The Judicial Application of Commitment Decisions: from *Gasorba* to the Digital Market Act

Conference

"Public and Private Enforcement of EU Competition Law in the Age of Big Data"

Milan, 30th November – 1st December 2023
Palazzo di Giustizia - Via Carlo Freguglia 1

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Co-funded by
the Training of National Judges
Programme of the European Union

Public and Private Enforcement of EU Competition Law in the Age of Big Data
COMPEUTER

Preliminary remarks

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* Commitments represent an alternative technique of public enforcement of Articles 101 and 102 TFEU
* They are based on reaching an agreement between companies and antitrust authorities
* Commitments changed the traditional way of enforcing competition rules:
  * authoritative power of the Commission (or ANC)
  * Negotiated outcome

Preliminary remarks (2)

* The initiative to propose commitments is (formally) reserved to the undertakings
* If the Commission decide to negotiate, then it can change its mind and revert to the ordinary scenario (GC 10 November 2021, T-612/17, *Google c. Commissione*, ECLI:EU:T:2021:763, § 637)
* Commitment can become binding only with the agreement of the undertaking
* Very common in the practice (around 50-60% of the decisions issued by the Commission

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Preliminary remarks (3)

* Strong incentives for both the Commission (or NCA) and the undertakings
* The focus is on the future (how the market will work) not on the past (the "anticompetitive" conduct
* Commission can pursue regulatory purposes

The introduction of commitment decision in the DMA

* The Commission can carry out market investigation inter alia to monitor systematical infringement of the DMA
* In this case it can issue "*an implementing act imposing on such gatekeeper any behavioural or structural remedies which are proportionate and necessary to ensure effective compliance with this Regulation*" (article 18 DMA)
* As an alternative, the Commission can issue a commitment decision: if "*the gatekeeper concerned offers commitments for the relevant core platform services to ensure compliance with the obligations laid down in Articles 5, 6 and 7 the Commission may adopt an implementing act making those commitments binding on that gatekeeper and declare that there are no further grounds for action*" (Article 25 DMA)
* What is the difference?

Civil actions related to the **same conducts** covered by the Commission decision.

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* This is the most important scenario where commitments and private enforcement can overlap
* By definition, the commitments shall make the competitive concerns described in the preliminary assessment no longer relevant
* In other words, the acceptance of the commitments entails that "*there are no longer grounds for action by the Commission*"
* This wording suggest that an enforcement activity is no longer needed
* **Question**: does this actually apply only to the Commission or also to national courts?

Can commitment decisions prevent damages actions?

* One could argue that granting damages could reduce the incentives of the undertakings to commit
* The more efficient private enforcement is, the less interest companies may have in negotiating commitments (and in any case in waiving the litigation phase)
* In addition as granting damages requires the finding of an infringement, one could also argue that a national judgment doing so would breach **Article 16 Reg. (EC) no 1/2003** and **art. 4(3) TFEU**, as the commitment decision does not contain that finding

No, they do not affect the powers of national courts

However:

* "*Commitment decisions are **without prejudice** to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case*" (Recital 13 Reg. 1/2003)
* "*Commitment decisions adopted by the Commission **do not affect** the power of the courts and the competition authorities of the Member States to apply Articles*" 101 and 102 TFEU (Recital 22 Reg. 1/2003)

No immunity form civil liability for committing undertakings

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Therefore, national Courts soon confirmed that:

* "*the commitment decision* ***does not entail any immunity*** *from civil liability but only makes it more difficult for the successful prosecution of compensatory actions*" (already TAR Lazio 7 April 2008 n. 2900, Trib. Milan May 30, 2019 No. 5122; Trib Milan December 23, 2019 no. 11893»
* "*la nulidad de las relaciones jurídicas litigiosas por entrañar fraude de ley* ***no es incompatible*** *con la Decisión de la Comisión de 12 de abril de 2006 (asunto COMP/B-1/38.348-REPSOL C.C.P.)* [...] porque la propia Decisión [...] no se pronuncia sobre si se ha producido o no una infracción del Derecho de la competencia» (cf. Tribunal Supremo, 8 maggio 2013, n. 272, Estación de servicio Fontanet c. Repsol)

Can commitment decisions foster private enforcement?

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* Smaller time lag between the offense and the decision (albeit negotiated)
* Better use of (limited) Commission resources and thus more decisions (negotiated and otherwise)
* More decisions means more chances of follow-on actions
* Can commitment decisions be considered as even fostering private enforcement?

The (tendentially) **negative effects** of negotiated settlements on damages actions.

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* Whit commitment decisions the distinction between so-called **stand-alone actions** and so-called **follow-on actions** is faded
* Commitment decisions leave the damaged parties without the so-called "privileged evidence" that suffices to prove before the national courts that a violation of Articles 101 or 102 TFEU has occurred
* Article 9 of Directive 104/2014/EU clearly does not apply to commitment decisions ("*an **infringement** of competition law found by a final decision of a national competition authority or by a review court is deemed to be **irrefutably established***), as there is no establishment of an infringement
* Commitments make it more complex to prove infringement, damage, and causation

No immunity, but no evidential effect too?

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* Relying on the lack of finding of any violation, the more restrictive approach suggest that commitment decisions shall have no effect in following civil proceeding
* Also in order to protect their attractiveness, and thus safeguard the **useful effect** of Article 9 Reg. (EC) No. 1/2003, according to this view commitments shall have **no relevance at all** in the process of convincing the national court that an infringement has been committed
* According to this view, follow on actions based on a commitment decision should be considered **fully stand alone actions**
* The decision to submit commitments comes in practice to be identified as a component of a broader strategy of the undertakings to limiting as much as possible the expected costs of the conduct under investigation

But what about the competitive concern that triggered the action of the Commission?

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* A more permissive view recognizes the existence of a margin within which commitment decisions can "help" claimants to meet the burden of proof required in civil judgments.
* The basic idea is rather simple: while it is true that a violation is not established, it is equally true that a violation is also not excluded
* Indeed, the adoption of a commitment decision is an indication of the existence of an (undefined) **competitive concern** of the Commission (or NCA)
* The acceptance of commitments requires the existence of an anticompetitive profile: otherwise, the **principle of proportionality** would (in theory) call for the dismissal of the case

The *Gasorba* case (case C-547/16)

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"national courts cannot overlook that type of decision.

Such acts are, in any event, in the nature of a decision.

In addition, both the principle of sincere cooperation laid down in Article 4(3) TEU and the objective of applying EU competition law effectively and uniformly require the national court to ***take into account*** *the* ***preliminary assessment*** *carried out by the Commission and regard it* ***as an indication****, if not* ***prima facie evidence****, of the* ***anticompetitive nature*** *of the agreement at issue in the light of Article 101(1) TFEU"*

The Paramount / Canal + case (case C-132/19 P)

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* *"decisions to accept commitments **must be founded on a 'potential infringement'**, that is, on an analysis of the undertakings' conduct and of the context surrounding it that supports the conclusion that **it is possible, and actually probable,** even if not yet certain, that the undertakings in question have been causing harm to competition.*
* *It is not a finding, yet the Commission must not confine itself to conjecture or to general hypotheses that are not even summarily tested in the light of the material that has been produced in the proceedings"* (Opinion of AG Pitruzzella § 70).

The (limited) evidential effect of commitment decisions

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* Commitments can therefore (somehow) help claimants by providing some sort of evidence to support the allegations of damaged parties.
* While not constituting a "privileged evidence" commitments are nonetheless an element that must be **taken into account**
* Claimants must prove the existence of the anticompetitive practice, **but** the text of the commitments decision can be used to steer national courts toward that conclusion

The (limited) evidential effect of commitment decisions

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* Already before *Gasorba* national courts recognized that competitive concerns could be enough to support the claimants in proving the existence of the violation (e.g. Tribunal de commerce di Parigi, 30 March 2015, DKT International c. Eco-Emballages et Valorplast)
* Of course, a commitment decisions are, as such, not enough
* If a national court believe that a given conduct is lawful, the existence of the commitment decision is not enough to force the national court o change its mind (see Audiencia Provincial di Madrid, 30 settembre 2011, n. 278, Estación de Servicio Villafria c. Repsol) (but see infra on so-called "negative decisions")

The (limited) evidential effect of commitment decisions

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* In the end, it is not a matter of principle (yes or no)
* Rather, it is necessary to assess, in concrete terms, what evidentiary benefits potential claimants may derive from the text of the final decision (and other documents)
* The question is how the content of the decision (and the documents gathered during the investigation) can "help" the damaged parties during a civil suit
* What is certain is that the benefits to the damaged are **more limited** than those resulting from an assessment decision

The (limited) evidential effect of commitment decisions

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* Commitment decisions "*do not relieve the damaged parties from the* ***burden of alleging and proving the constituent facts of their specific claim*** *that are in his direct availability and provide a picture that is not inconsistent with the findings of the Authority invoked in support of its thesis*" (Trib. Milan May 30, 2019 No. 5122)
* "*commitments* ***are not out-of-court confessions***" (Trib Milan December 23, 2019 no. 11893»
* "*the presentation of commitments* ***does not constitute an admission of guilt***" (cf. Trib. Milan, no. 9109/2015)"

(only?) the same value of other documents?

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"Being a document issued by a public authority, rendered at the end of a particularly complex and technical proceeding, its ***evidentiary value cannot be neutral, and it shall be at least equal to that of any other document submitted by the parties.***

The content shall be scrutinized by the civil courts according to the ordinary mechanism provided by the Civil Code, in light of the investigations given therein and the findings expressed therein.

The party harmed by the alleged antitrust offences shall prove it, since it is a ***so-called stand-alone action"***

(Trib Milan December 23, 2019 no. 11893

A principle of proof of the antitrust infringement?

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* National courts must base their assessment of the case on the evidence acquired in the course of the investigation;
* in particular, national courts must take into account the Commission's preliminary assessment and the elements that can be deduced from the communication of the relevant findings, in order to consider them as an indication, or **even as a principle of proof**, of the anti-competitive nature of the contested conduct, in the context of all the findings, including those of a different tenor, acquired at trial

Cass. civ. 4 October 2021 n. 26869

A rebuttable presumption of an infringement?

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* **They are not infringement decision** = Commitment decisions cannot have the same evidentiary value as infringement decisions
* **But they are not clearance decision** = Commitment decisions however cannot have the same evidentiary value as decisions finding no infringement either
* Indeed, they are usually adopted to remove the preliminary competition concerns raised by the Commission (or NCA)
* In some cases, commitments are agreed after a statement of objections has been issued.
* In these cases, commitment decisions may give rise to a sort of **rebuttable presumption** of unlawfulness of the contested conduct

Cass. civ. 27 February 2020 n. 5381

Why all these differences in case law?

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* The problem is that both the decision and the preliminary assessment contain little description of the facts, conduct, and - most importantly - their effects on the markets and third parties involved
* Hundreds of pages vs twentish
* The focus is on the provision of future remedies (often regulatory in scope), rather than on the analysis of the undertakings' conduct, also in light of the reduced relevance of the proportionality principle

Which help can be taken from a decision drafted like this ones?

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* «[w]*ithout having reached a definitive view*, *the Commission preliminarily concluded that IBM* ***appeared to be dominant*** *within the meaning of Article 102* [TFEU]»;
* «[t]he Commission **preliminarily** concluded that the cumulative effect of the following features of IBM's behaviour with respect to the supply of essential inputs **might amount** to a constructive refusal to supply that could raise concern under Article 102 [TFUE].
* The following recitals summarise the Commission's Preliminary Assessment in this regard, all of which remains provisional and **would need further analysis** before any definitive findings could be made» (COMP/39.692 – *IBM* §§ 26 and 32)
* «[i]*n a preliminary assessment, the Commission noted that the exclusive selling of the commercial broadcasting rights by the League Association* ***could restrict competition*** *between the clubs and companies in the first and second divisions*» (COMP/C-2/37.214 – Bundesliga, cit., § 1)

Hybrid procedures: commitment decision "strengthened" by an infringement decision

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* What happens if only one of the parties involved in a procedure proposes commitments and the Commission (or an NCA) issue an infringement?
* In this case, the commitment decision cannot be considered completely separated from the infringement ones since they concern the same conducts

(TAR Lazio 7 aprile 2008, n. 2900;
many cases from the Court of Milan)

Interim proceedings + disclosure and access to the file

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* The existence of a public enforcement proceeding has sometimes been considered a sufficient element to meet the ***fumus boni iuris*** threshold and therefore to grant interim measures (already App. Milan, Nov. 4, 2009)
* In interim procedures, the analysis of the case by the national court is necessarily less complete and thorough:
* National courts may be inclined to rely on the assessments already made by the Commission (or NCA) when the latter decided to initiate the public enforcement proceeding (whether an ordinary or a negotiated one)
* Similarly, a commitment decision can help claimants in a stand-alone action to meet the "**plausibility threshold**" and thus to obtain disclosure of relevant evidence or to get access to the Commission file (see Cour de Cassation, 19 gennaio 2010, Semavem c. JVC, in Bull. civ., 2010, IV)

Civil actions related to conducts occurred **after** the period covered by the Commission's decision

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* Actions against the undertaking that **breaches** the commitment made binding pursuant to Article 9 Reg. (EC) No. 1/2003
* Actions against the undertaking that **comply with** the commitment made binding pursuant to Article 9 Reg. (EC) No. 1/2003

The public enforcement perspective: Article 9(2) Reg. (EC) No 1/2003

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* From the public enforcement perspective, Article 9/2) Reg. (EC) n. 1/2003 provides the Commission with an instrument of "self-protection"
* The proceeding can be reopened and the Commission can fine the undertakings that have not fulfilled their obligations (AT.39.530 – *Microsoft*)
* In this case, what is being punished is the violation of the commitment, **not** a violation of Articles 101 and 102 TFEU
* The Commission does not have to prove the existence of an antitrust infringement, it is almost a contractual dispute

The private enforcement perspective: actions by third parties before national courts

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* Can private parties activate such (quasi) contractual litigation before a national court?
* Reg. 1/2003 is completely silent on the private enforceability of commitment decisions
* In the (national) case law, some courts have held – although as an obiter dictum - that this is not possible (see next slide)
* According to this view, reacting to a breach to the commitments is a sort monopoly of the Commission (or of the ANC which made the commitment binding)

Monitoring compliance with the commitments as a monopoly of the committing party (Commission/NCA)

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Sul punto, in disparte la circostanza secondo cui la competenza a verificare la corretta ottemperanza agli impegni assunti ex art. 14 ter L. n. 287/1990 e, in caso, ad intervenire è esclusivamente dell'AGCM, la quale ha, oltretutto, trasmesso due "prese d'atto" (all. n. 1 alla comparsa e all. n. 52 depositato successivamente, su autorizzazione del Giudice) della documentazione sulla osservanza degli impegni trasmessa dall'odierna convenuta, questo Tribunale ha disposto Consulenza Tecnica d'Ufficio al fine di verificare "attraverso la disamina della banca dati artisti audiovisivi di Nu. IM. (repertorio titoli ed opere), se quella consegnata ad ARTISTI 7607 corrispondesse o meno ed in che misura a quella in uso al 31.03.2017 a Nu. IM. limitatamente ai dati relativi alle opere audiovisive diffuse dagli utilizzatori fino all'11.03.2014".

Trib. Roma 11/04/2023 n. 5775

"[…] *the competence to* ***verify the proper compliance with the commitments*** *undertaken and, in the event,* ***to intervene belongs exclusively to the AGCM*** […]"

However, if commitments are clear, precise and unconditional …

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* There are several reasons in favor of the opposite conclusion
* Launching a proceeding *ex* Article 9(2) Reg. 1/2003 is a largely discretional decision of the Commission
* More generally, the very content of the typical commitments would seem to entail that third parties need to be able to rely on them before national courts
* Indeed, it is difficult to imagine cases in which the commitments made binding by the committing party (Commission/NCA) affect only the legal position of the committed party (the undertaking)
* Rather, under the ordinary scenario, the commitments also affect third-parties that have economic relations with the committed undertaking

… they (should) enjoy direct effect

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* The effects of commitments *vis-à-vis* third parties are usually favorable to the latter
* For example, third parties can benefit from the commitment of an undertaking to:
  * charge a certain price or to apply non-discriminatory terms of trade (cf. COMP/39.692 – *IBM*)
  * not execute contractual clauses that raise competitive concerns, , such as any "*use, resale or destination clauses or any tacit renewal clauses in future gas supply agreements*" (cf. COMP/B-1/37.966 – *Distrigas* § 27)
* After all, in the jargon of direct effect (at least before the *JP* case), a right is the other side of an obligation (in this case, assumed by the committing undertaking)

(almost) contractual litigation

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* The right of third parties to ask national courts to ensure compliance with the commitments perfectly fits with the general goals underlying the development of private enforcement
* In addition, contrary to damages actions, there cannot be any tension with the public enforcement pillar (e.g. leniency)
* Commitment decisions can be used:
  * **as a "shield"**, if the committing undertaking enforce a contractual clause that it committed not to apply or demands higher payment than the price "negotiated" with the Commission)
  * **as a "sword"**, to obtain the fulfillment of the contractual terms described in the commitments, including by requesting interim measures.

(almost) contractual litigation

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* The subject matter of the case is the committing undertaking's non-compliance with the obligations made binding by the Commission's decision, and **not a direct violation of Articles 101 or 102 TFEU**
* Depending on the circumstances, the subject of the civil suit is thus either a claim for **compliance** with the content of the commitments or a claim for **compensation** for the damage suffered.
* By virtue of the different evidentiary burden, the bringing of a civil action thus becomes a less complex activity
* From this perspective, commitments decisions can somehow **foster the development of private enforcement**

Actions against the undertaking that comply with the commitment

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* Generally speaking compliance with a commitment decision seems to preclude the possibility of subsequent civil litigation
* Many general principles (legitimate expectations, legal certainty, etc.) and, more generally, the need to ensure the consistency and non-contradictory nature of the legal order seem to support this conclusion
* However, there are also reasons why compliance with the commitments should not in itself guarantee immunity from civil actions

Actions against the undertaking that comply with the commitment

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* Probatio diabolica = before accepting the commitments, the Commission (or NCA) would be obliged not only to state that the commitments solved the competitive concerned but also to verify that their fulfillment is suitable to prevent any (present, future and even only potential) antitrust infringement
* the fact that commitments (may) pursue regulatory purposes could make the outcome of the commitments not focused on compliance with Articles 101 and 102 TFEU
* The undertaking takes part in drafting the commitments
* In the end, the issue resolving an antinomy between primary norms (i.e., Articles 101 and 102 TFEU) and secondary law (i.e., the decision with commitments)
* An antitrust infringement cannot become lawful just because it is carried out during the execution of a Commission decision

"strengthened" stand-alone case

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* **Higher burden of proof** = the commitment decisions not only does not help potential claimants meeting the burden of proof, but it makes the action more difficult
* While it cannot justify the immunity for the negotiating undertakings, the fact that the Commission finds the commitments suitable to solve the competition concerns may (correctly) lead the national judges to believe that competition rules have not been violated, at least *prima facie*

The prohibition of "negative decisions" finding that there has been no infringement

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* Third parties cannot request the application of contractual terms that the committing undertaking has accepted no longer to apply pursuant to a commitment decision
* Indeed, «*the ability of a third-party undertaking such as Canal + to win its arguments before a national court and succeed in its claim for damages against Paramount is* ***significantly weakened, since it will be necessary to rebut the presumption that the relevant clauses are unlawful***" (Opinion of AG Pitruzzella § 130).

The prohibition of "negative decisions" finding that there has been no infringement

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* However, according to Article 16(1) Reg. No 1/2003, "*when **national courts** rule on agreements, decisions or practices under Articles 101 or 102 TFEU which are already the subject of a Commission decision, they **cannot take decisions running counter to the decision adopted by the Commission***"
* "*A decision of a national court requiring an undertaking which has entered into commitments made binding pursuant to a decision adopted under Article 9(1) of Regulation No 1/2003 **to contravene those commitments would clearly run counter to that decision***"
* By holding "*that a national court hearing an action for enforcement of the contractual rights of Groupe Canal + could, if necessary, order Paramount **to contravene its commitments**, made binding by the contested decision, **the General Court misconstrued the first sentence of Article 16(1) of Regulation No 1/2003***" (CGEU, 9 December 2020, C-132/19 P, *Groupe Canal + SA*, §§ 109-111)

Civil actions related to conducts **predating** the period covered by the Commission's decision

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* It would seem to be an "ordinary" so-called stand-alone case, with the typical and well-known difficulties of this kind of actions
* Claimants shall prove before the national court:
  * the existence of the offence
  * the damage suffered
  * the causal link
* Is there any (potential) difference with the situation where a civil action concerns conduct that predates an infringement decision?
* Can the "negotiated nature" of commitments affect the content of the decision?

Civil actions related to conducts predating the period covered by the Commission's decision (2)

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* The Commission is required to ascertain the existence of an infringement as accurately as possible, not least because of the likely challenge by companies.
* The establishment of the infringement also includes the precise definition of its temporal scope.
* If a decision under Article 7 Reg. (EC) No. 1/2003 fixes the starting point of an offence at a certain date, it means that the Commission itself believed (or could not prove) that before that date the infringement did not exist
* In ordinary procedures, there is no reason why the Commission should exclude from the decision a particular component of the offence (from a temporal as well as a geographical point of view) that it considers to have in fact occurred
* The longer the duration of the infringement, the greater the fine;
* The higher the fine, the greater the benefit to the Commission (deterrence + accountability)

Civil actions related to conducts predating the period covered by the Commission's decision (3)

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* In commitments cases, the Commission **focuses on the future** (remedies) rather than on the past (the conduct)
* Undertakings have a specific interest that the decision cover a shorter period, in order to reduce the (already limited, as seen) utility that claimants may derive from it in civil court
* The offence (also as a part of the bargain with the undertakings) can be examined and described in not much detail
* From the Commission's viewpoint, it does not matter when the offence begun
* Limited judicial review and proportionality = a shorter duration does not oblige the Commission to reduce the intensity of the commitments (as a shorter duration would oblige the Commission to reduce the fine).

Civil actions related to conducts predating the period covered by the Commission's decision (4)

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* Does this mean that claimants can use the Commission's decision to draw evidence even if the decision covers a different period?
* **Certainly not**: parties cannot benefit directly from the decision, simply because conduct is not covered by it.
* However, what about article 5(1)(2) of dir. n. 2014/104/EU?
* Can a commitment decision be used to meet the "*reasoned justification*" and the "*plausibility of* [the] *claim*" thresholds to obtain a disclosure order by a national court and/or a national court ordering access to the file of a competition authority?
* Being possible that the temporal scope of the decision is one of the elements on which the parties (implicitly) negotiate, it cannot be ruled out that the competition authority could hold relevant information relating to the period that predates the one covered by the commitment decision

Thank you

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Co-funded by
the Training of National Judges
Programme of the European Union

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Action HT.5763: Training of National Judges in EU Competition Law
Grant Agreement No. HT.6148 SI2.858159

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