

The Principle of Equality: A Limit to the Commission's Discretion in EU Competition Law Enforcement?

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This article deals with whether the principle of equality has a limiting effect on the Commission's enforcement of EU competition law. Analysing the Commission's discretion during the enforcement of EU competition law and examining the principle of equality will build the foundation for the article. One can distinguish between situations where two parties to the same case are treated differently and where two parties to different cases are treated differently. In these two situations, the limitations of the principle of equality on the discretion of the Commission will be discussed with regard to the remedies used and the magnitude of fines imposed. It is concluded that the principle of equality has very little influence on the Commissions' actions in the field of EU competition law enforcement and some improvements are suggested to ensure transparency in the enforcement process.

I. Introduction

Principles are used in law to explain rules. According to Sir Gerald Fitzmaurice, principles lie under the surface of a rule, explaining its existence. They answer the question 'why', while rules answer the question 'what'.¹ In the EU law, the Court of Justice of the European Union (hereinafter 'the Court') has recognised a number of principles which are

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¹ Gerald G Fitzmaurice, 'The general principles of international law considered from the standpoint of the rule of law' (1957) 92 *Collected Courses of the Hague Academy of International Law* 1, 7.

binding upon the EU institutions and the Member States.² General principles are now even cited in the Treaty.³ Recognised general principles include, among others, the principles of legal certainty, proportionality, legitimate expectations, and equality.⁴

The principle of equality in European Union law (hereinafter 'EU law') holds that '[s]imilar situations shall not be treated differently unless differentiation is objectively justified'.⁵ This principle has several functions. The overarching function is a regulatory one: in Law and Economics, it ensures that the internal market can function and that neither state actors nor private actors distort the free movement.⁶ In administrative law, it prevents public authorities of the Member States and the EU from making arbitrary decisions.⁷ Moreover, in non-discrimination law, it performs a gap-filling function where the codified safeguards against discrimination fail to work.⁸

Since, equality '[i]s one of the fundamental principles of community [now EU] law',⁹ it affects all areas of EU law. A simple illustration of a situation where the principle of equality could affect EU competition law enforcement is the recent acceptance of commitments offered by Apple and four book publishers. The commitments simply stated that the concerned parties would cease their potentially anti-competitive behaviour.¹⁰ In many other cases, the European Commission (hereinafter 'Commission'), would have investigated the case for several years in order to impose a high fine on those undertakings. Why the Commission took this particular decision in

² See, for example, Case C-397/03 P *Archer Daniels Midland Co. and Archer Daniels Midland Ingredients Ltd v Commission of the European Communities* [2006] ECR I-4429; Case T-155/06 *Tomra Systems ASA and Others v European Commission* [2010] ECR II-04361.

³ Treaty on the Functioning of the European Union [2008] OJ C83/47, art 340(2).

⁴ Takis Tridimas, *The General Principles of EU law* (2nd edn, Oxford University Press 2006) 6

⁵ Joined Cases 117/76 and 16/77 *Albert Ruckdeschel & Co. et Hansa-Lagerhaus Ströh & Co. v Hauptzollamt Hamburg-St. Annen and Diamalt AG v Hauptzollamt Itzehoe* [1977] ECR 1753, para 7.

⁶ Tridimas (n 4) 45.

⁷ Paul Craig, *EU administrative law* (2nd edn, Oxford University Press 2012) 526.

⁸ Tridimas (n 4) 78.

⁹ Joined Cases 117/76 and 16/77 *Albert Ruckdeschel & Co. et Hansa-Lagerhaus Ströh & Co. v Hauptzollamt Hamburg-St. Annen and Diamalt AG v Hauptzollamt Itzehoe* [1977] ECR 1753, para 7.

¹⁰ European Commission, 'Antitrust: Commission accepts legally binding commitments from Simon & Schuster, Harper Collins, Hachette, Holtzbrinck and Apple for sale of e-books' (Press Release IP/12/1367, 13 December 2013) <http://europa.eu/rapid/press-release_IP-12-1367_en.htm> accessed 07 December 2013.

this case is not known, but one can wonder if it has followed the principle of equality. While the Commission retains a wide margin of discretion to decide in which cases and with which undertakings to settle a case or from which undertakings to accept commitments, this does not mean that it can ignore the principle of equality. It is therefore interesting to evaluate which influence the principle of equality has on the Commission's enforcement of EU competition law.

The goal of this article is to weigh the principle of equality against the discretion enjoyed by the Commission when enforcing EU competition law. Sections II and III therefore outline in parallel the discretion of the Commission with regard to the enforcement of EU competition law and the functions as well as application of the principle of equality by the Court. To tie these two strings together, section IV highlights four different situations questioning if and how the principle of equality limits the discretion of the Commission in enforcing EU competition law. Section V concludes.

II. The Commission's Discretion as an Enforcer of EU Competition Law

The Commission has three combined functions in the enforcement of EU competition law: It investigates breaches of EU competition rules, imposes, and enforces penalties for breaches. In this article, the focus is on the use of remedies by the Commission, or 'outcome discretion' as Petit calls it.¹¹ Three measures can be named in that regard: (1) Decisions according to Article 7 of Regulation 1/2003 finding an infringement of Article 101 or 102 TFEU; (2) Decisions according to Article 9 of Regulation 1/2003 accepting commitments; and (3) Settlements in cartel cases according to the settlement notice.¹² The following sections will explore the discretion enjoyed by the Commission with regard to these three remedies.

1. Decisions Finding an Infringement of Article 101 or 102 TFEU

A decision regarding Article 7 of Regulation 1/2003 (hereinafter an 'Article 7 decision') finds an infringement of Article 101 or 102 TFEU and requires

¹¹ Nicolas Petit, 'How Much Discretion do, and should, Competition Authorities enjoy in the Course of their Enforcement Activities? A Multi-Jurisdictional Assessment' (2010) *Concurrences: Revue des Droits de la Concurrence* 44, 56.

¹² Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases [2008] OJ C167/1.

this infringement to be ceased. The Commission can also impose structural and/or behavioural remedies that are necessary to put an end to the infringement. Furthermore, a fine is usually imposed on the infringing undertaking.¹³ The Commission must however ensure that the punishment for the infringement is proportionate.¹⁴ There are no restraints on the Commission's discretion to adopt an Article 7 decision as soon as it considers that the conditions in Article 101 or 102 TFEU are fulfilled.

2. Decisions Accepting Commitments

A decision regarding Article 9 of Regulation 1/2003 (hereinafter an 'Article 9 decision') accepts commitments in a form of settlement with the Commission. However, an Article 9 decision does not formally find an infringement of EU competition law, nor does it find that no infringement has taken place.¹⁵ The advantage of a commitment decision is that the proceedings will be resolved quicker and at a lower cost for both the Commission and the undertaking. Furthermore, it is in the interest of the concerned undertaking because no infringement is formally found. A disadvantage is that the Commission needs to monitor whether the undertaking is in compliance with the commitment and if there is no compliance it may have to reopen the proceedings.¹⁶ Furthermore, the Commission does not set a precedent by accepting commitments, because no breach of EU competition law is formally found.¹⁷

The discretion of the Commission to take such a decision seems to be limited in a number of ways. *First*, the undertaking in question must offer commitments to the Commission, i.e. both the Commission and the undertaking must consent to such a decision. This is because Article 9 mixes the public law nature of EU competition law enforcement with a contractual component: The Commission and the undertaking must negotiate and mutually agree on a way to solve the case.¹⁸ This means that the

¹³ Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] [2003] OJ L1/1, art 23(2).

¹⁴ *ibid.*

¹⁵ Commission, 'Antitrust Manual of Procedures' (2012) para 16 <http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf> accessed 07 December 2013.

¹⁶ Regulation 1/2003 (n 13) art 9(2).

¹⁷ Petit (n 11) 59.

¹⁸ Florian Wagner-von Papp, 'Best and even better practices in commitment procedures after Alrosa: The dangers of abandoning the "struggle for competition law"' (2012) 49 *Common Market Law Review* 929, 933.

Commission cannot *force* an undertaking to offer commitments. Undertakings cannot *force* the Commission to accept commitments.¹⁹ However, the Commission may be able to *pressure* an undertaking to offer commitments by threatening the imposition of fines.

Second, the Commission may not take an Article 9 decision if it ‘[i]ntends to impose a fine’.²⁰ According to the Regulation on best practices, this refers to the ‘nature of the infringement’ which may or may not call for a fine.²¹ As Petit points out, this limitation may appear somewhat strange, because it would eliminate the incentive for undertakings to offer commitments, namely the threat of a fine.²² However, pursuant to Wils, it seems that this clause should be interpreted as the Commission cannot accept commitments when its investigations have reached a stage where an infringement has been found and a fine should thus be imposed.²³ This interpretation seems to make more sense, since this would prevent the Commission from taking commitment decisions, where a decision according to Article 7 of Regulation 172003 should be made and a precedent should be set. Nevertheless, this leaves a wide discretion to the Commission to decide whether a case ‘calls’ for a decision according to Article 7 of Regulation 1/2003 or not.²⁴

Third, the Commission does not accept commitments in cases that involved ‘secret cartels’, meaning the great majority of cases concerning an infringement of Article 101 TFEU would be excluded.²⁵ The exception may be cases such as the abovementioned, where Apple and several book publishers offered commitments, which would likely have been a case under Article 101 TFEU.²⁶ Another example is the commitments accepted by the Commission in the *Sky Team Case* which concerned the cooperation of airlines.²⁷ Nevertheless, these cases appear to involve an open business

¹⁹ C-441/07 P *European Commission v Alrosa Company Ltd* [2010] ECR I-5949, para 94.

²⁰ Regulation 1/2003 (n 13) recital 13.

²¹ Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C208/6 para 116.

²² Petit (n 11) 58.

²³ Wouter P. J. Wils, ‘Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003’ (2006) 29 *World Competition* 345, 365.

²⁴ Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C208/6, para 116.

²⁵ *ibid.*

²⁶ Commission, ‘Antitrust: Commission accepts legally binding commitments from Simon & Schuster, Harper Collins, Hachette, Holtzbrinck and Apple for sale of e-books’ (n 10).

²⁷ BA/AA/IB (Case COMP/39.596) [2010] OJ C278.

arrangement rather than a secret cartel that was considered problematic with regards to EU competition law by the Commission. Thus, these cases are deemed to be suitable for a commitment decision.

Last of all, the Commission must ensure that commitments are proportionate.²⁸ This requirement is clarified by the judgment of the Court in *Alrosa*.²⁹ The Court held that Article 7 and Article 9 of Regulation 1/2003 have different aims³⁰ and that:

There is therefore no reason why the measure which could possibly be imposed in the context of Article 7 of Regulation No 1/2003 should have to serve as a reference for the purpose of assessing the extent of the commitments accepted under Article 9 of the regulation, or why anything going beyond that measure should automatically be regarded as disproportionate (...).³¹

The Court thus considers that the Commission's duty with regard to the principle of proportionality in Article 9 decisions only covers a duty to check if the commitments dispel the Commission's concerns about the behaviour of the undertaking in question.³² The Court justifies this by arguing that in this way undertakings whose commitments are accepted avoid being found to have infringed EU competition law.³³ Hence, there is only a weak constraint on the Commission with regard to what kind of commitments would be accepted under the principle of proportionality.

Even though there are a number of constraints on the Commission when deciding whether to accept commitments, none of them impose a strong limit on the Commission's discretion. Furthermore, as compared to an Article 7 decision, the procedural requirements are reduced and the *Alrosa* judgment shows that the review carried out by the Court in cases resolved by commitments is very limited.

²⁸ Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C208/6, para 115.

²⁹ C-441/07 P *European Commission v Alrosa Company Ltd* [2010] ECR I-5949.

³⁰ *ibid*, para 46.

³¹ *ibid*, para 47.

³² *ibid*, para 42.

³³ *ibid*, para 48.

3. Settlements in Cartel Cases

Where the Commission finds an infringement of Article 101 TFEU and intends to adopt a decision according to Article 7 of Regulation 1/2003, it may consider settling the case with the undertaking concerned.³⁴ A settlement differs from an Article 7 decision in two ways: (i) the undertaking will receive a 10% reduction of their fine;³⁵ and (ii) the undertaking must admit the infringement to the Commission.³⁶ Thus, this measure has advantages: (i) the case is likely closed quicker than under usual circumstances, (ii) both sides incur reduced costs, and (iii) the undertaking receives a lower fine. The disadvantage for the undertaking is that it must admit the infringement to the Commission. Settlements are currently only made in cases concerning Article 101 TFEU, not cases concerning Article 102 TFEU.³⁷

The Commission has a wide discretion to ask parties in Article 101 TFEU cases whether they are interested to settle a case or not.³⁸ However, it has the duty to ask all parties to a certain case if they are interested in a settlement in case a settlement is considered as suitable for that particular case.³⁹ In order to decide on the suitability of settlement, the Commission considers whether the settlement procedure will be a gain in efficiency, i.e. whether it will be less burdensome to settle the case as opposed to the adoption of an Article 7 decision. It may also consider if the case will set a precedent with an Article 7 decision, for example where novel questions or unclear case law are concerned.⁴⁰ Thus, the discretion enjoyed by the Commission with respect to settlements in cartel cases is very wide and only constrained by the obligation to offer a settlement to all parties to the same case.

³⁴ Commission Regulation (EC) 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 [2004] OJ L123/18, art 10a(1).

³⁵ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases [2008] OJ C167/1 (Settlement Notice), para 32.

³⁶ *ibid*, para 20(a).

³⁷ Reg 773/2004, art 10a(1).

³⁸ Reg 773/2004, art 10a(1); Settlement Notice (n 10) para 5.

³⁹ Settlement Notice (n 10) para 6.

⁴⁰ *ibid*, para 5.

III. The Principle of Equality

On the basis of the above discussion on the discretion of the Commission, the below section will introduce the principle of equality, first from the general point of view of EU administrative law and then from that of EU competition law enforcement.

1. EU Administrative Law

References to the general principle of equality can be found in numerous places within the Treaty on European Union (hereinafter 'TEU').⁴¹ It is first mentioned in the abstract in recital 2 of the preamble to the TEU and then again in Article 2 TEU. Specifically, Article 3(3) TEU refers to equality between men and women, Article 4 TEU to equality between the Member States and Article 9 TEU to equality between EU citizens. Furthermore, the Charter of Fundamental Rights of the European Union holds in Article 20 that 'Everyone is equal before the law'.⁴²

As explained in the introduction, the use of the principle of equality varies from field to field in which it is used. However, it is worth repeating that it '[c]onstrains the regulatory choices that can be made by the administration'.⁴³ This means that authorities must (i) justify their actions and (ii) that they cannot take arbitrary actions.⁴⁴ In this sense, the principle of equality interacts with other principles of EU law. For example, the principle of legitimate expectations and the principle of proportionality are related to the principle of equality in their functions, but are different in their specific content. The difference lies in the test that is carried out by the Court. It assesses if the principle of equality has been breached in two steps: (i) whether the party in question has been treated different from another party in a similar situation; and (ii) if there is an unequal treatment, whether there is an objective justification for that treatment.⁴⁵

An exemplification of this test is the *Ruckdeschel* case: Union Regulation did no longer provide for production refunds to producers of quellmehl, but

⁴¹ Treaty on European Union [2010] OJ C83/01.

⁴² Charter of Fundamental Rights of the European Union [2010] OJ C83/389.

⁴³ Craig (n 7) 526.

⁴⁴ Tridimas (n 4) 41.

⁴⁵ Joined Cases 117/76 and 16/77 *Albert Ruckdeschel & Co. et Hansa-Lagerhaus Ströh & Co. v Hauptzollamt Hamburg-St. Annen and Diamalt AG v Hauptzollamt Itzehoe* [1977] ECR 1753, para 7.

did so for producers of starch. The reason was that quellmehl and starch were no longer considered substitutable products.⁴⁶ The Court held that the defendants in the case, the Council and the Commission, had not produced any evidence to support that claim. Accordingly, it was not possible to distinguish between quellmehl and starch.⁴⁷ The Regulation was thus in breach of the principle of equality.⁴⁸

A further example provides the *Denkavit*⁴⁹ case: After a revaluation of the German currency, the *Deutsche Mark*, the agricultural sector suffered a loss. A Council Regulation aiming at remedying this loss provided that state aid to agricultural producers up to a certain amount would be allowed.⁵⁰ The applicant in this case was an industrial breeder of livestock who claimed that he should be included in the definition of the term 'agricultural producer'.⁵¹ The Court held that it was possible to differentiate between agricultural sectors, if this is based on objective criteria which are not arbitrary.⁵² In this case, industrial breeders of livestock were in a different situation than agricultural livestock breeders because the former were able to obtain their animal feed from international markets whereas the agricultural breeders were dependent on their own land. For that reason, industrial breeders were independent of a currency revaluation.⁵³ The unequal treatment between livestock producers could thus be justified.⁵⁴

2. EU Competition Law Enforcement

As the above cases illustrate, both the EU institutions and the Member States are required to treat persons and undertakings equally if they are in the same situation. Naturally, this also applies to the enforcement of EU competition law by the Commission.

A recent case on the treatment of different parties to the same cartel illustrates how this discretion is limited by the principle of equality. In the *Alliance One* case the Commission decided to hold certain parent companies jointly and severally liable for the participation of their subsidiaries in a

⁴⁶ *ibid*, para 6.

⁴⁷ *ibid*, para 8.

⁴⁸ *ibid*, para 10.

⁴⁹ Case 139/77 *Denkavit Futtermittel GmbH v Finanzamt Warendorf* [1978] ECR 1317.

⁵⁰ *ibid*, paras 4-5.

⁵¹ *ibid*, para 6.

⁵² *ibid*, para 15.

⁵³ *ibid*, para 17.

⁵⁴ *ibid*, para 18.

cartel fixing prices for raw tobacco.⁵⁵ The Commission, in this particular case, did not only apply the presumption that ownership of (nearly) 100% of the shares of the subsidiary meant that the parent could be held responsible for the actions of the subsidiary. Instead, the Commission applied the so-called 'dual base' approach where it also checked if there was evidence indicating actual control of the parent over the subsidiary.⁵⁶ Thus, the Commission had concluded that several of the parent companies involved could not be held responsible for the cartel, with the exception of Transcontinental Leaf Tobacco Corp. Ltd. This undertaking was held responsible for the conduct of its subsidiary, World Wide Tobacco Espana, SA, solely based on the fact that it held almost all the shares of that subsidiary.⁵⁷ The General Court held, and the Court of Justice confirmed on appeal, that the decision constituted an infringement of the principle of equality.⁵⁸ While the Commission was free to decide which undertakings to address in their decision according to Article 7 of Regulation 1/2003, it must make such assessment on an equal basis for all parties concerned in a certain cartel, unless the undertakings are not in comparable situations.⁵⁹

While parties to the *same* case can request the Commission treats them equally where they are in the same situation, as in the *Alliance One* case; the General Court's judgment in *Compagnie générale maritime* shows the principle of equality has a clear limit, since:

[t]he fact that the Commission has not imposed a fine on the perpetrator of a breach of the competition rules cannot in itself prevent a fine from being imposed on the perpetrator of a similar

⁵⁵ Case T-24/05 *Alliance One International, Inc and others v Commission* [2010] ECR II-5329, paras 13-19.

⁵⁶ *ibid*, paras 140-141.

⁵⁷ *ibid*, paras 217-218.

⁵⁸ *ibid*, paras 2118-219; Joined Cases C-628/10 P and C-14/11 P *Alliance One International Inc., Standard Commercial Tobacco Co. Inc v Trans-Continental Tobacco Leaf Corp. Ltd, European Commission and European Commission v Alliance One International Inc., Standard Commercial Tobacco Co. Inc., Trans-Continental Leaf Tobacco Corp. Ltd* [2012] OJ C295/6.

⁵⁹ There is a number of other cases concerning the setting of fines and the principle of equality in cartel cases, see for example, Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré SA and Others v Commission of the European Communities* [2007] ECR II-947; *T-13/03 Nintendo Co., Ltd and Nintendo of Europe GmbH v Commission of the European Communities* [2009] ECR II-975.

infringement. The principle of equality of treatment cannot be invoked where there is illegality.⁶⁰

The principle of equality cannot be invoked to complain about the amount of fines. One can also reflect that it is not possible to invoke the principle of equality where parties in *another* case have been treated differently.⁶¹ As a result, the considerable powers of the Commission as the first-instance enforcer of competition law are thus constrained by the possibility of undertakings to appeal the Commission's decisions to the General Court and the Court of Justice who can then apply general principles of EU law, such as the principles of equality. However, such a constraint is always dependent on the parties' decision to appeal their case to the Courts.

IV. Assessment of Different Situations

The *Alliance One* case shows that the Court will carefully scrutinise the Commission's actions against several parties in one and the same case. At the same time, as *Compagnie générale maritime* shows, the illegal nature of infringements of EU competition law limits the application sphere of that principle.

Nevertheless, there is very little case law from the Court discussing the issue of equality in the context of EU competition law enforcement. It is thus difficult for both the Commission and the concerned undertakings to know exactly when and to what extent the principle of equality applies in a given situation. The question to be considered in this discussion is thus in how far the discretion of the Commission is limited by the principle of equality when deciding on the outcome of cases concerning EU competition law. Two situations are possible:

1. The undertakings in question are parties to the same case; or
2. The undertakings in question are parties to different cases

In the assessment of these situations two stages of enforcement must be distinguished:

⁶⁰ Case T-86/95 *Compagnie générale maritime and Others v Commission of the European Communities* [2002] ECR II-1011, para 242.

⁶¹ See *infra* section IV.

1. The choice of remedies used by the Commission. That is, whether a case is resolved by an Article 7 decision, Article 9 decision or settlement (‘the remedy’); and
2. The choice whether or not the Commission imposes a fine on an undertaking and the magnitude of said fine (‘the punishment’).

Thus, the following matrix can be used to show which combinations of situations are possible:

	Remedy	Punishment
Parties to the same case	<i>Situation A</i>	<i>Situation B</i>
Parties to different cases	<i>Situation C</i>	<i>Situation D</i>

1. Situation A

With regards to the resolution of a case where several undertakings are parties to the same case, an infringement under Article 101 TFEU will generally be at stake. This situation is easily resolved by reference to EU legislation: In such a case the Commission has committed itself in the settlement notice to offer a settlement to all parties to one case.⁶² Even if this were not the case, the Commission would have to act in the same way, because the principle of equality requires the Commission to treat undertakings equally in the same situation. The very nature of a cartel is to bind several undertakings to act in a certain, agreed way. Thus, undertakings that are parties to the same Article 101 TFEU case will usually be in the same situation and must therefore be treated equally. However, the Commission is not obliged to grant a settlement to each of the parties if they do not cooperate with the Commission as necessary.⁶³ This can lead to so called ‘hybrid-decisions’ where the Commission settles with some of the parties to a case but takes an Article 7 decision against others.⁶⁴ Furthermore, drawing an analogy from settlements, the Commission would

⁶² Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases [2008] OJ C167/1, para 6.

⁶³ Commission Regulation (EC) 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 [2004] OJ L123/18, art 10a.

⁶⁴ See, for example *Animal Feed Phosphates* (Case COMP/38866) [2010] OJ C 111/15.

presumably be obliged to offer the possibility to propose commitments to all parties to one case where Article 101 TFEU is at stake.

2. Situation B

Where several parties to the same case are to be fined, the calculation of the fine will consider the circumstances of each undertaking separately. Pursuant to the notice on the calculation of fines, this includes, *inter alia*, the turnover of the concerned products, the duration of the infringement and possible mitigating and aggravating circumstances.⁶⁵ Thus, the amount of the fine for each party can vary significantly. The only condition that the principle of equality imposes on the Commission is that fines have to be calculated and allocated on the same basis, as the *Alliance One* case shows.⁶⁶ This leaves a large discretion to the Commission in determining fines. Numerous soft law instruments describe the procedure followed by the Commission in detail aiming at creating transparency about the process for the concerned undertakings.⁶⁷ Nevertheless, the practice of the Court shows that the Commission had a wide discretion, even where the interpretation of its own soft law instruments is concerned. In *Amann & Söhne*, where the importance of certain criteria when calculating a fine was at issue and the Court held that:

(...) neither Regulation No 1/2003 nor the Guidelines provide that the amount of fines must be determined in direct relation to the size of the affected market, that being only one relevant factor among others. (...) in assessing the gravity of an infringement the Commission must have regard to a large number of factors, the nature and importance of which vary according to the type of infringement in question and the particular circumstances of the case (...).⁶⁸

Consequently, the principle of equality only restricts the discretion of the Commission in cases of gross inequality, such as in the *Alliance One* case.

⁶⁵ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 [2006] OJ C210/2, paras 19-33.

⁶⁶ See *supra* section 3.2.

⁶⁷ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 [2006] OJ C210/2; Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17; Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases [2008] OJ C167/1.

⁶⁸ Case T-446/05 *Amann & Söhne GmbH & Co. KG and Cousin Filterie SAS v European Commission* [2010] ECR II-01255, paras 174-175.

3. Situation C

The most difficult and uncertain situation is probably the one where undertakings are parties to different proceedings where the resolution of a case takes different forms. One could argue that cases with very similar facts should be treated the same, at least in the sense that the Commission should offer the concerned parties a settlement or a commitment decision. Whether or not such a decision is actually taken depends very much on the cooperation of every single undertaking. However, the mere possibility of settling a case or offering commitments should exist in cases concerning similar infringements as such infringements where settlements or commitments were previously accepted. In such cases, both parties would be in comparable situations and should thus be treated equally, unless other conduct is objectively justified.

However, examining previous case law shows that it seems unlikely that the Commission would be obliged to offer a settlement or commitments to an undertaking because it has done so in a previous case. In *ABB*, the General Court considered that the Commission is not bound by its previous decisions with regard to the consideration of certain mitigating factors. More recently, in *Visa*, the General Court held that Visa could not claim that the Commission should adopt the same approach in this case as in *MasterCard* and *Cartes Bancaires*.⁶⁹ The Court adds that this may '[a]mount to a plea that they should benefit from an unlawful act committed in favour of a third party, which would be contrary to the principle of legality'.⁷⁰ It is thus unlikely that the Commission would accept any claim to the principle of equality, even if the facts of two cases were very similar.

In any case, it is difficult to assess how similar cases should be to impose a duty on the Commission to offer a settlement or a commitment decision to an undertaking. The fact is no case resembles exactly the other and therefore it will be easy for the Commission in most cases to distinguish them on the facts. For instance, market structures might differ, therefore that a structural remedy that was suitable in one case would not be possible in another, except they are similar cases. In essence, unless an infringement concerns

⁶⁹ Case T-461/07 *Visa Europe Ltd and Visa International Service v European Commission* [2011] ECR II-1729, paras 216-218.

⁷⁰ *ibid*, para 219.

the same market and takes exactly the same form, undertakings will always be in somewhat different situations, thereby making the application of the principle of equality difficult for both the Commission to apply, and parties to claim and the Court to assess. Therefore, the principle of equality does not constrain the Commission's power to decide on a resolution route in each separate case.

4. Situation D

The situation where a punishment is imposed on parties to different cases is the same as Situation B. The amount of fines can vary significantly according to the individual infringement. In addition, as in the *Compagnie générale maritime* case, undertakings cannot use the principle of equality to escape fines.⁷¹ Furthermore, as the Court held already in *Musique Diffusion*, undertakings cannot use the previous level of fines imposed by the Commission to make claims with regard to the principle of equality. The Commission is empowered to raise the level of fines at any point if it finds that the previous level is not sufficient to ensure a deterrent effect of fines.⁷²

5. The Limitation of the Commissions' Discretion by the Principle of Equality

On the basis of the above case studies, the principle of equality only really limits the Commission's actions in the field of EU competition law enforcement where there are several parties to the same case, which brings about the obligation to treat these parties equally. Usually, as such will be Article 101 TFEU cases. Article 102 TFEU cases will only concern the party whose situation cannot be compared to the situations of parties to other cases. However, even in cases concerning Article 101 TFEU, the application of the principle can be hindered where a party does not decide to appeal the Commission's decision to the Court of Justice. Thus, the constraints imposed on the Commission by the principle of equality are very small and uncertain for the undertaking concerned.

The wide discretion provided to the Commission can be justified by the need for flexibility on the side of the Commission. Infringements of EU

⁷¹ Case T-86/95 *Compagnie générale maritime and Others v Commission of the European Communities* [2002] ECR II-1011, para 242.

⁷² Joined Cases 100 to 103/80 *SA Musique Diffusion française and others v Commission of the European Communities* [1983] ECR 1825, paras 108-09.

competition law are serious matters causing damages to both the functioning of the internal market in general and consumers in particular. There is a good reason to argue that not all cases *should* be closed with a commitment decision or a settlement, in order to set precedents, clarify the application of EU competition law, and punish hard-core cartels.⁷³ In this way, the Commission is afforded by the necessary flexibility to assess each case on its individual merits. It also allows the Commission to adjust its enforcement technique due to the developments in economic theory, new kinds of infringements as well as societal preferences. However, in the view of the on-going criticism of the Commission as a first-instance enforcer of EU competition law,⁷⁴ it is difficult to expect the Commission improve its enforcement.

A clarification on the rules concerning commitments could be an improvement on the transparency of the actions taken by the Commission. In the same vein is the notice on settlements in cartel cases, the Commission should adopt detailed guidelines with regards to commitment decisions in order to be clear what exactly is meant by the current 'where the Commission intends to impose a fine' condition and to give more detailed guidance on the cases where commitments may be accepted. For example, conditions could be related to the infringement in question, the behaviour of the undertaking when cooperating with the Commission, or even the previous record of the undertaking. Such distinctions between different undertakings are unlikely to violate the principle of equality, since they are not in similar positions. For example, an undertaking that has been found guilty of an infringement of EU competition law cannot be compared with an undertaking without such a history. Likewise, the Commission could give some more guidance on their requirements concerning the kind of commitments that the Commission may accept, depending on the individual case of course. These conditions should explicitly be understandable by undertakings in advance. The Commission can adopt such conditions in the form of soft law, that is to say a notice or a communication. If this were to be done, the Commission would be bound by its own conditions, by being

⁷³ Petit (n 11) 59.

⁷⁴ See further Wouter Wils, 'The Combination of the Investigative and Prosecutorial Function and adjudicative Function in EC Antitrust Enforcement : a legal and economic analysis' (2004) 27 *World Competition* 201; Ian S. Forrester, 'Due Process in EC Competition Cases: a Distinguished Institution with Flawed Procedures' (2009) 34 *The European Law Review* 817.

subject to review by the Court, in case they are breached.⁷⁵ This would have the advantage of introducing more transparency into the Commission's actions in this field.

Admittedly, one could argue that soft law comes with its own set of problems. Commission Guidelines and Communications are often written in a general manner to cover as much ground as possible. This becomes problematic when the terms of the soft law are too general and not very helpful for undertakings or when the Commission is able to diverge from it depending upon specific features of the case.⁷⁶ In this respect, nothing can be won by the adoption of soft law. Legal certainty may even be endangered where undertakings trust that a case falls under a soft law instrument when this opinion is not shared by the Commission. However, this would be assuming the worst possible outcome from the adoption of a new soft law instrument. A well-drafted soft law instrument can assist undertakings to assess their own conduct and lead them to cooperate with the Commission in an enforcement situation in the best possible way.⁷⁷ Besides, the adoption of a soft law instrument appears to be the best, albeit not only, option to improve the transparency of the acceptance of commitments by the Commission.

V. Conclusions

Indeed, the Commission enjoys a wide discretion when deciding on the outcome of a case concerning Article 101 or 102 TFEU. This discretion is only limited to the cases where parties to the same case should equally be treated in considering a settlement or a commitment decision. Thus, although the principle of equality is meant to constrain the Commission's actions, it only applies in a limited way to the enforcement of EU competition law. Even worse the correct application of this principle may also require an appeal to the EU Courts. Thus, it would be desirable to determine a set of rules, possibly through a soft law instrument, regarding in which cases and under which conditions the Commission settles a case or

⁷⁵ Case T-380/94 *Association internationale des utilisateurs de fils de filaments artificiels et synthétiques et de soie naturelle & another v Commission* [1996] ECR II-2169, para 103.

⁷⁶ Nicolas Petit and Miguel P.L. Rato, 'From Hard to Soft Enforcement of EC Competition Law - A Bestiary of 'Sunshine' Enforcement Instruments' (2008) 19 <<http://ssrn.com/abstract=1270109>> accessed 07 December 2013.

⁷⁷ *ibid*, 18.

considers accepting commitments from undertakings that have or may have infringed EU competition la