Commitment decisions: A Polish perspective

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INTRODUCTION

The commitment decision is quite a new instrument for European competition authorities. At first, it was introduced at the European level at the time of the modernisation of competition enforcement rules by Regulation 1/2003. Many Member States, recognising the advantages of this tool, decided to introduce the commitment mechanism copying more or less the European model.

The commitment procedure is an expression of proceduralisation of law, the idea of which is to depart from direct and governing intervention in social life and apply legal means respecting the autonomy of individuals instead.[2]. Competition law, which has as its subject the quick change of economic conditions, seems to be particularly prone to that type of ideas

Current practice shows that the commitment procedure is a useful enforcement tool. Both competition authorities and undertakings have many reasons to issue a commitment mechanism instead of an infringement decision. Competition authorities have the possibility to eliminate anti-competitive conditions in a faster (and cheaper) way with a more effective use of their limited sources. In complicated cases when the facts are not obvious or the issue in question is very complex, the commitment procedure may be a better way to address potential restriction of competition. Also when the case would require a long and detailed analysis and an infringement decision would have limited precedential value, the commitment decision seems to be a good solution[3]. Since the commitment mechanism is far less exposed to the risk of appeal, competition authority may also be interested in accepting commitments when it comes to the conclusion that the evidence is ambiguous or simply weak[4]. From the undertaking's point of view, the possibility of obtaining a commitment decision has also many advantages. Firstly, the company avoids formal finding of infringement and therefore avoids the imposition of fine. Moreover, the commitment procedure does not have a prejudication character and thus the person claiming damages has to prove the infringement (if the infringement instead is formally established, it considerably facilitates private claims). Furthermore, lack of formal infringement finding means that the practice in question is not illegal *ex lege* and the undertaking may step by step change its behaviour in accordance with proposed commitments. The undertaking has also possibility to offer commitment which it knows it can realize in practice and the outcome of the proceedings is more comprehensible.

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Urzedu Ochrony Konkurencji i Konsumentów', 3/2005, Kwartalnik Prawa Publicznego,105-141,p. 133.
[3] Ch. J. Cook 'Commitment Decisions: The law and Practice under Article 9', 29 (2)/2006, World Competition, 209-228, p.212.
[4] J. Temple Lang 'Commitment Decisions and Settlements with Antitrust Authorities and Private Parties under European Law' in: B. Hawk (ed.) *International Antitrust Law & Policy: Fordham Corporate Law 2005,* 2006, New York, 265-324, p. 275.

On the other hand, the commitment mechanism is a kind of a compromise between the authority and the undertaking and therefore it has a lower deterrent effect. The application of the commitment procedure strengthens the administrative model of competition law enforcement in Europe. If taken too far, it may change competition authorities to regulatory bodies[5]. This because commitment mechanisms do not deal with past infringement but rather introduce remedies for the future. Overreliance on the commitment procedure may also delay introduction of effective private enforcement of competition law in Europe since there is an increased difficulty for successful assertion of claims in case when commitment decision is adopted[6]. The undertaking, on the other hand, may bind itself to commitments in case when the competition authority would be unable to prove existence of a violation[7].

The article provides an overview of rules regarding commitment procedure under Polish competition law, in particular stressing the differences between the Polish and European regulation. It describes the cases suitable for commitment mechanism as well as the influence of the procedure on the leniency programme. The text presents also the procedural issues relating to the commitment instrument, especially the steps for adopting the decision with emphasis on the importance of procedural safeguards and pointing out its relative lack in the process described.

1. The commitment decision under Polish law

The commitment mechanism was introduced into the Polish legal order together with several amendments aligning Polish law to European regulations. It is worth mentioning that introducing this instrument did not come from compliance obligations since according to Article 5 of Regulation 1/2003 national competition authorities are entitled to accept commitments in relation to Article 101 and 102 of TFEU (and Article 288 of TFEU provides for a direct applicability of regulations).

However, as it was explained in the substantiation to the project of the amendment of the Polish Competition and Consumer Protection Act[8], (hereafter CCPA) the aim of introducing the commitment decision to the Polish regulation was to increase the efficiency of Polish competition authority[9] whose main task is to protect competition on the market and not just impose fines on the undertakings. Additionally, the commitment procedure was introduced to Polish law in order to equal the position of an undertaking in the proceedings before the Polish competition authority and to that before the European Commission. It is interesting in this regard that the Polish regulation regards potential breaches of both Polish and European competition rules (therefore somehow repeats the authorisation included in Article 5 of Regulation 1/2003).

[5] G. S. Georgiev 'Contagious Efficiency: The Growing Reliance on U.S.-Style Antitrust Settlements In EU Law', 2007 Utah Law Review, , 971-1037, p. 1026.
[6] G. S. Georgiev 'Contagious Efficiency: The Growing Reliance on U.S.-Style Antitrust Settlements In EU Law', 4/2007, Utah Law Review, , 971-1037, p. 1035.
[7] A. Magnus, B. McGrath 'Commitments in competition enforcement. All's well that ends well'?, PLC April 2006, 14-16, p. 16.
[8] Print of the Sejm no. 2561 from 20.02. 2004, p. 5 of the substantiation of the Project of amendment.
[9] i.e. The President of the Office of Competition and Consumer Protection.

1.1. Cases suitable for commitment decisions

According to recital 13 of Regulation 1/2003 commitment decisions are not appropriate in cases where the competition authority intends to impose a fine. In addition, the opinion presented by the European Commission excludes the use of commitment decision to hardcore restrictions (e.g. cartels)[10]. Polish regulation does not impose such limitation, therefore it is possible to make use of the commitment mechanism in all kind of cases[11]. The decision whether to accept commitments or not rests exclusively with the Polish competition authority.

One should bear in mind that the regulation in question is an example of the Europeanisation of Polish competition law and there are no obligations to follow directly European model (e.g. also in Italy and in France a commitment decision may be issued in relation to hardcore restriction cases). Nevertheless, some authors indicate that such practice is inconsistent with the objectives expressed by the European legislator.[12] The instrument in question was originally designed to balance between the need to detect and punish competition law infringements and the necessity of maintaining procedural efficiency as well as introducing the possibility of instant removal of anticompetitive effects of certain practices on the market[13]. If commitment decisions are allowed to be issued with regard to hardcore restriction cases, this balance seems to be disturbed. Furthermore, the possibility of issuance of a commitment decision in all cases may hamper proper exercise of the rule of equality before the law and it may have negative effects on achieving proper deterrence of competition law. The latter does not however seem to be an actual threat for competition law application in Europe as competition authorities tend to impose heavy fines nowadays[14]. Nevertheless, even application of very high fines when combined with the widespread use of the commitment mechanism may have a negative influence on the deterrent enforcement of competition rules.

The possibility of adopting commitment decisions in hardcore restriction cases is not just theoretical. In 2008, the Polish competition authority has issued a commitment decision in a case involving fixing minimum resale prices[15]. The proceedings concerned the distribution agreement between Xella and its 10 distributors. The agreement contained a provision which explicitly prohibited the application of lower resale prices than the price of purchase of products from the producer. This kind of agreement is qualified as minimum resale price maintenance and as underlined to the decision *"pricing agreements are considered to be one of the hardcore restrictions of competition*[16]*"*. Such opinion has been also expressed in the motivation of the decision[17], however in the Polish competition authority's view, the provision was somehow specific because contrary behaviour of distributor would be economically irrational and has

[10] 'Commitment decisions (Article 9 of Council Regulation 1/2003 providing for modernised framework of antitrust scrutiny of company behaviour)',MEMO/04/217.
[11] C. Banasinski, E. Piontek (eds.) *Ustawa o ochronie konkurencji i konsumentów Komentarz,* 2009, Warsaw, p.310.
[12] A. Pera, M. Carpagnano 'The law and practice of commitment decisions: a comparative analysis', E.C.L.R. , 2008, 669-695, 685.
[13] A. Pera, M. Carpagnano 'The law and practice of commitment decisions: a comparative analysis', E.C.L.R. , 2008, 669-695, p. 685.
[14] For example in December 2009, Polish competition authority imposed maximum possible fines (i.e. amounting 10 % of the revenue) on some of the biggest producers of cement in Poland, participating in the cartel on the construction market.
[15] Decision DOK - 3/2008 *Xella*.
[16] Decision DOK - 3/2008 *Xella*, p. 22.
[17] Decision DOK - 3/2008 *Xella*, p. 11, 22, 24.

marginal importance[18]. Xella immediately after the initiation of the proceedings, began to amend its agreements with distributors. Of course, such active cooperation deserves its "reward", nevertheless it has been considered whether, in case of hardcore restrictions, other objectives of competition law, like educational or deterrent effect of the decision, should not prevail (especially that under Polish CCPA imposition of fine by the authority is not obligatory). The decision in Xella case may be a sign that the Polish competition authority will change its position in relation to resale price maintenance[19] and will not indicate this practice as a hardcore violation of antitrust rules. According to the current competition doctrine, only cartel cases are regarded as hardcore restrictions[20].

1.2. Commitment decision and leniency programme

The policy behind introducing the leniency programme and the commitment decision procedure to competition law is to some extend similar. Both tools have the object of inducing undertaking to active cooperation with competition authorities in order to terminate restrictions of competition existing on the market.

However, from the practical point of view, application of one of those instruments should exclude the possibility of introducing the latter one. It is because the undertaking applying for immunity (or fine reduction) under leniency programme is required to make self-incriminating statements and provide all relevant information and evidence relating to the alleged cartel. The competition authority may grant immunity only if it finds infringement (and the finding concerns also the leniency applicant). In turn, commitment decision does not include the finding of the infringement.

Under EU competition law, leniency programme concerns only cartel cases and in practice applications regard usually hardcore restriction cases where if no immunity was granted, it had been appropriate to impose a fine. Therefore, such cases would not be suitable for commitment decisions under Regulation 1/2003.

Polish regulation provides for a different solution. First of all, leniency programme applies not only to cartel cases but to all anticompetitive agreements. Secondly, as indicated above, there are no reservations as to cases suitable for the commitment procedure. As a result, it is not hard to imagine circumstances where an undertaking is put in a dilemma: to apply for leniency or propose commitments. It should be stressed that both instruments are of discretionary character. At the moment, considering the lack of settled case law, assessing the possibility of obtaining any of those instruments seems to be extremely difficult.

[18] Decision DOK - 3/2008 *Xella*, p. 24.
[19] Although in all cases regarding RPM the Polish competition authority stresses that pricing agreements are considered to be hardcore restriction, one can notice that even in Polish guidelines on the method of setting fines, RPM is qualified only a "serious" and not "very serious" infringement. Guidelines are available at Polish competition authority's website at: http://uokik.gov.pl/leniency_programme.php .
[20] See the decision of FTC in *Nine West* case regarding RPM practices: http://www.ftc.gov/opa/2008/05/ninewest.shtm. Also, the Spanish competition authority has applied in December 2009 *de minimis* rule to RPM practice in *El Corral de las Flamencas* case

Polish legislator imposes a significant burden on undertakings by forcing them to make decisions while available guidelines – both jurisprudential and those coming from Polish competition authority are in fact very little. As an effect, the undertaking will be under constrain in making a key decision as to the strategy of defence and this decision may have significant consequences in future (e.g. with regard to possible private claims).

The practice of application of those instruments under Polish regulation is vague, particularly in the light of recent *P4/Polkomtel* commitment decision[21]. The investigation concerned the alleged anticompetitive agreement regarding conditions on which Polkomtel has provided P4 with access to its network. At the end of 2008 four telecommunication network operators provided their services on the Polish market of mobile telephony. However, only three of them (including Polkomtel) had full mobile network infrastructure of national coverage. P4, which was the operator with limited coverage, concluded an agreement with Polkomtel on national roaming. The agreement obliged P4 to purchase access exclusively to the network of Polkomtel and guaranteed Polkomtel the right of priority to provide this service before other operators. In the decision the Polish competition authority indicates that P4 has filed an leniency application (interestingly, it is probable that P4 has applied for leniency only to force Polkomtel to remove the disadvantageous for P4 restrictions from the agreement). During the antimonopoly proceedings both undertakings has proposed commitments. Unfortunately, the authority does not explain in the reasoning of the decision its assessment of P4 leniency application. The case, however, indicates that under Polish law it is not completely excluded to file for both instruments in one proceeding. With no pointer from the authority in the future, such practice may blur boundaries between the two, in fact distinct, instruments.

1.3. Procedure

According to Article 12 of CCPA, it is possible to adopt commitment decisions in the course of antimonopoly proceedings[22]. There are two basic conditions to apply commitment procedure: the case is pending before the Polish competition authority and the proceedings are carried out against a particular undertaking (i.e. it is not just an investigation into a specific market situation). The regulation does not provide any time limits, therefore theoretically a commitment decision may be issued in all stages of the proceedings. In practice, it seems that the Polish competition authority is not willing to accept commitments if the undertaking concerned does not proactively act from the beginning of the antimonopoly proceedings. In *Zabka/Koral* case[23], one of the undertakings applied for a commitment decision, however the Polish competition authority decided to issue an infringement decision. As explained in the decision, the application of Zabka was refused because it was filed at the final stage of the proceedings, after the parties were acquainted with the evidence in files of the case. In the authority's opinion, proposing commitments after 8 months of proceedings would by no means accelerate the procedure and hence, the issuance of commitment decision would be aimless.

[21] Decision No DOK -6/2009 *P4/Polkomtel.*
[22] Polish CCPA provides for two types of proceedings: explanatory which may aim at initial determination whether an infringement occurred, market study, etc.; and antimonopoly proceedings which concern particular behaviour with regard to particular undertakings involved (may lead to an agreement or practice being prohibited and imposition of fine).
[23] Decision RKT 107/08 *Zabka/Koral*; what is interesting the decision was issued in 2008 (just like *Xella* case) and also concerned resale price maintenance.

Secondly, the CCPA introduces a condition regarding the plausibility of the existence of the infringement of competition rules (both Polish and European). "Plausibility" is a separate concept from "evidence" under Polish law. It is a kind of ersatz of the evidence *sensu stricto*. It allows fastening the proceedings by releasing the authority from strict standards of proof. The plausibility does not give certainty but only credibility as regards to the facts. As indicated by the Polish Court of Competition and Consumer Protection, the main aim of the provision is to fasten the antimonopoly proceedings, when object – elimination of the potential infringement – may be achieved without caring out the entire proceedings[24]. What is important, however, the condition does not mean that it is sufficient to obtain any degree of probability, even the smallest which in the opinion of the competition authority is adequate. The authority should obtain such a degree of probability that competition rules were breached that would make impossible to state that competition law was not infringed[25]. Otherwise, the commitment decision should not be adopted. It is because according the rule of deepening the trust of citizens existing in Polish administrative proceedings when choosing legal effect to particular fact, the authority should consider the "justified interest in the case", however without giving priority to public interest. Hence, if it is not contradictory to public interest, the doubts should be decided to citizens' advantage[26]. The plausibility, as a rule, should not be based only on the statements of the party[27].

In practice, however, the control over the process of adopting commitment decisions is slender. In fact, if the undertaking wants to avoid a long and expensive procedure that may involve a high fine, it may be willing to offer commitments, especially when the law is unclear, even if the facts of the case seem to be controversial. If the commitment decision was appealed (which is rather unlikely), the Polish Court of Competition and Consumer Protection is obliged to examine the case in first instance, therefore it is not as such oriented on "punishing" Polish competition authority for its procedural faults. Therefore, it appears that the main guard of "fair play" rules in the competition proceedings is the competition authority itself.

It is worth to mention that several practitioners have postulated removal of the condition of plausibility as in the light of this provision, proposing commitments may be found by the Polish competition authority as a acknowledge undertaking's guilt[28].

Contrary to European regulation, the Polish competition authority is not obliged to issue a formal act similar to preliminary assessment. As it is pointed out, the authority should inform the undertaking concerned about the plausibility of infringing competition law, otherwise it would make impossible for the undertaking to propose appropriate commitments[29]. The information should include precise and clear description of the practice which, in the authority's view, may constitute a prohibited practice. Nevertheless, the CCPA does not impose such obligation on the competition authority. The process is to large extend not formalised. On the one hand, it allows to keep the flexibility of the negotiations but on the other hand, causes a significant threat for basic rights of the party in the proceedings, in particular right of defence. The undertaking proposes commitments without having a detailed knowledge about actual

[24] Judgment of the Polish Court of Competition and Consumer Protection from 15.12.2006, XVII AmA 35/06.
[25] A. Gill, M. Swora 'Decyzja zobowiazujaca jako metoda rozwiazywania sporow w postepowaniu przed Prezesem
Urzedu Ochrony Konkurencji i Konsumentow', (3)2005, Kwartalnik Prawa Publicznego, 105-141, 128
[26] Judgment of the Suprme Administrative Court, 23.09.1982 r., II SA 1031/82 (ONSA 1982, no 2, item 91).
[27] Kazimierz Piasecki (ed.) *Kodeks postepowania cywilnego. Komentarz*, 3 edition, Warsaw, 2001, p. 1022.
[28] Paper of Working Group of Competition Law Society regarding proposition of changes to Polish Competition and Consumer Protection Act, dated as of 6.10.2008
[29] K. Kohutek, M. Sieradzka *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warsaw, 2008, 433.

concerns of the authority. As a result, it may negatively affect the proportionality of the commitments – the undertaking acts without formal statement of the authority and at the same time it has to take into account that the authority may abandon negations and issue an infringement decision.

The process of submitting commitments is also not regulated. It is not determined who has the initiative to propose commitments, hence both the undertaking and the authority are entitled to commence the process. It should be emphasized, however, that it is not possible to force the undertaking to give any commitments. At the same time, the undertaking cannot compel the authority to accept commitments.

1.4. Procedural safeguards

Although the undertaking is not obliged to propose commitments, nevertheless the benefits arising from the commitment procedure are considerable. Still elimination of potential restriction of competition should not be held at the expense of basic procedural rights.

The undertaking against which the proceedings are carried out is a party to the proceedings. Although this seems obvious, it is particularly important because only the entities which have the status of the party to the proceedings enjoy procedural rights provided for in administrative procedure, including the right to be properly and exhaustively informed about the legal and factual circumstances that may have influence on the existence of rights and obligations that are subject of the proceedings, the right to actively participate in all the stages of the proceedings, the right to be heard, and the right to have access to the file.

Although the substantiation to the project of the amendments of CCPA introducing commitment decisions states that the project is parallel to the enforcement tool from Regulation 1/2003, it is not entirely true. The Polish regulation does not provide for any consultation procedure (neither a public market test nor an opinion of "professional" body), therefore at the end of the day case handlers are the ones who in accordance with material gathered and experience have to decide whether or not accept commitments.

In particular, the lack of procedure analogous to market test provided for in Article 27.4 of the Regulation 1/2003 seems to have adverse effects. Observation submitted by third parties would enable the authority to get acquainted with different interest and put the commitments to a broad market test. The practice of the European Commission indicates that opinions submitted in the course of consultation procedure provided in the past some valuable remarks and in some cases resulted in appropriate modification of proposed commitments[30]. Publication of proposed commitments should not involve significant costs and administrative sources (after all, issuance of commitment decision should be rather an exception, then a rule). It is worth to mention that the procedure of public consultation exists not only in the European regulation but is also implemented in other Member States including France, Italy, and the UK[31].

[30] COMP/38.381 De Beers/Alrosa.
[31] A. Pera, M. Carpagnano 'The law and practice of commitment decisions: a comparative analysis.', E.C.L.R. , 2008, 669-695, p.676 and 669, A. Magnus, B. McGrath 'Commitments in competition enforcement. All's well that ends well?', PLC April 2006, 14-16, p. 15.

After the modernisation of Polish competition law in 2007, it is particularly important since Polish legislator has limited the definition of the party, depriving the entities lodging a complaint of the status of the party[32]. The rights of third parties are quite insignificant. First of all, the Polish competition authority is not obliged to inform third parties about the proposed commitments. It seems to be disadvantageous, above all in relation to entities directly affected with the practice which is subject to the proceedings. Third parties may only apply general provisions regarding right to be heard and from their own initiative submit explanations concerning essential circumstances of a given case. However, expressing a constructive opinion is only possible when the third party has a sufficient knowledge about the facts of the case and proposed commitments.

2. Elements of commitment decision

2.1. No formal finding of violation

One crucial characteristic of the commitment mechanism, especially for the undertaking concerned, is the fact this decision does not include a finding that there was a violation of competition rules.

This statement is justified also from the formal point of view. As indicated by the Polish Supreme Court, commitment decision does not definitively forejudge the existence of the infringement because it is only based on the plausibility of the violation[33].

Some authors indicate that a different view can be taken and it is acceptable to state that commitment decision *materially* confirms the existence of the violation and therefore it could be useful in private suits[34]. Such opinion seems to be unjustified, not only because it is totally contrary to the objectives of European model and would deprive this instrument from its primary attraction, but also from the formal point of view *(above)*. Even if offering commitments may be somehow understood as plead guilty *de facto*, it is not determine that the law was actually violated[35]. Such conclusion would not only influence private claims, but could also affect the assessment of potential violation by the same undertaking in the future[36].

The sentence of commitment decisions expressly states that the decision is only based on plausibility. Some concerns may raise to the wording of justification of the commitment decisions which, unfortunately, used not be so carefully drafted as it is done by the European Commission (e.g. "[the authorithy] *found the infringement (…) not only plausible but* ***even proven***"[37], *"the effects of the practice in* question are ***clearly anticompetitive***"[38], *"the effects (…) consist in abuse of dominant position (…)that distorts of competition"*[39]).

[32] Currently, Polish competition authority acts only *ex offico*, entities may submit to the authority a written notification concerning a suspicion that competition restricting practices, however the authority is not obliged to initiate proceedings.
[33] Resolution of the Polish Supreme Court, III CZP 52/08. The resolution was issued before modernization of Polish CCPA, however the wording of provisions regarding commitment decision has not been modified.
[34] C. Banasinski, E. Piontek (eds.) *Ustawa o ochronie konkurencji i konsumentów Komentarz*, 2009, Warsaw, p.314; What is interesting (and somehow disturbing) the publication (as a whole) was prepared mostly by former and current case handlers of the Polish competition authority.
[35] T. Skoczny (ed.) *Ustawa o ochronie konkurencji i konsumentów Komentarz*, 2009, warszawa, p. 739
[36] According to the Polish Guidelines on setting fines for competition-restricting practices past infringement is an aggravating circumstance that could raise the base fine up to 50% (the Guidelines are available on the Polish competition authorithy's website: www.uokik.gov.pl).
[37] Decision RGD 44/2005 *Gmina Miastko*.
[38] Decision RGD 16/2006 *Telewizja Kablowa VECTRA S.A. z siedzibą w Gdyni i Spółdzielnia Mieszkaniowa KORAB w Ustce.*
[39] Decision RWR 4/2009 *Gmina Jelenia Góra*.

2.2. Commitments and other conditions imposed

The undertaking may propose commitments of behavioural or structural remedies, factual or legal activities. The regulation states only that the commitments may concern undertaking or termination of certain activities. Obviously, commitments should lead to prevention or liquidation of effects of potential competition violation. As the practice does not differ from the European model, the issue will not be addressed in detail hereunder[40] .

The obligatory element of the commitment decision under Polish law is the imposition of information obligations. The authority should fix dates when the information should be submitted.

It is also possible for the authority to determine the final date for realisation of the commitments. There are no pointers as to the duration, however the authority should take into consideration legal and factual situation of the undertaking. Some authors point out that determination of final date is desirable with regard to security and certainty of legal transactions as well as necessity of effective realization of competition law aims[41].

3. Enforcement of commitment decision

3.1. Competition authority

Polish regulation provides for three tools aiming at effective enforcement of commitment decision.

The basic instrument regards the possibility of revocation of the decision. The revocation always takes place *ex offico* and has a discretionary character. First of all, it may be done in the event when the decision has been issued on the basis of false, incomplete or misleading information or documents. It is emphasized that the source of the information is of no importance[42]. Secondly, the decision may be revoked in case when the undertaking has not carried out commitments or obligations imposed in the decision Finally, the decision may be revoked if the circumstances having a significant impact on the issuance of the decision, have changed. What is important, however, the possibility of revocation of the decision in the last situation depends on the consent of the undertaking concerned. Thus, the Polish regulation differs from European model where the consent of the undertaking is not required. The requirement of undertaking consent is related to acquisition of specific "right" in commitment decision (the concept of advantage under Polish administrative regulation is understood broadly[43]). The benefit is that the undertaking has avoided potential finding of violation and fine imposition[44]. In any event when the decision is revoked, the authority is obliged to adjudicate on the merits of the case.

[40] See J. Temple Lang 'Commitment Decisions and Settlements with Antitrust Authorities and Private Parties under
European Law' in: B. Hawk(ed.) *International Antitrust Law & Policy: Fordham Corporate Law 2005,* 2006, New York, p.265-324, J. Temple Lang "Commitment decisions under Regulation 1/2003: legal aspects of a new kind of competition decision" E.C.L.R. , 24 (8), 2003, p. 347-356.
[41] K. Kohutek, M. Sieradzka *Ustawa o ochronie konkurencji i konsumentów. Komentarz,* Warsaw, p. 439.
[42] K. Kohutek, M. Sieradzka *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warsaw, p. 441.
[43] B. Adamiak, J. Borkowski (eds.) *Kodeks postepowania administracyjnego. Komentarz*, 8 edition,2006, Warsaw, p. 710.
[44] K. Kohutek, M. Sieradzka Ustawa o ochronie konkurencji i konsumentów. Komentarz, Warsaw, p. 444.

The authority may also impose a fine up to EUR 50 000 000 if the undertaking, even unintentionally, has not fulfilled the information obligations or provided untrue or misleading information. Finally, in case when the authority has determined final date for realisation of the commitments, it is possible to impose fine up to EUR 10 000 per each day of delay in execution of decision.

Contrary to the European model, the Polish regulation does not provide for the possibility of imposition fine up to 10% of the total turnover in the preceding business year. In case when no final date was determined the only "sanction" would be revocation of the decision and deciding on the merits of the case. Hence, the non fulfilment of the commitments does not constitute an infringement *per se* as it is in European commitment decision. Such solution leads to significant weakening of the possibilities of enforcement of the commitment decisions.

3.2. Third parties

As indicated above (in spite of doubts raised by some authors), commitment decision does not have a prejudication character[45]. In addition, in case when commitment decision is adopted, the CCPA expressly excludes application of provisions regarding possibility of issuing the decision finding the violation or the decision declaring termination of the violation.

Therefore the person claiming damages will be obliged to prove the infringement. An interesting issue, that has to be marked, is the possibility of claiming damages for improper fulfilment of commitments imposed in decision. In practice, it appears that fulfilling general prerequisites of civil liability (in particular proving casual nexus) would be difficult. It seems that such possibility would depend particularly on the character of commitments and the way in which the commitment were expressed.

It is clear that third parties have very little possibilities to influence the outcome of commitment procedure. They are not the party to the proceedings (even if they notify the possible infringement), they are not consulted during the proceedings and finally, they are also deprived from the possibility lodging the appeal (as they do not have a status of a party in administrative proceedings). Basically, what they can do is to wait for the result of the proceedings and accept it. This issue can be seen as a significant disadvantage of the Polish competition law procedure.

[45] Resolution of the Polish Supreme Court, III CZP 52/08.

CONCLUSIONS

The Polish regulation, although in principle designed to follow the European commitment mechanism, at the end of the day seems to be only "inspired" by the European regulation. Significant changes regarding mainly the process of accepting commitments, in particular lack of public market test, seem to be insufficient for proper realization of rule of openness of the proceedings. Introduction of the process of public consultation would definitely assure minimum degree of protection of the rights of third parties in the proceedings.

The diversity in the regulation of the commitment procedure across Europe has its origin in cultural, political and legislative factors[46]. However, those differences may have negative effect on uniform enforcement of competition law in the EU as well as on the implementation of the "one stop shop" system of EU competition law[47]. The Polish regulation of the commitment instrument gives a good example of the potential inequalities that may significantly affect the undertakings concerned if the proceedings are not carried out at the European level but in several Member States separately.

[46] A. Pera, M. Carpagnano 'The law and practice of commitment decisions: a comparative analysis', E.C.L.R. , 2008, 669-695, p. 685.
[47] Denis Waelbroeck 'Global Competition Law Centre Working Paper 1/08', p. 12-13; Note that in practice Polish completion law applies national procedure also in cases regarding 101 and 102 TfEU (e.g. Decision DOK 98/07 *Telekomunikacja Polska S.A.*).