understanding, firstly, where the debate between authority and freedom, which always characterises antitrust issues, is actually leaning. This is bearing in mind that an attempt to reconcile this conflict involves progressively discontinuing a necessarily punitive approach.

Secondly, it is worth taking into account the aspect which appears most problematic regarding the application of the commitments. That is to say the disputed possibility for undertakings to offer commitments which “exceed” what is necessary to terminate the anti-competitive behaviour subject to investigation.

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<sup>6</sup> The rule was also transposed in Italy through Decree Law 223 of 2006, turned into Law No. 248 of 2006, which introduced article 14-ter in Law 287 of 1990. The rule provides that “*1. Within three months of serving a notice of the opening of an investigation to find an infringement of articles 2 or 3 or of articles 81 and 82 of the EC Treaty, undertakings concerned can present commitments aimed at reducing the anti-competitive behaviour subject to the investigation. The Authority, having assessed the suitability of the commitments, can, within the limits set out in community law, make them binding for the undertakings and close the proceedings without finding the infringement. 2. The Authority, in the case of a failure to observe the commitments made binding under paragraph 1, can impose a financial fine of up to ten per cent of the turnover. 3. The Authority can automatically re-open the proceedings if: the de facto situation has changed regarding an element on which the decision was based; the undertakings involved contravene their commitments; the decision is based on information sent in by the parties that is incomplete, inaccurate or misleading*”.

<sup>7</sup> F. WAGNER-VON PAPP, *Best and even better practices in commitment procedures after Alrosa: the dangers of abandoning the “struggle for competition law”*, cit., p. 933.

Lastly, it appears necessary to discuss the legal nature of the aforesaid instruments and the necessary limits of their application.

## 2. COMMITMENTS BETWEEN AUTHORITY AND FREEDOM

The commitments are part of the “*consensual competition law enforcement*”<sup>8</sup> framework and constitute an attempt to balance between a policy of effective protection of competition and a simplified control system, which induced the legislator to identify

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<sup>8</sup> F. WAGNER-VON PAPP, *Best and even better practices in commitment procedures after Alrosa: the dangers of abandoning the “struggle for competition law”*, cit., p. 929, note 1; D. WAELBROECK “*The Development of a new ‘settlement culture’ in competition cases*”, in GHEUR and PETIT (Eds.), *Alternative Enforcement Techniques in EC Competition Law*, Bruylant, 2009, p. 221. The commitments actually run alongside the leniency programmes. In identifying the ratio and the function of the leniency programmes it is doubtless important to acknowledge what the Commission wrote in its Communication on leniency of 2002, where it clarified that “*the advantage that consumers and citizens draw from the certainty that secret agreements are discovered and punished is primordial compared to the interest in inflicting financial sanctions on undertakings which allow the Commission to discover and prohibit practices of this type*”. According to the Commission it is increasingly difficult, in the absence of cooperation from the undertakings, to discover and punish the cartels, which are of a “secret” nature, and to find the proof needed for the findings, even though the Authority can avail itself of substantial investigative tools. In European law it was therefore considered that the main public interest was to encourage the emergence of the collusive behaviour which was most serious and damaging for competitors and consumers and extremely hard to find, rather than the interest in punishing the single undertaking that, albeit taking part in such conduct, denounces the most serious antitrust unlawful deeds.

adequate solutions aimed at achieving streamlined procedures, by leveraging the consent of the undertakings and thus protecting their freedom, the driving force of market growth.

It is worth looking into the debate concerning the conflict between protection of competition and undertakings' freedom by analysing European case law<sup>9</sup>.

What becomes apparent based on the decisions is that undertakings' freedom takes multiple meanings. Sometimes entrepreneurial merit is protected, even when this means achieving a dominant position and the refusal, in some cases, to sell or to change supply and provisioning policies<sup>10</sup>. At other times it can be identified as contractual freedom which includes not only the freedom to conclude contracts (positive contractual freedom)<sup>11</sup>, but

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<sup>9</sup> The Commission wrote in its 1st Annual Report on competition policy, April 1972, that competition produces *"the major stimulus to economic activity, in that it ensures for its participants the maximum possible freedom of action...it facilitates the constant adjustment of demand and offer to technical developments... it is likely to ensure the best possible use of the production factors for the maximum profit of the economy in general, and in particular in the interest of consumers"*.

<sup>10</sup> General Court, 26 October 2000, T- 41/96, *Bayer*, in *Coll.*, II, page 3383, point 180, where it is noted that *"the case law of the Court indirectly recognises the importance of protecting the undertaking's freedom when applying the rules of the Treaty concerning competition, where it expressly admits that also an undertaking in dominant position can, in certain cases, refuse to sell or to change its supply and provisioning policy without falling within the prohibition of article 86"*.

<sup>11</sup> Court of Justice, 14 February 1978, C- 27/76, *United Brands*, in *Coll.*, pages I-207, points 182-191. See also Court of Justice, 26 November 1998, C-7/97, *Bronner*, in *Coll.* 1998, I page 7791, which considers that *"the refusal by a press undertaking which holds a very large share of the daily newspaper market in a Member State and operates the only nationwide newspaper home-delivery scheme in that Member State to allow the publisher of a rival newspaper, which by reason of its small circulation is unable either alone or in cooperation with other publishers to set up and operate its own home-delivery scheme in economically reasonable conditions, to have access to that scheme for appropriate remuneration does not constitute the abuse of a dominant position within the meaning of Article 86 of the EC Treaty"*.

also the freedom not to conclude contracts (negative contractual freedom)<sup>12</sup>. Finally, it is the freedom to choose suitable measures to re-establish competition rules after the finding of the infringement by the Commission<sup>13</sup>, and the voluntary presentation of the suitable measures to bring to an end the concerns of the Commission before the finding of the infringement, but after the opening of the investigation (commitments)<sup>14</sup>.

The freedom of undertakings to act in the market (and to choose the measures needed to terminate anti-competitive behaviour) and the powers of the Commission (to protect the market)<sup>15</sup> fall within a framework that encompasses the authority/freedom

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<sup>12</sup> Advocate General Julianne Kokott, in her conclusions presented on 17 September 2009, C-441/07P, in the *Alosa* case in [www.curia.eu.int](http://www.curia.eu.int), considered that “in adopting decisions concerning competition law, the Commission must take into account the principle of contractual freedom or the freedom of the undertaking. Contractual freedom does not however imply only the freedom to conclude contracts (positive contractual freedom) but also the freedom not to conclude contracts (negative contractual freedom)”. Advocate General Jacobs, in his conclusions of 28 May 1998 in the cited *Bronner* case, point 56, expressed this concept in the following way: “The right to choose one’s own commercial partners and that of freely disposing of one’s own assets corresponds to generally accepted principles recognised in the laws of the member states, in some cases at the constitutional level. To interfere with such rights requires careful justification”.

<sup>13</sup> Sentence of the General Court of 18 September 1992, T-24/90, *Automec*, in *Coll.*, p. 2223. The Court stated: “Given that contractual freedom must remain the rule it cannot, in principle, grant the Commission, in the framework of the powers of injunction it possesses in order to put an end to the breaches at article 85 No. 1, the power to enjoin one party to establish contractual relations, given that, in general terms, the Commission has specific means to impose the termination of an infringement on an undertaking. In particular, there cannot be held to be any justification for such a restriction on freedom of contract where several remedies exist for bringing an infringement to an end. This is true of infringements of Article 85(1) arising out of the application of a distribution system. Such infringements can also be eliminated by the abandonment or amendment of the distribution system. Consequently, the Commission undoubtedly has the power to find that an infringement exists and to order the parties concerned to bring it to an end, but it is not for the Commission to impose upon the parties its own choice from among all the various potential courses of action which are in conformity with the Treaty”.

<sup>14</sup> Court of Justice, 29 June 2010, C-441/07, *Alosa Company*, in *Coll.*, 2010, p. 2600.

<sup>15</sup> M. LIBERTINI, *La tutela della libertà di scelta del consumatore e i prodotti finanziari*, in [www.agcm.it](http://www.agcm.it).

dichotomy. Acceptance, by legislation, of undertakings' freedom is counterbalanced by the Commission, by checking that the individual undertaking's behaviour does not go against public interest<sup>16</sup>.

It can be inferred, based on the aforementioned decisions, that undertakings' freedom faced the powers of the Commission in both Regulations (No 17/1962 and No 1/2003) that followed one another, both aimed at protecting competition.

These Regulations involved conferring different powers. Article 3 of Regulation No 17/1962 provided inhibitory powers, whereas Article 7 of Regulation No 1/2003 provided conforming powers. Article 9 of the same Regulation introduced the commitment procedure covering abuse of dominant position and *agreements*.

It is useful to consider firstly article 3 of Regulation No 17/1962, which is the same as interpreted by European case law. In fact, the rule established that the Commission, having ascertained the infringement, could order undertakings to bring an end to the breach of the provisions laid down in articles 101 and 102 of the Treaty. This formulation was picked up by Italian legislation. Article 15 of Law 287 of 1990, in fact, provides that, "*where, following the investigation covered by article 14, the Authority identifies infringements of articles 2 or 3, it imposes a deadline on the undertakings and entities concerned to bring the infringements to an end*".

Article 3 of the aforementioned Regulation No 17/62, which is the same as article 15 of the Italian antitrust law, can be placed in the category of the "*cease and desist orders*"<sup>17</sup>. This is whereby the Commission orders undertakings to bring the infringement it

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<sup>16</sup> These undertakings, as the doctrine indicates, (T. ASCARELLI, *Disciplina delle società per azioni e legge antimonopolistica*, in *Riv. trim. dir. proc.civ.*, 1955, p. 275) operating in the market have no guarantee of profit, which can be a bonus following a tender bid conducted with legitimate instruments but with an uncertain outcome.

<sup>17</sup> For an analysis of the "*cease and desist orders*" category see P. FATTORI, *I poteri dell'Autorità garante in materia di intese ed abusi di posizione dominante: diffide e sanzioni*, in *Riv. It. Dir. Pubbl. Com.*, 1997, p.883.

found to an end and invites them to thereafter abstain from engaging in the behaviour subject to prohibition.

Legislation chose to assign inhibitory powers to the Commission, leaving it to the undertakings to choose between the measures necessary to restrain infringements. However, the application of this rule by the Commission and its interpretation by European Judges have highlighted a conflict between authority (which includes conforming powers) and undertakings' freedom.

With regard to case law, the court of justice established, in 1974, that exercising inhibitory powers “*obviously assumes different forms in relation to the type of transgression noted and can consist in an order to adhere to certain behaviour or to provide certain services, illegally omitted, or in an order not to persist in certain behaviour or practices and not to continue with certain situations contrary to the treaty*”<sup>18</sup>. Whereas, later, the general court, in an important decision, ruled<sup>19</sup> that the commission must not impose its own decision where the parties can choose between several alternatives, provided all conform to the rules of the treaty. According to the court, the confirming power of the commission must respect undertakings' freedom to define the necessary measures for terminating the infringement in all the cases where several types of legitimate behaviour exist, amongst which the undertakings can choose<sup>20</sup>.

The Commission, with Regulation 17 in force, transformed the inhibitory powers into conforming powers, with the sole limitation of not ordering structural remedies. This is probably because it considered the interference caused by such remedies as excessive for

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<sup>18</sup> Court of Justice of 6 March 1974, joint cases 6 and 7/73, *Commercial Solvents*, in *Coll.*, 1974, p. 223.

<sup>19</sup> General Court, 18 September 1992, *Automec*, T-24/90, cit.

<sup>20</sup> P. FATTORI- M. TODINO, *La disciplina della concorrenza in Italia*, Bologna, p. 371.

the running of the undertaking<sup>21</sup>. This body, which exercises (firstly under article 3 of Regulation 17/ 1962 and then under article 7 of Regulation No 1/2003) an authoritative and unilateral power, must respect the principle of proportionality, which prevents the imposition of disproportionate corrective measures on undertakings in order to eliminate the anti-competitive effects of their behaviour.

Relevant decisions of European Courts show that, precisely by virtue of the said principle, the Commission cannot impose structural corrective measures - such as, by way of example, the obligation to transfer assets (production plants, brands, companies, production divisions) or to sell shareholdings, when there exists an equally effective behavioural remedy such as the obligation to change trade practices<sup>22</sup>.

Within such a system there was increasing awareness of the need to supplement the inhibitory, conformative and punitive instruments with corrective measures, capable of reconciling the effectiveness of the community checks on agreements<sup>23</sup> and on abuses of dominant positions with allowing the undertakings to make their own choice of suitable measures to eliminate the anti-competitive behaviour before being checked by the Commission.

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<sup>21</sup>S. AMADEO, *Decisioni della Commissione*, in *L'applicazione del diritto comunitario della Concorrenza, Commentario al regolamento n. 1/2003 del Consiglio del 16 dicembre 2002*, cit., in particular at p. 109.

<sup>22</sup> Court of Justice, 6 April 1995, C- 241/91 and C- 242/91, *Radio Telefis v. Commission*, in *Coll.*, p. 1529. The Court writes: “in the context of the application of Article 3 of Regulation No 17, the principle of proportionality means that the burdens imposed on undertakings in order to bring an infringement of competition law to an end must not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed”. The General Court of 18 September 1992 ruled in a similar way, case T-24/90, *Automec*, cit.

<sup>23</sup> See P. MENGOZZI, *Decisioni con impegni e diritto comunitario*, in *I nuovi strumenti di tutela antitrust*, cit., 1, which emphasises the importance of antitrust commitments in matters of concentration.

The preferred instruments for this purpose were the commitments, originally regulated only for concentrations and accepted by the Commission as practice for the excluding abuses. The European legislator specifically regulated concentration commitments well before Regulation No 1/2003 went into force<sup>24</sup>. By 1989 the Council had adopted Regulation No 4064/89 which, at article 8, gave the Commission the possibility of establishing, when deciding on the authorisation, conditions and obligations assumed by the parties after starting the preliminary proceedings (i.e., stage two). The possibility of presenting commitments was later broadened through Regulation No 1310/1997<sup>25</sup>, which extended the possibility of presenting commitments even during the first stage of concentrations, that is, before initiating the preliminary proceedings.

Commitments relating to concentrations are now governed by article 6, para. 2 of Regulation No 139/2004<sup>26</sup>, which provides the possibility of subordinating the decision, by which concentrations are declared compatible with the EU market, “*Conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market*”.

In cases where the problem which arises in the context of competition is easily identifiable and can be easily resolved<sup>27</sup>, these commitments, by virtue of the thirtieth recital of said Regulation, can be presented before starting proceedings. Alternatively, they

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<sup>24</sup> See R. CAIAZZO, *Antitrust, Profili giuridici*, Torino, 2007, p. 249.

<sup>25</sup> See eighth recital in the EC Council Regulation No 1310 of 1997, in GUCE L180, of 9 July 1997.

<sup>26</sup> EC Council Regulation No 139/2004, in *GUUE*, 29 January 2004, L24, p. 1.

<sup>27</sup> In this case the commitments can be presented on an informal basis, even before the notification, at the time of the notification or within 25 working days of the date of receipt of the notification by the Commission.

may be presented after the beginning of the preliminary proceedings<sup>28</sup>. In both cases, the commitments must be presented in a timely manner and suitably described in detail, specifying how the anti-competitive behaviour will be “fully” resolved.

With regard to the powers of the Commission, it is important to note that European case law has extended even further the discretion which it enjoys in the acceptance of commitments, sustaining that the said Authority has “*a wide margin of discretion in assessing the need to obtain commitments to dissipate the serious doubts raised by concentration*”<sup>29</sup>.

In fact, according to the Court, the main aim of these new protective instruments is to guarantee the competitive structure of the markets<sup>30</sup> and, in this sense, the commitments considered most suitable to eliminate anti-competitive behaviour were the structural ones, particularly burdensome for the undertakings<sup>31</sup>, but legitimate inasmuch as proposed and accepted by them.

The limit of proportionality was considered manageable by virtue of the undertaking’s consent to use any suitable means to eliminate the infringement. The introduction, of a specific reference to the proportionality principle in the Regulation on

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<sup>28</sup> In this case the undertakings must present commitments before the expiry of the period within which the Commission is required to make a pronouncement, i.e. within 90 working days of the date the proceedings were started.

<sup>29</sup> General Court, , 4 July 2006, T-177/04, *Easy Jet Airlineco.Ltd. v. Commission*, in *www.curia.eu.int*, point 128.

<sup>30</sup> Court of Justice, 25 March 1999, T-102/96, *Gencor v. Commission*, in *Coll.*, 753, point 316.

<sup>31</sup> Examples of structural commitments are cited below, all viewable on *www.eu.lex*: *Pfizer/Farmacia*, 2003 (commitment to transfer a business); *Royal Canin*, 2002 (sale of a series of domestic animal foodstuff brands); *Solvay/Montedison*, 2002 (sale of a production plant); *Ras Degussa*, 2006 (sale of a company in The Netherlands); *Haniel/Ytong*, 2010 (sale of a firm in a member state).

concentrations of 2004<sup>32</sup>, did not affect the conviction. The Commission continues to accept, and prefer, the structural remedies proposed by the undertakings. The General Court<sup>33</sup> understood the principle of proportionality as binding for the Commission, in terms of focusing its assessment of the suitability of the commitments to resolve the problems of competition only in the markets concerned (according to the Court, it is not necessary for the Commission to extend the scope of this assessment of suitability of the commitments to non-concerned markets). Thus, that it can be said that this principle does not limit the will of the party, but rather it limits the assessment of the commitment by the Commission.

In conclusion, the limit of the Commission's discretion which EU case law had identified in reference to the order to cease the infringements (unilateral power), was not applied to the commitments in the concentrations (based on a bilateral agreement between Commission and undertakings). The consent of the undertaking to terminate the anti-competitive behaviour allows disregarding the proportionality limit.

Also with regard to agreements and abuse of dominant position, it shall be noted that, well before Regulation No 1/2003 went into force, the Commission had introduced a practice which already involved acceptance of commitments in matters of excluding abuses<sup>34</sup>. The latter are different from the commitments accepted by the Commission in reference to concentrations, where an *ex ante* perspective dominates (the measures are established before effecting the operations). Commitments in matters of abuse of dominant position and agreements are aimed at terminating the anti-competitive aspects of illicit behaviour, whose effects had already affected the market, and therefore was already the subject of antitrust proceedings (the Commission is thus acting in an *ex post* perspective).

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<sup>32</sup> Recital 30.

<sup>33</sup> General Court, 4 July 2006, T-177/04, *Easy Jet Airlineco.Ltd. v. Commission*, cit.

<sup>34</sup> M. BOCCACCIO - A. SAJA, *La modernizzazione dell'antitrust. La decisione con impegni*, cit., in particular at p. 288.

The practice of also accepting *ex post* commitments has allowed two main issues. Firstly, the Commission is able to achieve the mission entrusted to it rapidly and with simple procedures. Secondly, it has allowed undertakings to contribute in identifying the measures needed to terminate the anti-competitive behaviour subject to investigation, thus avoiding the finding of the infringement and the risk of compensation actions to the benefit of competitors or consumers<sup>35</sup>.

Examples of this practice which are advantageous for both the Commission and the parties, are the commitments presented by *IBM*<sup>36</sup> and *Coca Cola*<sup>37</sup> and accepted by the Commission. In the first case the commitment consisted in the duty assumed by the company to disclose the information needed to permit contenders to compete under fair conditions. In the second case the company had decided to change the behaviour contested by the Commission and to stop including exclusivity clauses in its contracts with suppliers.

It can be immediately perceived that informally accepted commitments concerned cases of exclusivity abuse, whereas agreements restricting competition were largely left outside the commitments' scope of application, by being taken out of the "negotiation" with undertakings and subjected to sanctions. Commitments in matters of abuse of dominant position, accepted informally, did not ensure transparency and effectiveness of the action of the Commission in the following ways<sup>38</sup>. a) They did not include the participation of third parties; b) they prevented the undertaking presenting the commitments from appealing against any denial thereof; and c) they obstructed their actual implementation inasmuch as,

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<sup>35</sup> S. AMADEO, *Decisioni della Commissione*, in *L'applicazione del diritto comunitario della Concorrenza, Commentario al regolamento n. 1/2003 del Consiglio del 16 dicembre 2002*, cit., in particular at p. 124.

<sup>36</sup> See EC Bulletin, 1984, n. 10, as well as *XIV Report on Competition Policy* (Brussels, 1986), paragraphs 94-95.

<sup>37</sup> The informally concluded commitment was noted by the Commission in its *XIX Report on Competition Policy* (Brussels, 65).

<sup>38</sup> S. AMADEO, *Decisioni della Commissione*, cit., p. 125.

in the absence of a specific regulatory provision enforcing execution, the Commission could not impose pecuniary sanctions. These limits were remedied by the relevant provisions contained in article 9, inserted in Regulation No 1/2003, through which a decentralised antitrust protection system was set out<sup>39</sup>.

The introduction of Regulation No 1/2003 entailed a change in the balance of powers attributed to the Commission for the protection of competition. It can be stated that after the introduction of this Regulation the legislative limitation to undertakings' freedom of choosing the measures to re-establish competition (following a check by the Commission) was offset by the possibility as set out in legislation, of offering commitments also covering agreements and abuse of dominant position.

Article 7 of Regulation No 1/2003, in fact, permits the Commission<sup>40</sup> not only to order the termination of infringement, but also to impose on undertakings "*the adoption of all the structural remedies proportionate to the infringement and necessary to effectively*

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<sup>39</sup> The decentralisation of the application of articles 81 and 82, introduced by Regulation No 1/2003, was announced in 1999 in the *White Paper on modernisation of the application of articles 81 and 82 TCE*. This reform, with regard to Regulation 17/62, envisaged the elimination of the exclusive competence of the Commission for the assignment of exemptions under article 81, para. 3 TCE (article 9 para 1 of Reg. 17/62) with its extension also to the Authority and to national judges. On the basis of the White Paper, in December 2000, the Commission issued a regulation proposal under article 83 TCE (Proposal for a Council Regulation concerning application to undertakings of the competition rules covered in articles 81 and 82 of the Treaty bearing a change to regulations 1017/68, 2988/74, 4056/86, and 3975/87 in GUCE 2000, C-365). See A. TIZZANO, *Appunti sulla cooperazione internazionale in tema di concorrenza*, cit., 695, which remarks how the centralised protection system, set out in Regulation 17, gave way to an extraordinary expansion of the role of the Commission.

<sup>40</sup> This is only to the Commission and not to States because, by virtue of article 5 of Regulation No 1 /2003, the national authorities "*acting ex officio or following a report, can adopt the following decisions: - order the termination of an infringement; - impose precautionary measures; - accept commitments; - inflict fines, late payment penalties or any other sanction set out in national law*". The power, attributed by article 5 to the national authorities, appears to be different from that set out for the Commission alone by article 7 of EC Regulation 1 of 2003. For further details refer to Chapter II, paragraph 1.3.

*bring the infringement to an end*". Establishing, however, that such structural remedies "can only be imposed where there is no equally effective behavioural remedy or where an equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy". This last detail constitutes an explanation of the observance of the principle of proportionality, which had already been affirmed by the case law of the Court of Justice and by whose virtue "the burden imposed on undertakings aimed to bring the infringement of competition rules to an end must not exceed the limits of what is appropriate and necessary to achieve the established goal, that is to say, restoring the situation to its compliance with the law, with reference to the infringed rules at issue"<sup>41</sup>.

Thus, while observing the principle of proportionality, the Commission can identify structural measures that impact the structure and the organisation of the undertaking, and it can also inflict fines<sup>42</sup>.

Undertakings' freedom, which in this case means freedom to choose appropriate measures to eliminate the anti-competitive aspects of certain behaviour, and which the new

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<sup>41</sup> Court of Justice, 6 April 1995, C - 241/91, *Radio Telefis Eireann*, in *Riv. Dir. Ind.*, 1996, p. 115.

<sup>42</sup> Article 23 of this regulation sets out that "the Commission can inflict fines on undertakings which infringe the instructions contained in articles 81 and 82 of the Treaty". The power to fine remained, in the new system of responsibilities, an important instrument for the Commission. In fact the latter is competent to deal with the most serious cases of infringement of competition, removing these from the authority of the States. See: The Communication of the Commission on cooperation within the network of Guarantor Authorities for competition, 2004/C 101/3 in *GUCE* 101 of 27 April 2004. In the fourteenth recital it is held that "the Commission is in the most ideal position where one or more agreements or practices, including network agreements or similar practices, impact on competition in more than three member states (trans-border markets which include more than three member states or several national markets)". At the fifteenth recital it is added that "the Commission is in a particularly suitable position to deal with cases which show a close relationship with other community provisions for the application of which the Commission has exclusive competence or which can be better applied by the Commission; this also applies to cases in which the protection of community interest requires the adoption of a decision by the Commission to align community competition policy with novel competition problems or to ensure effective observance of competition rules".

formulation of article 7 of Regulation No 1/2003 (that transformed inhibitory powers into conformational powers) has weakened, re-emerges in the possibility, set out in article 9 of the same Regulation, of offering commitments in matters of agreements and abuse of dominant position.

In the new framework outlined by Regulation 1/2003, the commitments appear indeed as sound instruments for antitrust protection, where deemed suitable for removing anti-competitive concerns. But their application has generated two different problems. On the one hand the application of the proportionality principle to commitments has proved controversial, and on the other hand the limits to their application appeared hard to identify.

### **3. VOLUNTARY NATURE OF COMMITMENTS AND REDUCED APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY IN THE COURT OF JUSTICE DECISION IN THE ALROSA/DE BEERS CASE**

The first problem that arose from the institution of the commitments concerned the application of the proportionality principle. The principle understood as the choice of the easiest means. It led to two well-known and contrasting decisions, one by the General Court<sup>43</sup> and the other by the Court of Justice. This certainly makes the *Alrosa/De Beers*<sup>44</sup> relevant and well-worth of attention.

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<sup>43</sup> See General Court, 11 July 2007, T-170/06, *Alrosa Company Ltd v. Commission*, in [www.curia.eu.int](http://www.curia.eu.int).

<sup>44</sup> Court of Justice, 29 June 2010, C- 441/07P, *Alrosa Company*, cit.

In order to understand the relevant topics emerging from the decision of the General Court and from the judgment of the Court of Justice, we must start with the facts that led to these decisions.

The proceedings started when the two companies De Beers and Alrosa Company Ltd., both prominent leaders in the world market for the production and supply of uncut diamonds, notified the Commission of the terms of a trade agreement they had signed, where *Alrosa* undertook to sell its production to De Beers for the next five years.

The Commission, considering the agreement potentially anti-competitive, served a notice with the charges to *Alrosa* and De Beers, where it stated that the agreement as notified was potentially in breach of article 101 No 1 of the EC Treaty. In addition, the Commission served a separate notice to De Beers for alleged abuse of dominant position, forbidden under article 102 of the EC Treaty.

The fact that the Commission served two separate notices, one to De Beers and the other to both *Alrosa* and De Beers that had signed the agreement, enabled the following. First, the two companies, within the proceedings for agreements could, jointly submit to the Commission a commitment aimed at progressively reducing the sales of diamonds. Secondly, De Beers, within the alleged abuse of dominant position proceedings, could separately present its own commitments, after the Commission had considered the joint commitments inappropriate for terminating the anti-competitive behaviour subject to the investigation.

With regard firstly to the joint commitment of De Beers and *Alrosa*, the Commission rejected such commitment after having assessed the remarks of the twenty-one concerned “third parties” that took part in the market test.

Following the rejection, De Beers decided to present new individual more cogent commitments. These are as compared to the first commitment presented with *Alrosa*. The Commission adopted a decision that made these commitments binding and thereupon closed the proceedings.

Considering itself directly involved and harmed by this ruling, *Alrosa* challenged this decision before the General Court. The appeal was on the grounds of breach of the principle of proportionality in the application of antitrust legislation, given that De Beers could have proposed less restrictive commitments to the Commission, compared to those offered and accepted.

The General Court and the Court of Justice took different and diametrically opposed positions.

According to the General Court, the limitations arising from observance of proportionality also apply to the commitments. In fact, the objective of article 7 is the same as article 9 and coincides with the main objective of Regulation No 1/2003, which guarantees effective application of the competition rules set out in the Treaty. The Commission disposes, for this purpose, of a margin of discretionary judgement in choosing to make the commitments offered by the undertakings concerned binding, and to adopt a decision pursuant to article 9, or to follow the path set out in article 7 of the same regulation, which requires the finding of an infringement. However, the existence of this margin of discretion concerning the choice of which path to follow does not exempt the Commission from the obligation to observe the proportionality principle when it decides to make commitments offered pursuant to article 9 of Regulation No 1/2003 binding.

For the General Court, a check on the proportionality of a measure is thus an objective check, as the suitability and necessity of the decision challenged must be assessed in comparison with the aim pursued by the Institution. For decisions adopted in application of article 7 of Regulation No 1/2003, the aim is to bring the infringement found to an end. For decisions adopted in application of article 9 of said Regulation, the aim is to meet the concerns expressed by the Commission in the framework of the preliminary assessment.

The Court of Justice, on the contrary, reached a conclusion of “attenuated” application (with the detail which will be given shortly) of the principle of proportionality on the basis of two arguments. Firstly, the voluntary nature of their presentation and secondly the peculiarity of the proceedings for commitments, “*aimed to ensure that the*

*competition rules laid down in the EC Treaty are applied effectively, by means of the adoption of decisions making commitments, proposed by the parties and considered appropriate by the Commission, binding in order to provide a more rapid solution to the competition problems identified by the Commission, instead of proceeding by making a formal finding of an infringement. More specifically, Article 9 of the regulation is based on considerations of procedural economy, and enables undertakings to participate fully in the procedure, by putting forward the solutions which appear to them to be the most appropriate and capable of addressing the Commission's concerns”<sup>45</sup>.*

It is worth taking separately into account the two aforesaid arguments, which gave grounds to the decision of the Court of Justice.

With regard to the first argument, it seems that the Court of Justice, and perhaps even more the Advocate General<sup>46</sup>, in her conclusions, have well emphasised the freedom of the undertakings, in the sense of contractual freedom.

The conclusions of the Advocate General make clear a willingness to protect negative contractual freedom, i.e. the freedom to break contracts previously stipulated, possibly exceeding concessions made to the Commission. These arguments have been taken up by the Court, in the part of the decision in which it is stated that “*undertakings which offer commitments on the basis of Article 9 of Regulation No 1/2003 consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the regulation after a thorough*

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<sup>45</sup> Point 35 of the decision of the Court of Justice.

<sup>46</sup> Conclusions of Advocate General Juliane Kokott, presented on 17 September 2009, C-441/07 P, point 225: “*contractual freedom is part of the general principles of community law. It constitutes the corollary of the freedom of action of persons. It is also firmly bound to the freedom of undertakings protected at constitutional level. In a Community one is required to observe the principle of an open market in free competition; guaranteeing contractual freedom is indispensable. Also the case law of the Court acknowledges that economic operators are entitled to contractual freedom*”.

*examination. On the other hand, the closure of the infringement proceedings brought against those undertakings allows them to avoid a finding of an infringement of competition law and a possible fine*<sup>47</sup>.

The principle of proportionality, understood as a choice of the mildest means, which limits authoritative and unilateral powers (and is necessarily applied in antitrust proceedings which end with the finding), does not apply to commitment procedures (based, instead, on a consensual logic). Within such proceedings the proportionality principle must be understood in the sense of the suitability of the commitment to resolve the anti-competitive concerns. Protection of public interest cannot be sacrificed by the offer of commitments.

In other words, given that the concern of the Commission must be to check that the commitments are suitable to bring the contested infringements to an end, the proportionality principle consists in the check on the suitability of the commitment to remove the anti-competitive concerns which gave rise to the proceedings<sup>48</sup>.

In addition, according to the Court of Justice, the framework of the commitment procedure, “*created in order to provide a more rapid solution to competition problems*”<sup>49</sup>, impedes the Commission (as well as the national Authorities) from seeking less restrictive solutions for the interests of the trade partners of the undertaking offering the commitments.

In truth, the Court specified that the Commission must take into consideration the less restrictive commitments as concerns third parties (linked to the undertaking by

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<sup>47</sup> Point 48 of the decision of the Court of Justice.

<sup>48</sup> G. FONDERICO, *Il caso “Alrosa” e la proporzionalità delle decisione con impegni*, cit., p. 250. The writer sustains that in most cases there isn’t a problem of necessity but of suitability or relevance of the measure with regard to the unlawful act charged.

<sup>49</sup> Point 35 of the decision of the Court of Justice.

contractual relationships), where these commitments are offered by the parties during the proceedings.

In the present case, the Commission had fulfilled this check, carefully assessing the less restrictive commitment, presented jointly by the two companies but opposed by the twenty-one opposing third-party undertakings during the market test, because it considered inappropriate for resolving the anti-competitive concerns set out in the preliminary assessment.

The Court stated: *“Since the Commission is not required itself to seek out less onerous or more moderate solutions than the commitments offered to it, as was observed in paragraphs 40 and 41 above, its only obligation in the present case in relation to the proportionality of the commitments was to ascertain whether the joint commitments offered in the proceedings initiated under Article 81 EC were sufficient to address the concerns it had identified in the proceedings initiated under Article 82 EC. As the Advocate General observes in point 80 et seq. of her Opinion, the Commission concluded, after taking note of the results of the market test it had conducted, that the joint commitments were not appropriate for resolving the competition problems it had identified”*<sup>50</sup>.

The latter clarification is especially important. The Court of Justice does not limit the ability of the Commission to judge all the commitments offered by the parties and to choose, amongst them, the measure which appears the least restrictive in the context of the undertakings, but on condition that such measures are suitable to resolve the competition concerns shown in the preliminary deed. Therefore, proportionality is applied in the choice between the various commitments offered by the undertakings and it is not negated by the Court, but rather “attenuated”. On the basis of this observation, recent doctrine has

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<sup>50</sup> Point 61 of the decision.

established the “salami tactics”<sup>51</sup>. The parties, rather than offering the Commission only two commitments, should formulate a wide series of alternatives, amongst which the Commission could choose the least restrictive. In truth, the same doctrine which proposes this theory also points out its limits<sup>52</sup>. The presentation of a wide range of commitments would increase the discretionary capabilities of the Commission, would restrict the range of challenges of the undertakings and would not resolve the “deficit” in the protection of the partner of the undertaking which offered commitments.

With regard to the latter’s position, one cannot fail to note that the decision of the Commission to make the commitments binding does not result in the contract automatically becoming null and void and “*does not mean that the other undertakings are deprived of the possibility of protecting the rights they may have in connection with their relations with that undertaking*”<sup>53</sup>.

In conclusion, the Commission, by accepting the commitments and making them binding, is acting as administrative authority that protects competition; it does not relinquish its role as Authority. It undertakes to carry out an accurate test of proportionality on the suitability of the commitment (offered by the undertakings and the expression of their widest possible autonomy, which shall be acknowledged, above all in terms of antitrust) to terminate the anti-competitive behaviour, to the advantage of all the third parties who are present in the market (competitors, new businesses, consumers). The decision of the Commission does not have direct repercussions on the downstream contract and cannot relieve the undertaking – subject to proceedings – from assuming the civil

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<sup>51</sup> F. WAGNER-VON PAPP, *Best and even better practices in commitment procedures after Alrosa: the dangers of abandoning the “struggle for competition law”*, cit., page 937 et seq.

<sup>52</sup> F. WAGNER-VON PAPP, *Best and even better practices in commitment procedures after Alrosa: the dangers of abandoning the “struggle for competition law”*, cit., page 937 et seq.

<sup>53</sup> Point 49 of the decision.

liability linked to contractual non-fulfilment. The decision of the Court, in my opinion, constitutes the point of arrival in the development of antitrust protection, which has attempted a difficult balancing between the freedom of undertakings to act (and even react after the start of proceedings) and the antitrust function intended as “*protection of public interest, undertakings and consumers*”.

The commitments are aligned, without replacing them, with the powers originally attributed to the Commission. The undertakings can decide to propose the remedies needed to terminate the presumed anti-competitive behaviour to the Commission, with the sole insuperable limit of having to choose the remedy suitable for eliminating the infringement (and suitability is one of the components of proportionality). All this suggests a consensual reconstruction of the commitments. The undertakings can decide for themselves the extent of offering any measures which they consider necessary to terminate the anti-competitive behaviour subject to investigation. This is done without ending the function of the Commission who are tasked with rigorously checking the commitments’ suitability for removing the anti-competitive behaviour subject to investigation. Both the Commission and the undertakings work “side by side”. The Commission can suggest suitable amendments for acceptance of the commitments to the undertakings.

#### **4. THE NATURE OF COMMITMENTS: LEGAL RULING OR CONTRACT? THE AGREEMENTS PURSUANT TO ARTICLE 11 OF LAW 241/1990 IN THE ITALIAN LEGAL SYSTEM**

The thesis proposed by the Court of Justice, is worth repeating. It leverages the voluntary nature of the presentation of the commitments, and seems to tend towards a consensual reconstruction of the institution, standing halfway between public-law and

contract-law paradigms. As this does not exactly respond to the characteristics of one or the other law, it has been seen as a sort of “hybrid”<sup>54</sup>.

In truth, Italian statute law could help in this dogmatic uncertainty of the institution, by recalling the framework of the commitments within the more general scenario of the agreements, mentioned in article 11 of Law No 241/1990<sup>55</sup>.

As a matter of fact, the commitments can be hardly framed in the category of private-law contracts, not because of the power differences between the Commission and

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<sup>54</sup> F. WAGNER-VON PAPP, *Best and even better practices in commitment procedures after Alrosa: the dangers of abandoning the “struggle for competition law”*, cit., p. 933.

<sup>55</sup> The rule states: “1. In acceptance of the observations and proposals presented pursuant to article 10, the administration can conclude, without prejudice to third party rights and in any case in pursuit of the public interest, agreements with the interested parties in order to determine the discretionary content of the final ruling, or in replacement thereof. 1.bis. In order to encourage the conclusion of the agreements covered at paragraph 1, the person heading the proceedings can prepare a calendar of meetings to which he may invite, separately or at the same time, the recipient of the ruling and any opposing parties. 2. The agreements covered in this article must be stipulated, on pain of nullity, in a written deed, unless the law provides otherwise. To these are applied, where not otherwise provided, the principles of the civil code in matters of obligations and contracts insofar compatible. 3. The agreements replacing the provisions are subject to the same controls set out for the latter. 4. For reasons of public interest the administration withdraws unilaterally from the agreement, except for the obligation to deal with the settlement of compensation in relation to any prejudices occurring to the detriment of the private interest. 4-bis. As a guarantee of the impartiality and the proper performance of the administrative action in all cases in which a public administration concludes agreements in the cases set out at paragraph 1, the stipulation of the agreement is preceded by a decision of the body which will be competent for the adoption of the ruling”. In favour of placing this case under article 14ter in that of the agreements, governed in general terms by article 11 1. No 241/1990, see V. CERULLI IRELLI, “Consenso” e “Autorità” negli atti delle Autorità preposte alla tutela della concorrenza” in *20 anni di Antitrust*, cit., p. 325; L. DE LUCIA - M. MINERVINI, *Le decisioni con impegni*, cit., p. 525; M. LIBERTINI, *Le decisioni “patteggiate” nei procedimenti per illeciti antitrust*, cit., p. 283 and A. POLICE, *Tutela della concorrenza e pubblici poteri*, Torino, 2008, p. 173; A. SCOGNAMIGLIO, *Decisioni con impegni e tutela civile dei terzi*, cit., p. 503.

the undertakings<sup>56</sup>, but rather because of the different role which the Authority fulfils.

The latter, in deciding over the acceptance or denial of the commitments, does not question its own judicial sphere of action, but rather acts within its public interest duty directly granted by law. It acts as an “authority” that exercises a special administrative “multi-regulation” power over other parties’ judicial sphere without acting within its own sphere of private autonomy<sup>57</sup>.

In other words, the binding aim of pursuing public interest, which governs the formation of the commitment, precludes us from considering it as a mere private-law contract<sup>58</sup>.

After all, sub-commitment procedures are strictly dependent on and linked to the ordinary finding proceedings. Offering of commitments is part of the ordinary proceedings<sup>59</sup>. This tight dependency supports the thesis of exercising administrative powers also in commitment procedures. In fact, while it is beyond doubt that the Antitrust body exercises, at the start of the antitrust proceedings, the function of market protection through exercising powers which distinguish it as an authority, similarly, this function is

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<sup>56</sup> F. WAGNER-VON PAPP, *Best and even better practices in commitment procedures after Alrosa: the dangers of abandoning the “struggle for competition law”*, cit., p. 943.

<sup>57</sup> I wish to refer to the most accurate remarks in C. LEONE, *Gli impegni nei procedimenti antitrust*, cit., page 149 et seq.

<sup>58</sup> G. GRECO, *Accordi amministrativi tra provvedimento e contratto*, Torino, 2003, pages 118-119, points out that the reiterated binding aim of the pursuit of public interest which governs the formation of the agreement constitutes the focal point of the entire institution. The author is critical of the doctrine and case law which consider that the binding aim also affects the public administration’s private law cases; he also opposes this thesis by holding that the function of the effect of private law is either a merely superficial declaration which does not constitute a real limit, or it is hugely different from the function of administrative activity.

<sup>59</sup> C. LEONE, *Gli impegni nei procedimenti antitrust*, cit., p. 105 et seq.

also necessarily exercised within the sub-proceedings, which start with a party's petition. This is all the more if one considers the interruptive effect which the first can cause on the second.

These arguments impose a publicistic frame to the present case which, therefore, cannot avoid the alternative between unilateral rulings and administrative agreements. Indeed, the answer largely depends on the nature of the proposed commitment, as advanced by the undertaking and accepted by the Authority. It is a question of establishing whether this proposal constitutes a mere assumption of a manifestation of will entirely ascribable to the Authority, or if the proposal is meant to "conform" this manifestation of will, contributing to its formation.

But when this occurs it is because the unilateral ruling widens the judicial range of the petitioner and conforms to a content typified by the ruling and not strictly limited to the type of proposal advanced. In the present case the effects are restrictive regarding the recipient, so that seen as a ruling we must think of an order (whether a command or a prohibition), whose content is not legally typified, outside the function being performed (the commitments must be "*such as to bring to an end the anti-competitive behaviour subject to investigation*").

But this is not how the ruling frames the present case. It is not irrelevant that article 14 *ter* links this function to the commitments presented rather than to the act of the Authority. The said Authority is called upon not to impose performance "*so as to bring to an end competitive behaviour*", but rather to assess "*the suitability of the commitments*" and to "*make them binding for the undertakings*".

So, these commitments are not, like other cases, beyond the mandatory content of an act, after all still unilateral, but they conform the possible content of the Authority's manifestation of will, as always happens when wills meet and proposals advanced by other parties are accepted. In other words the will of the private entity does not remain outside the function, but becomes part of the structure of a decision that certainly parallels the agreement concluded between the Antitrust and the undertaking which favours

“*cooperation rather than competition*”<sup>60</sup>. The Antitrust upholds the undertaking’s proposal, thus supporting relationships based on agreed upon actions rather than unilateral decisions.

The private entity’s will is thus essential and becomes part of this preceptive case’s structure, so that it cannot be reduced to the role of a mere and inert supposition of an act of will which, by itself, constitutes the source of the effects produced.

Legislation does not say that the Authority can close the proceedings in advance during the preliminary investigation, imposing actions that bring the anti-competitive behaviour under investigation to an end. This task could not be envisioned by legislation, because this would have meant giving the Authority (*inter alia* based on summary proceedings) unlimited powers.

Should this be a unilateral ruling, it would have an atypical content, not even attributable to the power of issuing a warning (which follows the finding of the infringement), given that article 15 of the law circumscribes this power to an order to “*bring the infringements to an end*”. Instead, the commitments’ contents can be quite diverse and “*can bring the anti-competitive behaviour to an end*” with a wide range of interventions and obligations, which are not at all limited to the “*termination of the infringements*”.

But this “*quid pluris*” can only arise from the participation and the intended content of the undertaking subject to the proceedings.

The proposal of commitment in fact “fills” the power of the Authority with content and places it beyond any criticism of unconstitutionality, because of its atypical nature, aggravated by the lack of any finding of infringement. Whereas the “unilateral ruling”

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<sup>60</sup> G. NAPOLITANO, *Servizi pubblici, diritto della concorrenza e funzioni dell’Autorità garante*, in *20 anni di Antitrust*, cit., p. 773.

would heavily impact on the judicial/economic area of other parties without any substantive supposition justifying it.

In fact, if one excludes each intended contribution of the undertaking from the circumstance constituting the limit, what would result is a punitive act, issued in a context where all the unfailing guarantees also required by the European Court of Human Rights<sup>61</sup> would be missing. This would actually prevent such a unilateral act from even legitimately coming to life. Instead, where the undertakings' contribution is valued, and where it commits to certain virtuous deeds, also the content of the obligations, as formally imposed by the Authority, assumes a different meaning. This framework of relationships is actually quite beneficial to the undertaking, because it is likely to cause less harm than the sanction.

Such outcome is typical of a process of formation of the source-act based on the *in idem placitum consensus*, that is, on the agreement of the parties rather than on the unilateral power of only one of them.

The “commitment”, even in ordinary language, means an offer to provide burdensome services. Where these allow, if accepted, achieve an advantageous position, or avoid more taxing consequences. The decision of the Authority to make these commitments “binding” has the typical function (even if not the judicial garb)<sup>62</sup> of acceptance of proposal, which gives rise to the joining of intentions.

We are therefore faced with a case which, considered globally, can only be placed in the context of the administrative agreements pursuant to article 11 of Law 241/90.

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<sup>61</sup> European Court, 8 June 1976, *Engel v. The Netherlands and the European Court*, 21 February 1984, *Ozturk v. Germany*, in *Riv. It., dir. Proc. Pen.*, 1985, 894; European Court, 23 November 2006, *Jussila v. Finland*, in *Riv. Dir. Trib.*, 2007, p. 34. It emerges from this case that certain administrative sanctions can be considered criminal sanctions and consequently the sanctions proceedings must be observant of the many corollaries comprised in the principle of legality.

<sup>62</sup> See *infra* paragraph 5.

Whereas a unilateral and governing arrangement based on the Authority's decision appears in conflict with the role of the "commitments" presented by the undertaking, and with the aforesaid function of proposal of a shared relationship framework.

In addition, and for another salient reason, the commitment cannot be a unilateral act. All unilateral acts, on ex parte motion, do not exclude, even in the case of acceptance, that the ruling may be even just partly distinct from the motion itself. This occurs particularly where the case in question is not entirely constrained under applicable legislation: the power to at least introduce incidental elements (conditions, terms, tasks) in the public interest, without thereby altering the (wider-ranging) measure claimed, still stands<sup>63</sup>.

The Authority is precluded from this. In fact, notwithstanding that its power is anything but prescriptively outlined in a binding way, the Authority is not allowed, in the case of acceptance, to distance itself from the proposal (or better from the latest proposal, after the intense negotiations referred to in the preceding chapter). The discretion of the antitrust authority ceases when it meets the solid barrier of the undertakings' freedom to decide the content of the commitment.

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<sup>63</sup> See the recent T.A.R. della CAMPANIA, Sect. II, 2 April 2009, No 1277, in *Foro amm.*, 2009, p. 1201, which stated "the constant doctrinal orientation on this point shows that such clauses (referred to the discretion of the administration) can be imposed at the discretion of the administrative authority, provided this does not alter the nature and the typical function of the act and does not harm the legal positions of the recipients, further clarifying that no incidental, impossible and unlawful elements are admitted which will be considered as not imposed. It is also noted that, these being clauses expressing administrative discretion, they are not permitted in a case where no discretion is given to the administrative authority in the matter [quid]": Consiglio di Stato, Sect. IV, 23 January 1984 No. 23 in Consiglio di Stato, 1984, p. 10: "the addition of accession clauses or incidental elements (this also includes the condition) to the administrative deed is still possible every time this is not forbidden by law or it appears incompatible with the nature and characteristics of the ruling".

The power of the antitrust authority to make only the commitments proposed by the undertakings binding, without any chance of altering the content, has been upheld by the Consiglio di Stato<sup>64</sup>.

This power is thus characterised by a precise and negative limit. The Authority cannot make other commitments, other than those offered by the party, binding, as there with it would betray the undertaking's intent, clearly expressed.

Again, this is typical of an agreement and not of a unilateral act, because only the agreement (but not the unilateral act) stems from the wishes of both parties and the perfect coincidence of their aims. So that neither of the two, not even a Public Authority, can move away from the proposal, after acknowledging that it can and must accept it<sup>65</sup>.

This confirms that the institution stands in the category of agreements pursuant to article 1 of Law 241/ 1990. With the clarification, however, that this is still a special case, in that it presents some derogating connotations.

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<sup>64</sup> Consiglio di Stato sect. VI, 19 November 2009, n. 7307, cit. The Consiglio di Stato maintains that *“the imposition of obligations on the undertaking postulates that the commitments are exactly those which the undertaking has proposed, as the Authority cannot add other obligations besides what the undertaking declared being ready to accept. In other words, the administration exercises a discretionary power in the assessment of the proposed commitments, but where it considers that these commitments are suitable for terminating the competitive behaviour that caused the finding procedure, it shall stop the proceedings and make the commitments binding without the possibility of supplementing what the undertaking previously envisioned and agreed upon. The Authority has the power to assess the commitments proposed as satisfactory or unsatisfactory for the purposes of competition and market protection, as institutionally appointed, but if it assesses the commitments as satisfactory, it stops the proceedings and makes these commitments, but no others, binding, whereas in the opposite case it pursues the proceedings aimed at finding the infringement”*.

<sup>65</sup> Please refer to what was recently declared by the TAR della Toscana, sect. II, 30 December 2011, n. 2077 in *www.giustamm*, which, precisely because of the presence of an administrative agreement, decided to forbid a unilateral amendment to the contractual riders.

## 5. NECESSARY LIMITS OF APPLICATION OF THE INSTITUTION

At this point we need to mention the limits of application of the institution, as can be acknowledged at a national level. These limits have not been systemically enunciated in recent Commission interventions<sup>66</sup>. In fact, European law has set out (with the thirteenth recital of Regulation No 1/2003) a single, primary, limit to the application of the institution. Hard-core cartels that is to say arrangements, between several independent producers of certain goods and services, aimed at establishing measures tending to limit competition in their market, by undertaking to fix pricing or share the markets between themselves.

The interpretational memorandum of article 9 of Regulation No 1/2003, and the examination, in concrete terms, of the cases where the Commission has accepted commitments, confirm that the limit to the acceptance of the commitments concerns hard-core restrictions.

But this limit does not appear sufficient to ensure legal certainty, which appears undermined by the use of the commitments instrument when novel legal issues arise. In fact, the commitment procedure impedes the Commission from finding the infringement and the undertakings from using this assessment to understand the effective anti-competitive reach of the behaviour.

The doctrine<sup>67</sup>, specifically with references to cases involving novel legal issues, has cast light on *“the main criticism against the hands-off approach of the ECJ in Alrosa is that the severely limited judicial review of commitment decisions may result in a vicious*

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<sup>66</sup>F. WAGNER-VON PAPP, *Best and even better practices in commitment procedures after Alrosa: the dangers of abandoning the “struggle for competition law”*, cit., 929.

<sup>67</sup>F. WAGNER-VON PAPP, *Best and even better practices in commitment procedures after Arosa: the dangers of abandoning the “struggle for competition law”*, cit., p. 929.

*circle: legal uncertainty about outcomes in the infringement procedure makes commitment decisions attractive for undertakings. The resulting decrease in the number of infringement decisions breeds further legal uncertainty about what the law demands. This results in an even greater demand for commitment decisions and accordingly fewer infringement decisions. Lacking authoritative statements of the law, undertakings look to previous commitment decisions and non-binding guidelines to estimate the threat points in the bargaining process. This reliance on “quasi case law” increases the Commission’s discretion in future negotiations. The Commission, in turn, accommodates the increased demand for commitment decisions so as to profit from the increased discretion it enjoys, for example in framing proactive remedies”.*

So, neither in the *Best Practices for the conduct of proceeding concerning Arts. 101 and 102 TFUE*<sup>68</sup>, nor in the *Antitrust Manual of Procedures* of March 2012<sup>69</sup>, does one find limitations of some sort, which instead emerge in the most recent Italian case law.

In Italian law the proceedings which lead to the acceptance or rejection of the commitments presented by the parties highlight the importance of the will of the undertakings. It is through these commitments, that undertakings renounce defending themselves in the ordinary finding proceedings and submit the measures (shaped during negotiation) aimed at solving the anti-competitive circumstances to the judgement of the Authority.

Similarly, the Authority’s assessment of the suitability of the commitment to solve the anti-competitive concerns subject to the investigation also occupies a central position. This does not remove the role of the Authority, called upon to carry out its core mission of

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<sup>68</sup> Commission Notice of Best Practices for the conduct of proceeding concerning Arts. 101 and 102 TFUE, O.J. 2011, C308/6.

<sup>69</sup> Commission, *Antitrust Manual of Procedures* of March 2012.

protecting the market. As case law<sup>70</sup> and doctrine<sup>71</sup> have both recorded, the Authority therefore conducts a careful examination of the commitments proposed by the private entity from two different angles. Firstly, it carries out an assessment of technical suitability of the obligations assumed for resolving the problem identified in the preliminary assessment. Secondly, it evaluates the advisability of resolving the specific case through acceptance of commitments, taking into consideration any need to opt for an infringement decision.

In fact, administrative case law<sup>72</sup> has remarked, with regard to incorrect commercial practices, that “*the Authority therefore is called upon to assess – in exercising highly discretionary powers – not only the suitability of the corrective measures proposed for bringing the illegal behaviour to an end, but also the existence of an important public interest in the finding of any infringement*”.

These very arguments can be deemed as valid also for commitments in matters of abuse of dominant position.

From the rulings of the Authority and later decisions of administrative judges, it is possible to understand the criteria the Authority adopted regarding its discretion in accepting or rejecting the commitments. This provides a track to the commentator.

The key public interest, referred to in the decision, can be identified as a) in the need to establish principles covering an unusual case, or a changed market arrangement<sup>73</sup>

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<sup>70</sup> T.A.R. del LAZIO, Sect. I, 19 May 2010, n. 12281 in *giustizia-amministrativa.it*; T.A.R. del LAZIO, Sect. I, 18 January 2011, n. 396, in *www.giustizia-amministrativa.it*.

<sup>71</sup> A. CATRICALA - A. LALLI, *L'Antitrust in Italia. Il nuovo ordinamento*, Milano, 2010, p.32.

<sup>72</sup> T.A.R. del LAZIO, Sect. I, 18 January 2011, n. 396, in *www.giustizia-amministrativa.it*.

<sup>73</sup> After all, also in the American system, although with some changes already described, it was noted (G. FAELLA *Decisions of acceptance of the commitments, consent orders and consent decrees: antitrust and the limits of power*, cit. 1) that “*the choice regarding the negotiated closure of the proceedings falls to the FTC, which can*

and b) in the existence of an interest on the part of the Authority to impose a fine (having a deterrent and warning function for market operators).

In the first place, the closure of the commitment procedure precludes the finding of anti-competitive circumstances, so that it is evident that faced with circumstances never before taken into consideration by the Authority, or changes in the market situation, it is appropriate to reject the commitment offered by the party and to continue with the ordinary finding proceedings.

In the second place, with regard to the limits of discretion in more serious cases, where a fine serves as a warning, it appears that since its initial decisions in this matter (in particular the *Producers of marine paints* ruling<sup>74</sup>, whose argumentation was later fully upheld by the Consiglio di Stato)<sup>75</sup> the AGCM was inclined to consider that decisions making commitments cannot be adopted in relation to horizontal cartels vulnerable to sanctions.

The reason for this exclusion, according to the Authority, is identified in the need not to impede the effectiveness of the leniency programmes. These are conceived as the right instruments for bringing out and finding these horizontal agreements and for combatting them. Above all, however, they are to observe the canons of European case law, which has been sustaining for many years that it was impossible for the Commission to accept commitments covering secret horizontal cartels.

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*decide to pursue the investigations notwithstanding the offer of adequate corrective measures, where it considers it preferable to reach a court solution for reasons of public interest (including for example the need to clarify the interpretation of the antitrust laws in a doubtful or novel case)".*

<sup>74</sup> AGCM, Ruling 16151 of 15 November 2006, in [www.agcm.it](http://www.agcm.it).

<sup>75</sup> Consiglio di Stato, Sect. VI, 29 December 2007, n. 14157, in [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it).

Therefore, in its decision of 2 March 2009, *Producers of wooden chipboard panels*<sup>76</sup>, the Consiglio di Stato had a chance to further confirm the conclusions which had been reached by European case law. In particular, the it judged that, in the light of the principles affirmed at European level “*given that the national Authority is required to proceed with the same standards as the parameters set out in the European context, where the said Authority is considering imposing a financial administrative sanction in consideration of the type and scope of the agreements it can correctly reject the commitments, without being required to observe further motivating obligations*”.

In this context and in the judgement of the Consiglio di Stato, the reference in the ruling to the parameter of the gravity of the *agreement* is “*by itself, only adequate to justify the rejection of the commitments*” inasmuch as “*acceptance of the commitments is not advised in cases of agreements which appear, at the time when the decision is to be taken, of significant gravity (so-called hard-core infringements)*”.

Also the TAR del Lazio, in its decision of 2 December 2009, No. 12319 regarding the case of the price list for pasta<sup>77</sup>, reaffirmed the full legitimacy of the Authority’s action which, “*in exercising its own discretion, considers inadvisable accepting the commitments where it intends to impose a financial fine, that is to say in cases of agreements which, at the time of adoption of the decision on the commitments, seem to be of such gravity that acceptance of the commitments would deprive the sanction of its deterrent force*”. Faced with this argument, the first instance judge concluded that “*the perception of the gravity of the agreements constitutes a correct parameter on which to effect, rebus sic stantibus [in these circumstances], the assessment relating to the acceptance or rejection of the commitments proposed*”, and that “*the presence of serious restrictions on competition*

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<sup>76</sup> AGCM, Ruling 16835, *Producers of chipboard panels in wood*, of 17 May 2007, in *Bollettino* n. 20 of 2007.

<sup>77</sup> AGCM, Ruling 17681 of 5 December 2007, in *Bollettino* n. 26 of 2007.

*arising from a secret horizontal cartel (hard-core infringements) itself constitutes a sufficient reason to reject the commitments, consistent with community guidelines”.*

In light of the above, it is immediately obvious that the commitments instrument is particularly effective in cases of abuse of dominant position, with the necessary exclusion, which has recently emerged in the European context, of those cases where the abuse is perpetrated by means of particularly invasive behaviour that impacts other parties running their own businesses<sup>78</sup>.

The rulings of the Authority so far examined and the decisions of the administrative judges seem to confirm the impossibility of accepting commitments in case of agreements restricting competition, where these agreements are horizontal or concern pricing. But then again there are cases in which the Authority has deemed commitments acceptable even with agreements falling in such categories<sup>79</sup>. These circumstances are worth being examined, because it can be assumed that in these cases the Authority has not observed the limit which it has itself repeatedly affirmed in its rulings and which arises from European law.

One such ruling concerned the “Abi/Co.ge.ban” Banking Agreements<sup>80</sup>, where the commitments proposed by the parties that had implemented an agreement on the interbank fees charged to customers were considered acceptable, limiting the independence of the banks in determining their pricing policies. A similar case was the ruling concerning the Order of Veterinary Surgeons of Turin<sup>81</sup>, where the Authority accepted the commitments

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<sup>78</sup> Please refer to the quoted point *Guidelines on the priorities of the Commission in the application of article EC 82 to the excluding practices*,

<sup>79</sup> For a critical observation see L. DI VIA, *Le decisioni in materia di impegni*, cit., p. 247.

<sup>80</sup> AGCM, Ruling 16709, cit.

<sup>81</sup> AGCM, Ruling 16500, cit.

proposed by the parties in a case where a horizontal cartel was apparent, albeit this time without secrecy. (This makes it perhaps less blameworthy than if secret). It is clear that the distinctiveness of this professional activity tends to neutralise the secrecy of the agreements.

Indeed, these rulings appear to go beyond the dividing line between a legitimate act by the Authority, which has the discretion to make the commitments presented by the parties binding, and an unlawful act, inasmuch as it is in breach of the European guidelines that the Authority is required to comply with.

In fact, the picture emerging from European law has shown that the Commission not only advises against the conclusion of commitments in the cases it considers the most serious, namely the agreements on pricing or on market sharing, but that it has also progressively considered such commitments as forbidden. The evolution of the European protection system, with its intention to take into consideration (so as to assess any unlawfulness of behaviour by an undertaking) the effects of behaviour on the end consumers, and which considers agreements on minimum pricing and on market sharing as inherently forbidden, could only and without any doubt decisively exclude the hard-core agreements from the application of commitments.

For all the other cases, a discretionary assessment by the Authority will be necessary in order to compare the request for a commitment presented by the undertaking with the existence of a substantial public interest in the continuation of the finding judgement. This public interest can subsist, for example, apart from serious cases other than the ones above recalled, also where the complexity of the case could suggest continuing with the finding judgement.

In these cases national case law could set the example for the actions of the Commission, also restraining it from accepting commitments in all novel cases under antitrust law.

This being said, and in conclusion, we cannot avoid mentioning the limits of the institution and its being necessarily complementary to the sanction. The Authority must

“find” every time it has to examine cases that require a meticulous assessment whether they be novel, serious<sup>82</sup> or complex cases. The commitments cannot replace the original antitrust protection instruments but can only coexist with them. They can be chosen to protect public interest “*by offering the advantage of being also accepted by the private parties concerned and therefore providing stability in their regard*”<sup>83</sup>.

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<sup>82</sup> And not only in the cases of hard-core cartels. In fact the Authority could decide towards not accepting commitments in the cases such as the ones above recalled (chapter 1, paragraph 5) and identified in the recent Communication on the excluding abuses, point 22. That is, all those cases where it is possible to do without a detailed assessment of the anti-competitive impact of the excluding behaviour: where the dominant undertaking impedes its own producers/customers from using the competitive products, grants them financial incentives on condition that they do not use the competitive products or pays a distributor to delay the market entry of a competitive product.

<sup>83</sup> V. CERULLI IRELLI, “*Consenso*” e “*autorità*” negli atti delle Autorità preposte alla tutela della concorrenza, cit., p. 344.