Lorenz Marx University of Bayreuth

Enforcement of Art. 102 TFEU – a Statistical Analysis

Introduction

Procedural rules can legitimize and greatly influence the outcome of legal proceedings.[1] In order to properly evaluate the impact of a particular framework of substantive law, it is therefore essential to understand the way it is being enforced. This is especially true for the rules on anti-competitive behaviour. In the eyes of the European Commission, competition law's primary concern is to enhance consumer welfare by maintaining effective competition and thus ensuring efficient resource allocation in the markets.[2] If this premise is taken seriously, European competition law needs to be measured not only by its merits, but also by the European Commission's concrete enforcement practice.

Usually the analysis of European competition case law is more of a qualitative nature. Qualitative research aims to analyse and understand coherences through individual cases. Carefully selected individual cases are categorized and interpreted in order to reach a deeper understanding of a more complex phenomenon. [3] Quantitative research, by contrast, collects standardized data to systematically examine the variability within an aggregate. A statistical analysis of collected data helps to come to generalizable statements about the aggregate.[4] While the European Commission has presented some empirical data about its cases,[5] quantitative research on European competition proceedings is relatively rare. However, there are notable exceptions: Hüschelrath and Laitenberger have conducted a statistical analysis into the European Commission's investigations of hardcore cartels.[6] Stephan has undertaken an empirical assessment of the European Commission's Leniency Program.[7] Wils has occasionally used quantitative data for the purpose of examining the European Commission's enforcement priorities.[8] With regard to the Court of Justice of the European Union,

[1] *Luhmann*, Legitimation durch Verfahren, 1997, 11 ff.
[2] Cf. *Kroes*, SPEECH/05/512, online <europa.eu/rapid/press-release_SPEECH-05-512_en.htm> and the Report by the EAGCP, An economic approach to Article 82, <ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf>, 7 et seq. With regard to the ongoing discussions about the concerns of competition law cf. *Whish/Bailey*, Competition Law, 2012, 19 et seq.; *Nazzini*, The Foundations of European Union Competition Law, 2011, 40 et seq.; *Drexl* in: von Bogdandy/Bast, Principles of European Constitutional Law, 2010, 659, 669 et seq.; *Odudu*, O.J.L.S. (2010), 1 et seq.; *Schweitzer* in: Drexl et al., Technology and Competition, 2009, S. 511, 514 ff.
[3] *Punch*, Introduction to Social Research, 2014, 82 et seq.
[4] *Punch*, Introduction to Social Research, 2014, 113 et seq.
[5] See Commission staff working document, Ten Years of Antitrust Enforcement under Regulation 1/2003, SWD (2014) 230/2.
[6] *Hüschelrath/Laitenberger*, E.C.L.R. (2013), 33-39.
[7] *Stephan*, J.C.L.E. (2009), 537-561.
[8] See for instance *Wils*, J.E.C.L.A.P. (2013), 293-301.

both Rodger and Ibáñez Colomo have reviewed quantitative data in order to analyse its decision practice in preliminary rulings regarding competition law.[9]

This submission presents the key findings of a statistical inquiry into the European Commission's competition law enforcement in the period between 1 May 2004 and 30 April 2014.[10] It comprises all final decisions the European Commission has adopted with regard to the alleged violation of competition rules. Decisions in procedural matters were not recorded. After giving an overview over the European Commission's overall track record in the reference period, this submission will zoom in on the abuse cases the European Commission has dealt with. It will specifically focus on the commitment procedure, a relatively new type of procedure intended to settle cases consensually and cooperatively. The analysis provides valuable insight into the European Commission's enforcement priorities and success. It specifically reveals that the utilization of the commitment procedure has not met the objectives connected with its introduction.

Procedural Framework

With regard to the European Commission's competition cases, the current basic framework is set out in Regulation 1/2003.[11] Regulation 1/2003 entered into force on 1 May 2004, replacing Regulation 17/1962[12] that had been in place for more than forty years. As early as 1997 the European Commission had articulated a need to overhaul the enforcement system provided for by Regulation 17/1962.[13] In 1999 the Commission issued a white paper urging for a fundamental reform of European competition procedure.[14] The enlargement of the European Community and a general trend towards globalization had led to a steady increase in cases.[15] The Commission believed an effective competition law enforcement was no longer guaranteed under Regulation 17/1962, because the massive case load prevented the European Commission from concentrating on fighting the most harmful competition law infringements.[16] The aim of the reform process was thus to ensure effective supervision of competition rules while imposing less administrative constraints on businesses and still guaranteeing sufficient legal certainty.[17] Regulation 1/2003 has been

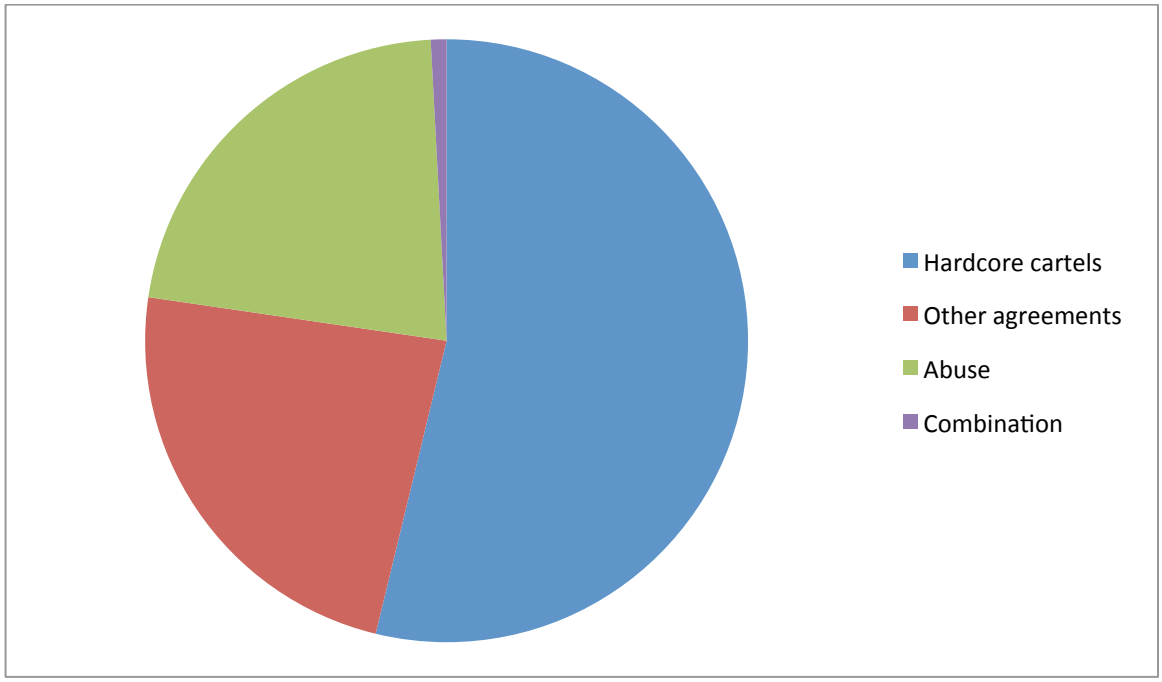
[9] *Rodger*, G.C.L.R. (2014), 125-139 and *Ibáñez Colomo*, Yearbook of European Law (2013), 389-431.
[10] The following analysis is based on a more extensive study that considers a larger data base and addresses more parameters than presented here. The data set can be made available upon request.
[11] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1.
[12] Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 1962 13/204.
[13] Regarding the genesis of Regulation 1/2003 see *Wils*, Principles of European Antitrust Enforcement, 2005, 1 et seq.; *Wils*, JECLAP (2013), 293 et seq.
[14] White paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty, Commission programme No. 99/027, OJ 1999 C 132/1.
[15] White paper paras 19 et seq.
[16] White paper paras 24 et seq.
[17] White paper paras 41 et seq.

accompanied by Regulation 773/2004[18] further detailing the procedural structure and the procedural rights of the parties involved and by various Commission notices on specific procedural aspects.

Case load under Regulation 1/2003

Over the course of ten years, the European Commission has adopted 119 decision regarding alleged violations of competition law. Figure 1 shows that the European Commission's main priority during that period has clearly been the prosecution of hardcore cartels. The 64 cases involving hardcore cartels comprise 54% of all decisions adopted. The remainder of the decisions is almost evenly split between cases concerning other agreements or concerted practices that were not considered hardcore cartels but still a violation of Art. 101 TFEU and cases concerning an alleged abuse of market power pursuant to Art. 102 TFEU. The 26 abuse cases add up to 22% of all decisions adopted.

Figure 1: Commission decisions 2004-2014 – subject matter

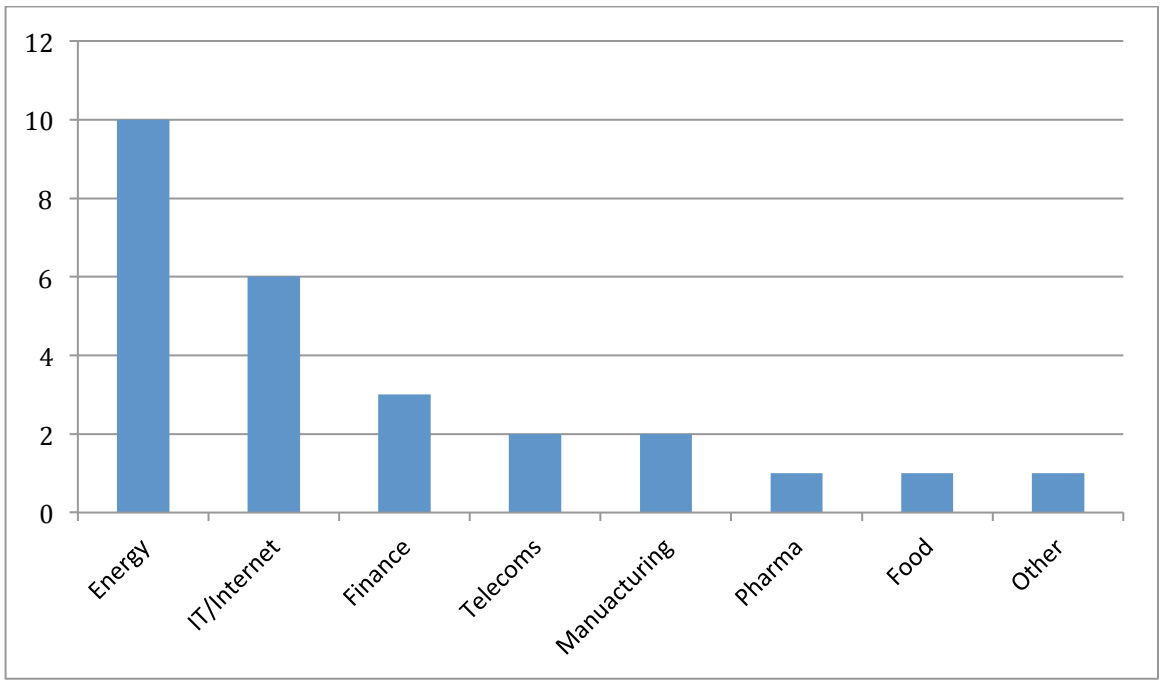


Since the introduction of Regulation 1/2003 the European Commission has adopted decisions in relation to cases in almost all economic sectors. However, as figure 2 depicts, the decision practice has not been uniform across all sectors. There seems to have been a distinctive focus on the energy sector and the IT/Internet sector. 59% of all decisions adopted dealt with alleged abuses in these two industry sectors. The European Commission's enforcement record in abuse cases appears to be in line with its broader political scope: When presenting its political agenda, the new European

[18] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ 2004 L 123/18.

Commission recently reasserted that creating an Energy Union[19] and a Digital Single Market[20] are two of their main political priorities going forward.[21] Current evidence for this enforcement focus can be found in the European Commission's investigations against Gazprom[22] and Google[23].

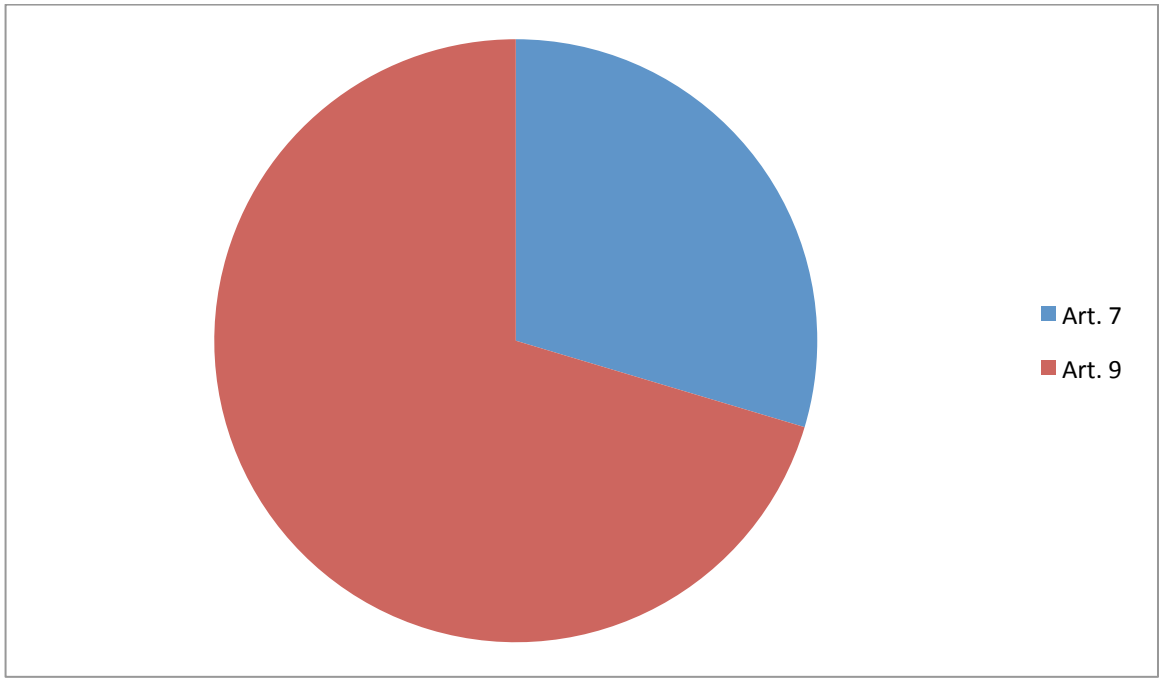
Figure 2: Abuse cases 2004-2014 – industries concerned



To terminate its competition proceedings, the European Commission has the choice between two types of decision: On the one hand, it can adopt a prohibition decision pursuant to Article 7 Regulation 1/2003. On the other hand, it can opt to issue a commitment decision pursuant to Article 9 Regulation 1/2003. With a view to all 119 competition proceedings, prohibition decisions continue to be the most important pillar of the European Commission's enforcement record. Regarding only abuse cases, however, the commitment procedure has proven to be the more popular alternative. As can be seen from figure 3, 70% of all decisions adopted in abuse cases have been commitment decisions. This is why the analysis will primarily focus on this relatively new decision-making tool.

[19] See <ec.europa.eu/priorities/energy-union/docs/energyunion_en.pdf>.
[20] See <ec.europa.eu/priorities/digital-single-market/docs/dsm-factsheet_en.pdf>.
[21] On the Juncker Commission's general political agenda see <ec.europa.eu/priorities/docs/pg_en.pdf>.
[22] COMP/39816 – *Gazprom*.
[23] COMP/39740 – *Google Search*.

Figure 3: Abuse cases 2004-2014 - type of decision



The Commitment Procedure – a new way of settling competition cases

History

In recent years, European competition law enforcement has seen a general trend towards a more consensual resolution of competition issues. Instruments rewarding cooperation like the leniency program[24] or the settlement procedure[25] have been introduced. With regard to the abuse of market power, the most noticeable new mechanism is the commitment decision pursuant to Art. 9 Regulation 1/2003. This decision-making tool was introduced by Regulation 1/2003 to extend the Commission's set of instruments towards a more future-oriented enforcement.[26] It is designed as an alternative to the traditional, more adjudicative prohibition decision pursuant to Art. 7 Regulation 1/2003. According to Art. 7 Regulation 1/2003, the Commission is able to formally terminate proceedings by making commitments voluntarily offered by the parties binding and enforceable. The European Commission may choose to do so if it finds that the commitments adequately meet the competition concerns expressed to the parties. By choosing the commitment path, the European Commission does not have to find nor prove that an infringement of competition law has actually occurred. Furthermore, no fines are imposed on the undertakings concerned. Conversely, commitment decisions are no appropriate measure in cases where the European Commission

[24] See Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ 2006 C 298/17.
[25] See Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ 2008 C 167/1.
[26] *Podszun*, ZWeR (2012), 49, 61.

actually does intend to impose a fine.[27] Consequently, the commitment decision is not suitable for the solution of cases concerning hardcore cartels.

It is not an entirely new development for competition authorities to use a negotiated settlement procedure co conclude their proceedings. For instance, both the Federal Trade Commission and the Department of Justice in the United States have for decades made frequent use of so-called consent agreements.[28] In fact, the American example eventually inspired the introduction of a formal commitment procedure in Regulation 1/2003.[29] But even under the regime of Regulation 17/1962 the European Commission resolved some of its cases by accepting informal commitments.[30] In return, the procedures were closed via so-called comfort letters or not even initiated in the first place. More rarely, the Commission would adopt a formal exemption decision that was under the condition of compliance with some negotiated commitments. It seems that the European Commission has made quite frequent use of some form of informal settlement. However, as these decisions were not usually made public, precise figures are not available.[31] Given the lack of clear-cut procedural rules, certain inconsistencies in the European Commission's approach to informal settlements under Regulation 17/1962 have been criticized.[32] Hence it was not until the adoption of Regulation 1/2003 that this negotiated settlement procedure was given an express legal basis and clear consequences.

Structure

The commitment decision under Art. 9 Regulation 1/2003 is a procedural substitute to the infringement decision under Art. 7 Regulation 1/2003. It is in the European Commission's discretion to choose the procedural option it considers adequate in each specific case.[33] The commitment procedure is a voluntary process that both the Commission and the participating parties can terminate at any time. Because of its voluntary nature, the commitment procedure is less strictly structured than the prohibition procedure and allows for a more flexible approach. However, the European Commission's Best Practice Guidelines[34] and its Antitrust Manual of Procedures[35] provide

[27] See recital 13 Regulation 1/2003.
[28] Cf. *Rubinfeld* in: Ehlermann/Marquis, European Competition Law Annual, 2010, 85, 89 et seq.
[29] *Wils* in: Ehlermann/Marquis, European Competition Law Annual, 2010, 27, 31.
[30] See in detail *van Bael*, C.M.L.R. 1 (1986), 61-90.
[31] According to *van Bael*, C.M.L.R. 1 (1986), 61 et seq. 90% of all Commission cases were settled via informal agreements in the years 1976 to 1984. Only 5% of those agreements were later reported in press releases or the annual competition reports.
[32] *van Bael*, C.M.L.R. 1 (1986), 61, 64.
[33] The wording of Art. 9 Regulation 1/2003 clearly states the European Commission "may" make commitments binding. See also *Ortiz Blanco/Jörgens/Kellerbauer* in: Ortiz Blanco, European Competition Procedure, 2013, para 13.09.
[34] Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ 2011 C 308/6.
[35] Antitrust Manual of Procedures, Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU, <ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf>.

many references to the actual design. In practice, the boundaries between the two types of procedure are sometimes blurred. It is possible to change back and forth between the two decisional instruments even if proceedings are far advanced.[36]

The commitment procedure begins with the formal initiation of proceedings according to Art. 11 VI Regulation 1/2003, Art. 2 I Regulation 773/2004. The European Commission explicitly encourages the companies involved to signal their interest in discussing commitments as early as possible.[37] If the European Commission is convinced of the Company's good faith, it prepares a preliminary assessment of its competition concerns. The preliminary assessment must be distinguished from the formal statement of objections pursuant to Art. 27 Regulation 1/2003, Art. 10 Regulation 773/2004. The latter lays out in detail the facts and the legal issues of the case at hand and is a prerequisite for the adoption of a prohibition decision pursuant to Art. 7 Regulation 1/2003. For the clear wording of Article 27 Regulation 1/2003 such detailed evidence is not needed in the case of Art. 9 of Regulation 1/2003. Therefore it is not necessary that the Commission has already fully investigated the facts of the case at hand.[38]

After the release of the preliminary assessment the parties are granted a period of time to draft and propose appropriate commitments.[39] The possibilities to design appropriate commitments are manifold and depend largely on the specific competition concerns. Mirroring Art. 7 Regulation 1/2003, the commitments can include behavioral or structural remedies.[40] If the European Commission is convinced that the commitments offered dispel its concerns, it carries out a market test in accordance with Art. 27 Regulation 1/2003. In a market test notice usually published on the European Commission's website interested third parties are invited to submit their feedback within a minimum period of one month. The feedback received is not legally binding the European Commission' decision on how to proceed. However, it does frequently provide important input for possible improvements.[41] If the Commission considers that changes to the commitments are necessary, another round of negotiations ensues.[42] If the commitments offered in the course of these negotiations change substantially, a new market test needs be carried out.[43] If, however, the

[36] This is what happened for instance in COMP/30925 – *Telekomunikacja Polska* where informal commitments were discussed but ultimately a prohibition decision was adopted. Conversely, in COMP/39230 – *Rio Tinto Alcan* the European Commission started negotiating commitments after four years of intense investigations.
[37] Best Practice Guidelines para 118; Antitrust Manual of Procedures Chapter 16 para 19.
[38] *Ortiz Blanco/Jörgens/Kellerbauer* in: Ortiz Blanco, European Competition Procedure, 2013, para 13.12.
[39] Best Practice Guidelines para 126. According to Antitrust Manual of Proceedings Chapter 16 para 39 the usual period of time granted is one month.
[40] With regard to the commitments' structure see Antitrust Manual of Proceedings Chapter 16 para 40, with regard to their content see paras 45 et seq.
[41] Antitrust Manual of Proceedings Chapter 16 para 66.
[42] Antitrust Manual of Proceedings Chapter 16 para 67.
[43] Best Practice Guidelines para 133; Antitrust Manual of Proceedings Chapter 16 para 67.

Commission concludes that the commitments offered adequately address its concerns, it formally declares them binding on the parties.

Goals

The commitment procedure's legislative objective is threefold: Shortening the duration of proceedings while still ensuring transparency and legal certainty.

First and foremost, commitment decisions are supposed to lead to shorter proceedings.[44] As the European Commission points out, "commitment decisions are an enforcement instrument primarily designed to restore effective competition. […] commitment decisions involve less procedural steps (and therefore less resources) than a final decision under Article 7 (e.g. Preliminary Assessment instead Statement of Objections; no access to the file is expressly foreseen, no hearing; usually a shorter decision). As a result, the "commitment path" can bring a swifter change to the market, without necessarily being less effective."[45] The idea is that by way of negotiation a workable solution can be found quicker than by way of a traditional, more trial-like proceeding. The parties should have a strong incentive to avoid a fine and therefore cooperate rather than obstruct the proceedings. In the eyes of the European Commission, there are markets that could especially benefit from quick settlements specific nature: "The primary purpose of commitment decisions is to preserve effective competition by addressing the potentially anti-competitive practices and to ensure a quick outcome on the market. Commitment decisions allow for the quicker resolution of competition concerns on a more cooperative basis. Such decisions have often been adopted in fast-moving markets and/or in markets that are in the process of liberalisation." [46] Once again, the European Commission's enforcement focus is in line with its general political agenda. Fast-moving markets like the IT/Internet sector often hold great potential for innovations that will eventually benefit all consumers. It is therefore crucial to be able to react to competition concerns like foreclosure tendencies in a timely and flexible manner. The same is true for recently liberated markets like the energy sector. These markets are usually dominated by former state monopolies and competition is only emerging. To enable effective competition on these markets, quick intervention may be pivotal.

Somewhat complementary to the efficiency goal are the commitment procedure's other two objectives: Providing a high level of legal certainty while still ensuring transparency. One of the main deficiencies under Regulation 17/1962 was the lack of a legal mechanism to make agreements with

[44] See for instance *Dunne*, J.C.L.E. (2013), 399, 405; *Ward/Banks/Kristof* in: Rose/Bailey, Bellamy&Child: European Union Law of Competition, 2013, para 13.100; *Wagner-von Papp*, C.M.L.R. (2012), 929, 959; *Kellerbauer*, E.C.L.R. (2011), 1, 3; *Temple Lang* in: Gheur/Petit, Alternative Enforcement Techniques in EC Competition Law, 2009, 121, 142; *Wils*, World Comp. (2008), 335, 343 f.; *Cook*, World Comp. (2006), 209, 210.
[45] Antitrust Manual of Procedures Chapter 16 paras 6 et seq.
[46] See Commission staff working document, Ten Years of Antitrust Enforcement under Regulation 1/2003, SWD (2014) 230/2 para 21.

the parties binding and, in case they were not met, enforceable. The commitment procedure is meant to provide for more dependability: „Unlike 'informal settlements' (such as practised before Regulation 1/2003 came into force), commitment decisions render commitments offered by companies legally binding, which creates legal certainty and ensures that effective competition is continuously preserved." [47]

One trade-off that comes with introducing a negotiated settlement procedure is the private nature of such negotiations. By admitting interested third parties to the proceedings, market testing the proposed commitments and notifying the public of procedural steps along the way, the European Commission seeks to provide an adequate level of transparency: "Commitment decisions also serve to clarify the Commission's competition policy since a non-confidential version of the decision is published. Other market participants can learn from the decision and the commitments what was considered by the Commission sufficient to remove the competition concerns. […] The fact that the commitments are not imposed by the Commission but voluntarily submitted and implemented only after discussions with the parties as well as a market test may also facilitate the later implementation of the commitments."[48] In this sense, there are two different layers to the transparency goal. The first one is to make sure that in each case potentially affected third parties are being heard and informed. Beyond the individual case ensuring transparency also means establishing some sort of self-committing guidance for future cases similar to the case law established by the prohibition decisions. [49] This way, the transparency goal serves as a counterbalance to the commitment procedure's otherwise one-sided efficiency-oriented alignment. [50]

Criticism

The commitment procedure as an alternative route to settling competition cases has been criticized for a variety of reasons. Most of the criticism can be attributed to one of the two following pillars:

One the one hand, the European Commission's commitment practice is criticized for disregarding the principle of proportionality. The argument is that because of its superior bargaining position, the European Commission is able to obtain commitments that go beyond what would be necessary to effectively address the competitive concern raised in the case at hand.[51] In the Alrosa Case, however, the Court of Justice of the European Union held that the principle of proportionality applies to commitment proceedings to a lesser degree.[52] It specifically ruled that "the Commission is not

[47] Antitrust Manual of Procedures Chapter 16 para 8.
[48] Antitrust Manual of Procedures Chapter 16 para 6.
[49] *Ward/Banks/Kristof* in: Rose/Bailey, Bellamy&Child: European Union Law of Competition, 2013, para 13.101.
[50] *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht, 2014, § 21 para 60 poignantly warn that the lack of transparency could lead to an „escape into the commitment procedure".
[51] *Podszun*, ZWeR (2013), 49, 63; *Wagner-von Papp*, C.M.L.R. (2012), 929, 959 et seq.
[52] CJEU, C-441/07 P – *Alrosa*, ECLI:EU:C:2010:377, paras 40 et seq.

required itself to seek out less onerous or more moderate solutions than the commitments offered to it."[53] As a result, the ECJ granted the European Commission considerable leeway in deciding on the adequacy of the commitments offered.[54]

The other main point of criticism is raised in the context of a presumed shift in competition law enforcement away from the classical ex-post perspective to a more ex-ante regulatory approach.[55] The European Commission is criticised for using the commitment procedure to pursue regulatory goals that go beyond the individual cases. This proactive use of the commitment procedure without the proper mandate of a regulatory body and without the safeguards typically encompassed in the process of regulation may lead to a premature and artificial market design.[56]

Statistical Analysis

This contribution aims to take a different approach to assess the commitment procedure's raison d'être. The analysis of all abuse decisions adopted in the reference period will concentrate on the legislative goals that have been pointed out above. By applying statistical measures it will assess whether these goals are currently achieved. Since it is the commitment decision's predominant objective, the analysis will largely focus on the efficiency goal of shortening of proceedings.

Methodology

In a first step, the date of the formal opening of proceedings and the date when the commitment or prohibition decision was adopted were identified for all abuse cases in the reference period. Then, the duration of the proceedings was calculated in days. For both groups of decisions, Art. 7 and Art. 9 Regulation 1/2003, three statistical parameters were determined and compared. The arithmetic mean is the sum of a collection of numbers divided by the number of numbers in the collection. It is the most frequently used mean to report central tendencies within a distribution. The median is the number separating the higher half of a distribution from the lower half. In addition to the arithmetic mean, the median is a valuable measure of location, because it reduces the impact of outliers. The standard deviation is used to quantify the amount of variation within a distribution. A low standard deviation indicates that the results are very close to the mean. A rather high standard deviation indicates that the results are spread out over a wider range.

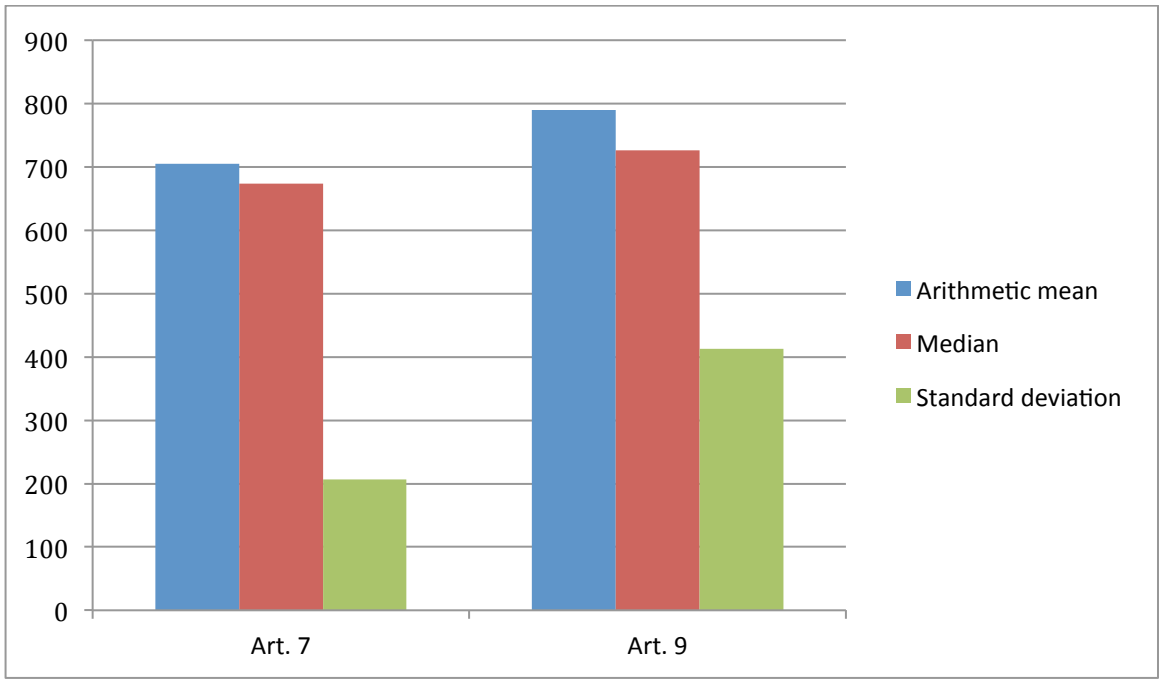
Duration of Proceedings

There should be signs of a correlation between the type of decision and the duration of proceedings, resulting in shorter commitment proceedings. However, figure 4 shows that both arithmetic mean

[53] CJEU, C-441/07 P – *Alrosa*, ECLI:EU:C:2010:377, para 61.
[54] Cf. *Ezrachi*, EU Competition Law, 2014, 520; *Cengiz*, E.C.J. (2011), 127, 140.
[55] See *Ibáñez Colomo*, Yearbook of European Law (2010), 261, 276 et seq.
[56] Cf. *Dunne*, J.C.L.E. (2014), 399, 411 et seq., 428 et seq.; *Podszun*, ZWeR (2012), 49, 65 et seq.

and median are higher with the commitment decisions than with the prohibition decisions. These numbers suggest that choosing the commitment path does in fact not automatically lead to shorter proceedings. It has to be noted that within the commitment decisions the standard deviation is relatively high. This could be an indicator for a somewhat uneven distribution. On the other hand, arithmetic mean and median are very close to each other, which signals that the distribution is not overly skewed by outliers.

Figure 4: Abuse cases 2004-2014 – average duration

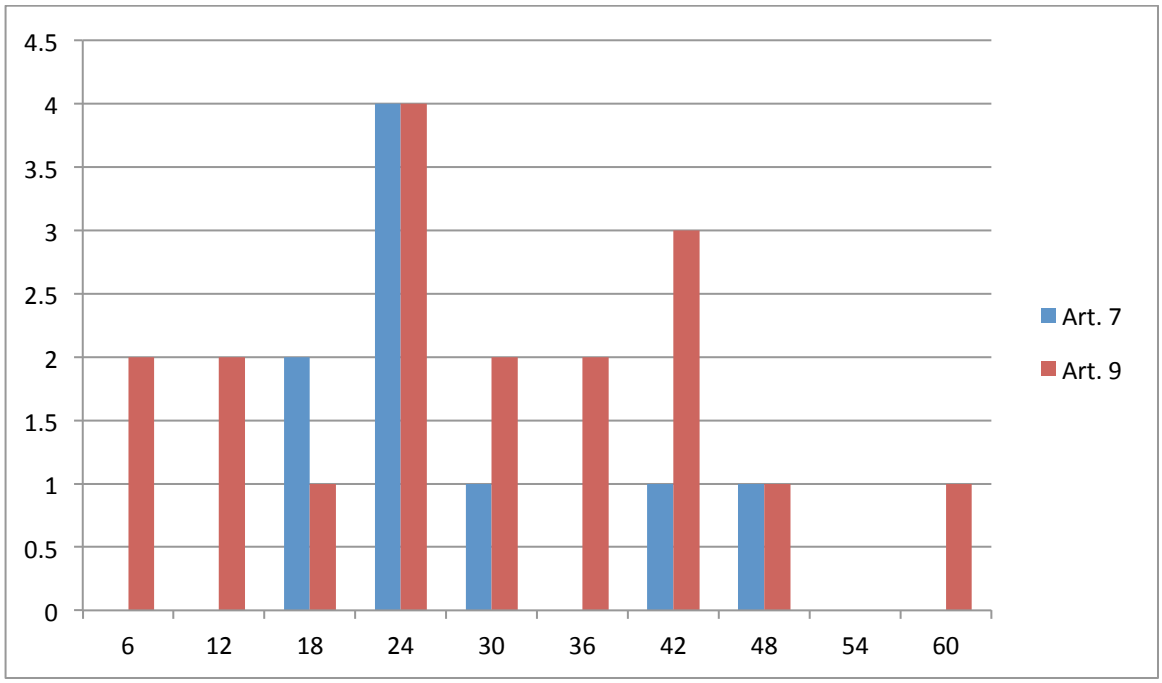


In order to more accurately describe the accumulation within a distribution, the mode is another frequently used statistical measure. The mode depicts the value that appears most often in a given set of data. The mode can show where the majority of results fall without placing too much weight on singular outliers. With the analysis at hand, using the mode as parameter has proven unsuccessful because the duration of proceedings has been measured in days. Recalculating the duration in months and clustering the cases in groups of six months allows for a better insight into the accumulation.

Figure 5 shows that the mode for both commitment and prohibition decisions is at 24 months. This means that for both decision types the largest proportion of proceedings was concluded after 18 to 24 months (21% for commitment decisions and 44% for prohibition decisions). However, this metric also reveals that 47% of the commitment proceedings and 33% of the prohibition proceedings lasted longer than the mode of 24 months. The metrics suggest there is no correlation of the sort that proceedings terminated via commitment decisions lead to shorter proceedings compared to those

terminated via prohibition decision. If anything, the numbers indicate that commitment proceedings last slightly longer than prohibition proceedings.

Figure 5: Abuse cases 2004-2014 - duration clustered biannually

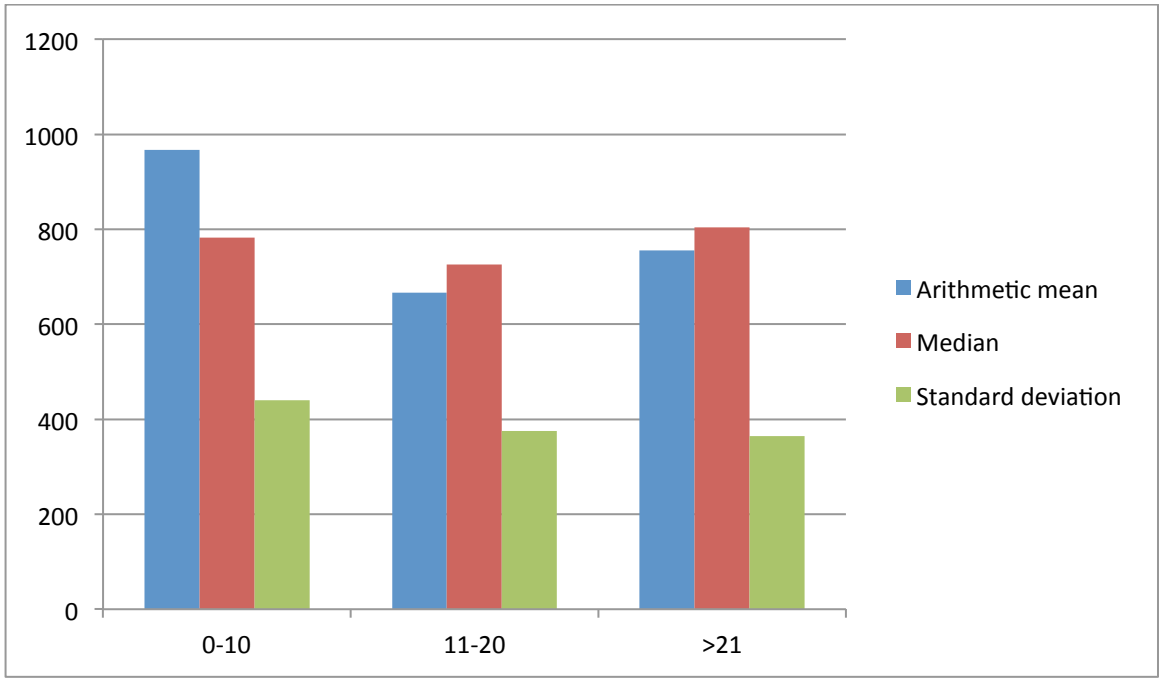


Aside from the type of decision, there are other factors that possibly influence the length of proceedings. That is why in a second step, a number of variables are introduced in order to control for the findings above.

The first potentially influencing factor is the participation by third parties in the proceedings. To measure this factor, the number of participants in the market test was allocated for each commitment decision. The results were grouped in three tiers combining the cases with 0 to 10 participants, 11 to 20 participants and above 21 participants. As figure 6 reveals, the results do not signal that the level of participation by third parties has a significant effect on the duration of proceedings. In fact, the highest arithmetic mean and median were measured within the group of 0 to 10 participants whereas the group of 11-20 participants had the lowest parameters. One explanation for these findings could be that participants in the marked test are not formally admitted to the proceedings as "parties concerned" within the meaning of Art. 27 Regulation 1/2003.[57] They are merely treated as "interested third parties" and hence are granted only minor participation rights.

[57] See CJEU, C-441/07 P – *Alrosa*, ECLI:EU:C:2010:377, paras 90 et seq. See also *Ezrachi*, EU Competition Law, 2014, 520.

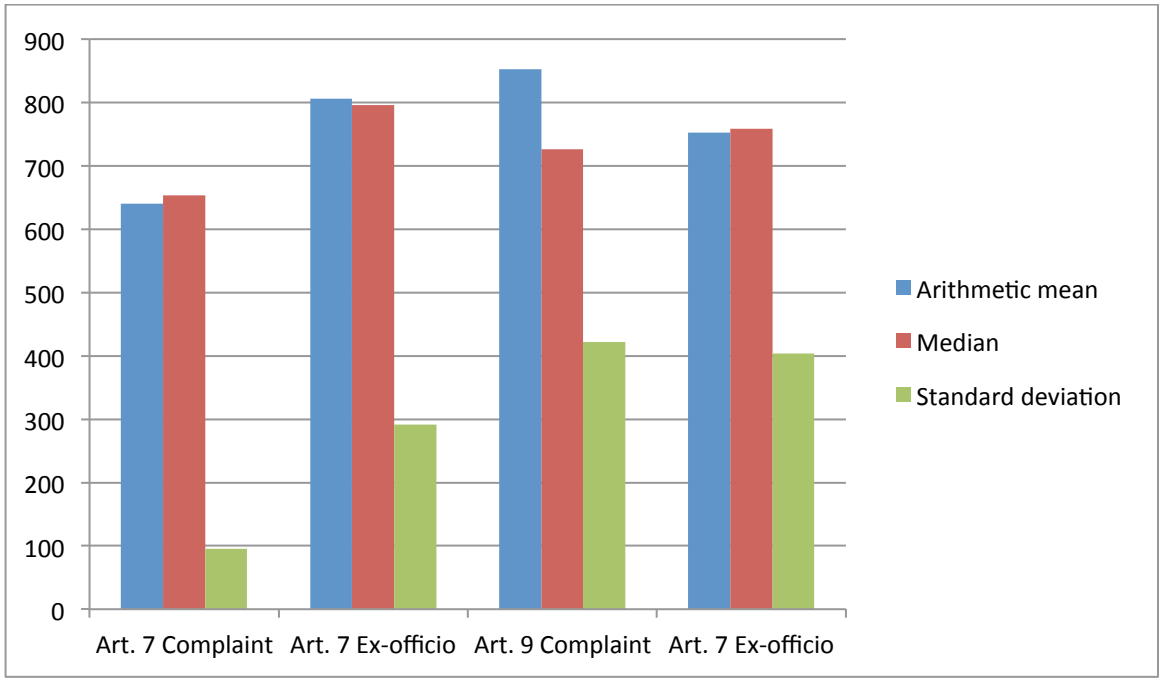
Figure 6: Commitment decisions 2004-2014 – participants in the market test



Another way to factor in participation by third parties is to distinguish the cases that were started by a complainant from those that were started ex-officio. According to Art. 27 Regulation 1/2003, complainants are formally admitted to the proceedings and enjoy comprehensive participation rights.[58] Figure 7 displays that regarding prohibition decisions, arithmetic mean and median are lower for cases that were initiated by complaint. The results for the commitment decisions are somewhat contrary: The arithmetic mean is 12% higher for the proceedings initiated by complainants, whereas the median is 4% slightly higher for the ex-officio proceedings.

[58] See *Ortiz Blanco/Jörgens/Kellerbauer* in: Ortiz Blanco, European Competition Procedure, 2013, para 13.24.

Figure 7: Abuse cases 2004-2014 - initiation of proceedings



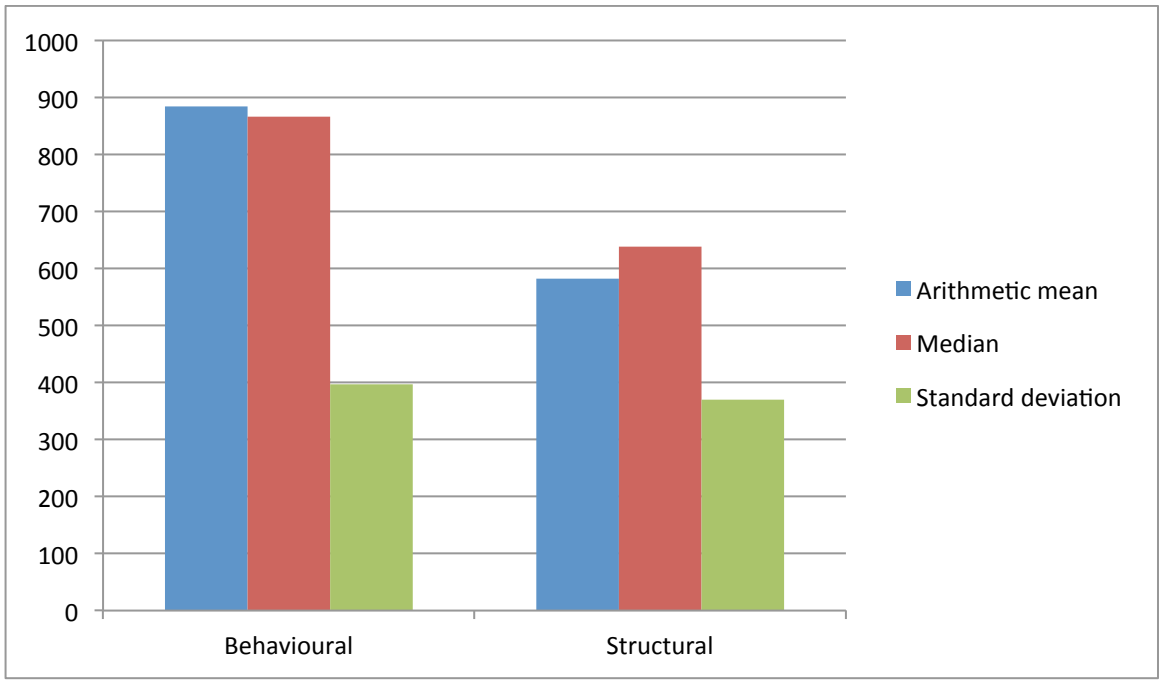
One factor that seems to influence the lengths of proceedings is the nature of the commitments eventually agreed on. When deciding upon the suitable remedy, the European Commission can choose between behavioural and structural remedies. While structural remedies have not been imposed in a prohibition decision so far, there have been several instances where the negotiated commitments included structural remedies. Figure 8 exhibits that the cases concluded by structural remedies were terminated in remarkably short time: The arithmetic mean is 34% lower, the median 26% lower than the number for cases settled by behavioural remedies.

What is interesting about this observation is that all cases where structural commitments were agreed upon concerned the energy sector. Exactly these structural remedies are referenced when the European Commission's commitment practice is criticised for disregarding the principle of proportionality. In theory, it is not impossible that the European Commission could impose such structural remedies top-down in a prohibition decision. However, Art. 7 Regulation 1/2003 stipulates a clear statutory preference for behavioural remedies over structural remedies.[59] Therefore it seems rather unlikely that a prohibition decision imposing an ownership unbundling would hold up in court.[60]

[59] See the wording of the third sentence Art. 7(1) Regulation 1/2003: "Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy."
[60] *Podszun*, ZWeR (2013), 49, 60; *Wagner-von Papp*, C.M.L.R. (2012), 929, 960; *Körber* in: Weiß, Die Rechtsstellung Betroffener im modernisierten EU-Kartellverfahren, 2012, 73, 87; *Immenga* in: Immenga/Körber, Die Kommission zwischen Gestaltungsmacht und Rechtsbindung, 2012, 10, 16 et seq.; *Klees*, WuW (2009), 374,

In the context of negotiation theory it is therefore unlikely that the parties expected a structural prohibition decision to be a realistic alternative to a negotiated agreement.[61] It seems more plausible that the parties recognized that the European Commission had a strong interest in obtaining structural remedies and tried to leverage their accommodating offer for favourable concessions in return, possibly avoiding political actions.[62]

Figure 8: Commitment decisions 2004-2014 – type of remedy



As mentioned above, the commitment procedure provides for a more flexible alternative to the infringement procedure. The European Commission can switch to the commitment path at any stage of the proceedings. In fact, 45% of all commitment decisions adopted had started with a formal statement of objections pursuant to Art. 27 Regulation 1/2003, Art. 10 Regulation 773/2004. This combination of proceedings has proven especially harmful in terms of the efficiency goal. Figure 9 shows that for those combined proceedings the arithmetic mean is 54% higher and the median is 49% higher. To change one's mind halfway through the investigations seems to sizeably extend the duration of proceedings.

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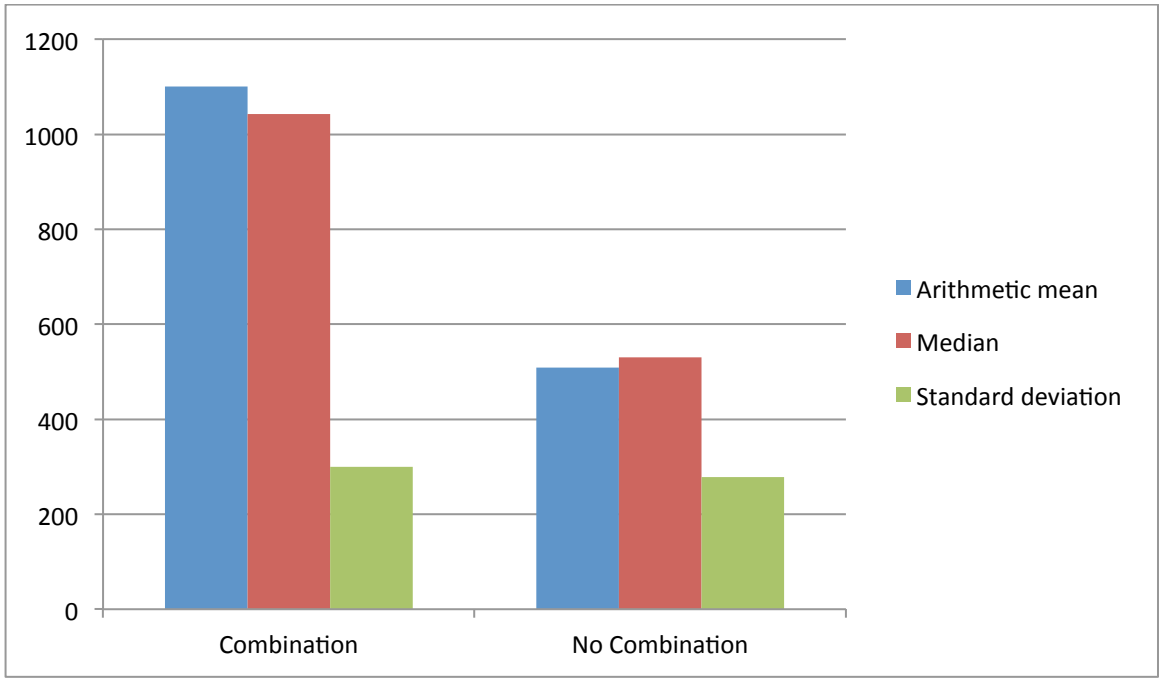
378 et seq. Even *von Rosenberg*, E.C.L.R. (2009), 237, 243 who deems structural remedies would be proportionate in these cases concedes that "the scope of use for this remedy is relatively narrow".

[61] On the concept of BATNA (best alternative to a negotiated agreement) see *Fisher/Ury/Patton*, Getting to Yes, 1999, 101 et seq.

[62] *Wagner-von Papp*, C.M.L.R. (2012), 929, 960.

Figure 9: Commitment decisions 2004-2014 – combination of proceedings



Transparency

While the analysis above does not provide for a correlation between the type of decision and the duration of proceedings, it might hint at a trade-off between the efficiency goal and the transparency goal. Figure 7 suggest that commitment proceedings take longer if a complainant is formally admitted to the proceedings. Having third party interests taken into account at all stages of the formal proceedings may ensure a higher level of transparency but seems also prone to prolong the negotiations.

It is also noteworthy that so far there has been a second round of market tests only once.[63] At the same time, the parties did submit modified commitment offers after the first round of market tests in every commitment case so far. It is not entirely clear exactly when modifications to the commitments become so significant that a second round of market tests is necessary.

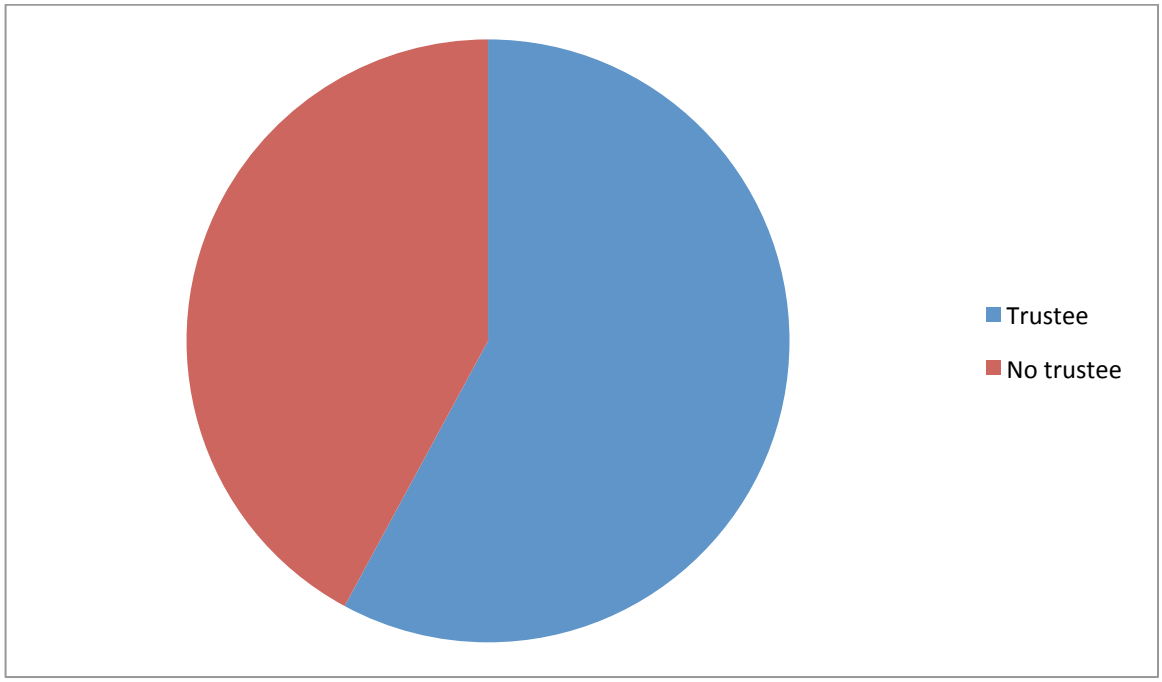
Legal certainty

With regards to the goal of higher legal certainty, doubts remain, too. It is true that commitment decisions are legally binding by nature. However, the fact alone that the European Commission declares commitments binding for the parties involved says little about whether they are complied with. In March 2013, the European Commission had to impose a fine amounting to EUR 561 million on Microsoft for its failure to comply with commitments.[64] Over the course of more than a year,

[63] COMP/39654 – *Reuters Instrument Codes*, paras 20, 66 et seq.
[64] COMP/39530 – *Microsoft.*

neither the European Commission nor – allegedly – Microsoft had noticed that the commitments were not adhered.[65]

One mechanism frequently used to monitor compliance with commitments is the instalment of a trustee.[66] The idea of assigning a trustee with overseeing the implementation of complex agreements was originally developed in merger control proceedings. The Trustee is formally independent from any of the parties. Its mission is to assist the Commission in monitoring the implementation of the commitments. What is somewhat striking about the European Commission's practice so far is that there seems to be a kind of binary approach to securing the legal certainty goal. In 58% of the commitments adopted so far trustees are included. However, in the other 42% of the commitments no monitoring mechanism is provided at all. Neither the Commission nor the parties involved in the negotiations seem to have come up with other mechanism ensuring compliance with the commitments agreed upon.[67]



Conclusion

What can be drawn from this analysis is that the use of the commitment procedure between 1 May 2004 and 30 April 2014 has not been able to meet its objectives. On overall, cases concluded via commitment decisions have not been settled within a shorter time frame than those terminated by a

[65] *Aleixo*, E.C.L.R. (2013), 466, 477.
[66] On the role of the trustee cf. *Brueckner/Hoehn*, C.L.I. (2010), 73-80.
[67] See with examples for other possible mechanisms *Aleixo*, E.C.L.R. (2013), 466, 478.

prohibition decision. Furthermore, a potential conflict of goals between the efficiency goal and the transparency goal became apparent.

The numbers suggest that the European Commission has not found the optimal balance between the commitment procedure and the infringement procedure yet. According to Wils, an optimal enforcement should rely equally on both and choose carefully between them.[68] Commitment decisions should be used in those cases where the benefits in terms of an earlier termination of the alleged infringement outweigh the detriments of the "escape into the commitment procedure". This makes the commitment procedure unsuitable for the observable fill-in role where the conventional prohibition procedure has failed. On the other hand, it is vital for the European Commission to build and maintain a reputation for being able to handle its cases successfully under the traditional, adjudicative infringement procedure. Only if the European Commission can demonstrate its ability to win contested cases – if need be in court – it will be able to obtain good settlements without having to pay a discount price for it. With regard to the already unbalanced ratio of 70/30 this means that the shift towards the commitment decision needs to be closely watched, both in a quantitative and qualitative sense.

[68] See for the following *Wils* in: Ehlermann/Marquis, European Competition Law Annual, 2010, 27, 36 et seq.