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# A Search for Appropriate Judicial Scrutiny

## - An analysis of the implications of the jurisprudence laid down by the CJEU regarding third party challenges to commitment decisions

JURM02 Graduate Thesis
Graduate Thesis, Master of Laws program
30 higher education credits

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Semester of graduation: Autumn 2017

# Contents

# Summary

As of 2004, with the entry into force of Regulation 1/2003, the Commission has been granted a possibility to substitute its infringement procedure in competition law enforcement, for a simplified commitment procedure. The major difference lies in that instead of having to conduct a thorough investigation into the behaviour of one or more undertakings, and follow this investigation with a finding of infringement of Article 101 or 102 TFEU and a possible fine, the Commission can now accept commitments from undertakings addressing its competition concerns. The Commission must only conduct a preliminary investigation, concluding that it intends to adopt an infringement decision in order for this option to become available, in accordance with Article 9 of the regulation. This essay aims to investigate the positive and negative aspects of the commitment procedure. A further aim is to analyse the possibilities for a third party of challenging a commitment decision.

This possibility brings with it several positive outcomes as well as many possible detriments. On the positive side are aspects such as a greater efficiency in competition enforcement and a more effective use of the Commission's resources – the Commission being the main enforcer of EU competition law. Another positive outcome is that this development was at large a codification of something that was already occurring, however previously without any possibility of actually enforcing the offered commitments. The negative impacts of the procedure include a decline in legal certainty, and a lack of consideration for the interests of third parties, consumers as well as the public interest. Concerns have also been expressed regarding the possibility for the Commission to use the procedure as a way of regulating specific markets, and taking the adjudication on novel legal issues into its own hands.

Especially after the CJEU developing some jurisprudence there are concerns relating to an overuse of the procedure, and that the procedure will be used as a loophole for the Commission in order to escape judicial review. In the cases *Commission v Alrosa* and *Morningstar v Commission*, the CJEU has granted the Commission a vast degree of discretion as to what commitments it may accept, limiting its own scope for judicial review drastically compared to in infringement decisions. The two rulings are the only cases where the EU Courts have ruled on the validity of a commitment decision, and in both cases the appeal before the Court came from a third party applicant. Research shows that an undertaking subject to a commitment decision has never brought an action for appeal. In *Alrosa* the applicant, with the same name, was a business partner to the undertaking which has offered commitments to the Commission. Alrosa considered the commitments to be disproportionate in that they were too onerous. In *Morningstar* the applicant was a competitor of the view that the commitments were not enough to address the competition concerns expressed by the Commission.

Both cases were ruled in favour of the Commission, and in my opinion the message is quite clear: the current legal situation does not seem to provide third parties with any real possibilities of challenging commitment decisions. As it seems third parties are the only actual parties currently submitting appeals to commitment decision, the limiting of their doing so may mean limiting the real possibility for judicial review of commitment decisions. The current legal situation does in my view not offer an appropriate level of judicial scrutiny of commitment decisions.

# Sammanfattning

Sedan 2004, när förordning 1/2003 trädde ikraft, har kommissionen givits en möjlighet att ersätta sitt förfarande för överträdelsebeslut inom tillämpningen av konkurrensrätt, med ett förenklat förfarande där specifika åtaganden görs bindande gentemot företag. Den huvudsakliga skillnaden ligger i att istället för att behöva genomföra en grundlig utredning gällande ett eller flera företags ageranden, och därefter fatta ett beslut om överträdelse av antingen Artikel 101 eller 102 FEUF, ofta inkluderande en bot, kan kommissionen nu godta åtaganden från de berörda företagen vilka har som syfte att undanröja kommissionens betänkligheter. Kommissionen behöver enbart göra en preliminär bedömning, och med bakgrund i denna avse att fatta ett beslut om att en överträdelse ska upphöra för att detta alternativ ska bli tillgängligt, i enlighet med artikel 9 i förordningen. Denna uppsats syftar till att undersöka de positiva och negativa aspekterna av åtagandeförfarandet. Ett ytterligare syfte är att analysera möjligheterna för tredje parter att utmana ett kommissionsbeslut som gör sådana åtaganden bindande.

Möjligheten stadgad i artikel 9 bär med sig såväl ett antal positiva konsekvenser, som flertalet negativa sådana. På den positiva sidan finns aspekter såsom en ökad effektivitet i tillämpningen av konkurrensrätten samt en nyttigare användning av kommissionens resurser – då kommissionen har rollen som den huvudsaklige tillämparen av EUs konkurrensrätt. Ytterligare en behållning är att utvecklingen av ett formellt åtagandeförfarande i stort egentligen var en kodifiering av vad som redan pågick, dock tidigare utan praktiskt möjlighet att göra åtaganden formellt bindande gentemot de berörda företagen och därmed hålla dem till dessa. De negativa inverkningarna av förfarandet innefattar ett avtagande i rättssäkerheten, och en brist på hänsyn gentemot tredje parters intressen, konsumenters intressen och det allmänna intresset. Bekymmer har även uttryckts vad gäller möjligheten för kommissionen att använda åtagandeförfarandet som ett sätt att reglera

specifika marknader och sektorer, och därmed ta prövningen av nya rättsliga frågor och dilemman i sina egna händer.

Särskilt sedan EU-domstolen utvecklat praxis på området råder betänkligheter kring en överanvändning av förfarandet, samt att förfarandet kan komma att användas som ett kryphål för kommissionen för att slippa undan domstolsgranskning. I fallen *Kommissionen mot Alrosa* och *Morningstar mot kommissionen* har EU-domstolens båda instanser givit kommissionen ett omfattande utrymme för skönsmässig bedömning gällande vilka åtagande den är villig att acceptera, Därmed begränsas domstolens eget utrymme för granskning drastiskt jämfört med för överträdelsebeslut. De två rättsfallen är de enda där EU-domstolen har beslutat om giltigheten för ett åtagandebeslut, och i båda fallen kom överklagandet från en tredje part. Undersökningar visar att ett företag som själv är föremål för ett åtagandebeslut aldrig har begärt överprövning av kommissionens beslut. I *Alrosa* kom begäran från en affärspartner till det företag som hade erbjudit kommissionen åtaganden. Den sökande ansåg att åtagandena var oproportionerliga i det att de var alltför långtgående. I *Morningstar* var den sökande en konkurrent, med synen att åtaganden inte var tillräckliga för att undanröja kommissionens konkurrensrättsliga betänkligheter.

Båda fallen blev beslutade till förmån för kommissionen, och i min mening är budskapet relativt tydligt: det gällande rättsläget verka inte erbjuda tredje parter några reella möjligheter att överklaga kommissionsbeslut som gör åtagande bindande. Då det verkar som att tredje parter är de enda som faktiskt söker överprövning gentemot sådana beslut, kan en begräsning såsom denna innebära en begräsning av den faktiska möjligheten för granskning av åtagandebeslut. Det rådandet rättsläget erbjuder i min åsikt inte tillräckliga möjligheter för rättslig granskning av åtagandebeslut.

# Preface / Förord

För 64 månader sedan började jag på juristprogrammet i Lund. Nu har de månaderna plötsligt tagit slut, juristprogrammet är avklarat och den 15 februari, när höstterminens studentkort går ut, är jag officiellt inte längre student. Jag kommer behöva betala fullpris för både kaffe på Pressbyrån och tågresor med Skånetrafiken. Jag hoppas identitetskrisen inte blir alltför stor.

Jag vill tacka alla de som gjort min tid i Lund till vad den varit. Tack till mina tjejkompisar, de mest fantastiska vänner någon kan önska sig, för att ni alltid finns där. Lund vore inte Lund utan er. Tack mamma och pappa, för ert outtröttliga stöd, alla peppande ord och för att ni tog med er färska svenska kantareller och prästost när ni hälsade på mig under min utbytestermin. Tack Oliver, för att du tror på mig även när jag inte gör det. Och för att du talar om för mig när jag skriver alldeles för långa meningar. Jag vill även tacka min handledare Xavier Groussot, för alla hjälpsamma tips och råd som fått mig att tänka ett steg längre under skrivandet av detta examensarbete.

För 64 månader sedan kastade jag mig ut i studentlivet utan att ha en aning om vad det skulle innebära. Nu kastar jag mig i ut i arbetslivet. Jag hoppas det tar emot mig lika väl.

Lund den 29 december 2017

*Sofie Olovsson*

# Abbreviations

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| CJEU | Court of Justice of the European Union |
| EC | European Community |
| EEC | European Economic Community |
| ECJ | European Court of Justice |
| EU | European Union |
| EUMR | European Union Merger Regulation |
| GC | General Court |
| NCA | National Competition Authority |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |

# 1 Introduction to the Research

This essays centrals around the possibility, granted through Article 9 of Regulation 1/2003[1], of making commitments binding upon undertakings as a means of addressing any concerns the European Commission might have as regards to compliance with the EU competition rules. Since the possibility became available in 2004 it has been frequently used and widely debated. In its ruling in case C-441/07 P *Commission v Alrosa*[2] 2010 the European Court of Justice (ECJ) had its first opportunity to deliver an opinion on the procedure. My research focuses on the implications of the ruling in *Alrosa* and the recent ruling by the General Court (GC) in case T-76/14 *Morningstar v Commission*[3], mainly the effects the cases have, and will have on the possibility for appropriate judicial scrutiny of commitment decisions.

## 1.1 Purpose and Research Questions

Article 9 of Regulation 1/2003 states that in a case where the Commission intends to initiate investigations into the conduct of one or more undertakings regarding their compliance with the competition rules laid down in Article 101 or 102 TFEU, the undertakings may offer commitments - changes in behaviour or structure. If the Commission concludes these commitments are enough to put their competition concerns to rest they may adopt a decision making these commitments binding on the undertakings. My aim is to provide some clarity as concerns the positive aspects and effects which may result from this procedure, as well as look into the negative aspects of Article 9 and critique the commitment procedure has received. Is it possible that what started out as, in my view, a positive development for the public competition

[1]Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1–25. Articles 81 and 82 of the then EC Treaty have since (without any modification) become Articles 101 and 102 TFEU. In this paper I will systematically refer to the current numbers.
[2] C-441/07 P *Commission v Alrosa*, ECLI:EU:C:2010:377.
[3] T-76/14 *Morningstar v Commission*, ECLI:EU:T:2016:481.

procedure has also started a negative development vis-à-vis e.g. legal certainty and predictability? When most cases are resolved through this negotiated form, suddenly a lot of jurisprudence is evolving at the hands of the Commission instead of the EU Courts.

A very central concept for my research is that of discretion. The Commission was granted a very wide discretion by the ECJ in *Alrosa*[4], as to what commitments it may accept in order to put a suspected infringement to an end. In addition, the proportionality assessment under Article 9 is not at all as strict as if the Commission were to adopt a so-called infringement decision under Article 7 of Regulation 1/2003. Infringement decisions prohibit undertakings from conducting certain behaviour as this behaviour infringes EU competition law, and impose remedies in order to put infringements to an end. The result is a Commission which is not required to investigate whether, or prove that, a commitment decision is proportionate to the same extent as if it had adopted an infringement decision where it was the author of the remedies. This is combined with the fact that whatever remedies the Commission includes in a commitment decision, the EU Courts will at length refrain from assessing it, as they will trust the Commission has made a right and just assessment of the situation, on account of the wide discretion it holds.

Further I wish to scrutinize what the actual possibilities are for a third party, harmed by a commitment decision, to challenge it in front of a court, as both *Alrosa* and *Morningstar* came about due to third party challenges. In particular, my focus lies on suspected infringements of Article 102 TFEU – abuse of a dominant position, and third party challenges. If a dominant undertaking is causing competition concerns as of its compliance with Article 102, that undertaking will determine what commitments it may be willing to offer. The cause of concern might be the entry into one, or more, specific business agreements, however the other party or parties do not have any real input when it comes to the commitments offered to the Commission. This was

[4] C-441/07 P *Commission v Alrosa*, paras 61-67.

the scenario in *Alrosa*. In recent GC ruling from 2016, *Morningstar*, the issue was that of a competitor with an opinion that the commitments made binding upon an undertaking were not enough to address the competition concerns expressed by the Commission. In both cases the Commission's commitment decision has remained. To fulfil the purpose of this essay I pose the following research questions:

1. What are the positive aspects of the commitment procedure available under Article 9 of Regulation 1/2003?
2. What are the dangers of granting the Commission such a wide margin of discretion as the ECJ did in *Alrosa* in adopting decisions?
3. Given the Commission's wide margin of discretion, and the rulings in both *Alrosa* and *Morningstar*, what are the real possibilities for a third party to successfully challenge a commitment decision? Are commitment decisions protected from an appropriate level of judicial scrutiny?

## 1.2 Delimitations

I am aware that the case which is the main subject of my focus, *Alrosa,* is from 2010, making the ruling 7 years old. However, it is the only case of its kind, where the ECJ has delivered a ruling on the appeal of a commitment decision, and hence it has been the centre of a lot of debate. The ECJ has since not taken on a similar case. There was up until recently no knowledge of how the CJEU would tackle a case coming from a competitor dissatisfied with commitments for the opposite reason – namely that a set of commitments are not enough to address competition concerns. With the *Morningstar* ruling delivered by the GC in 2016, the window of successfully challenging a Commission decision now seems even smaller. The GC did not back down from the *Alrosa* jurisprudence, despite the critique following that case. This also despite the fact that the GC in *Alrosa* actually delivered a ruling in favour of the applicant, annulling the Commission Decision in question, a ruling drastically altered by the ECJ.

The research in this essay is limited to the commitment procedure in relation to Article 102 TFEU, as both rulings at the centre of my investigation started out with the Commission accepting commitments which would address its competition concern relating to abuse of a dominant position. In fact, a great deal of cases dealt with under Article 9 are such were the Commission has concerns regarding Article 102 TFEU and abuse of dominance.[5] As analysing the commitment procedure is relation to Article 101 TFEU does not fall within the scope of this essay, the settlement procedure in cartel cases will not be accounted for.[6]

The research is also limited to the public enforcement procedure laid down in Regulation 1/2003, meaning the private enforcement procedure is not analysed or elaborated on. In some sections the possibility for private enforcement is mentioned to provide some context, however the eventual possibility of targeting a commitment decision through private enforcement is not taken into account when answering the research questions posed in this essay. As for public enforcement, the procedural aspects are not developed on, as this is not within the scope of the research. Neither is the possibility to challenge a commitment decision, or any EU act, on procedural grounds included. The decentralised enforcement model and the public enforcement acted out by NCAs and national courts is only analysed to the extent that is relevant to my research, more specifically regarding the balance of power between national authorities and the Commission.

Any concerns as to the effects of the commitment procedure prior to its entering into force are also excluded from the scope of this essay as the procedure has now been available for so many years. I find it more relevant

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[5] Jones, Alison & Sufrin, Brenda, *EU Competition Law: Text, Cases, and Materials*, 6th Edition, Oxford Competition Law 2016, p 951 f.

[6] Governed by Commission Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty OJ L 123, 27.4.2004, p. 18–24, as amended by Commission Regulation 622/2008 on the conduct of settlement procedures in cartel cases, OJ L 171, 1.7.2008, p. 3–5.

to focus on the critique which has been delivered in the past few years, in order to keep my research more relevant and up to date.

I have deliberately chosen to include more general positive aspects of the commitment procedure, at large based on the Commission's own views and perspective. The reason for not including any specific positive reviews of the *Alrosa* and *Morningstar* rulings is that I do not find that would contribute to finding an answer to my final and most important research question, however interesting it might have been to include. As for the critical opinions I have chosen more specific assessments of the implications of especially *Alrosa*, as they provide information I deem to be useful in answering as well my second as my final research question. The critique is meant to be focused at the implications of the commitment procedure and its case law, which grants a wide margin of discretion to the Commission upon adopting commitment decisions. The positive remarks are directed at the commitment procedure as an instrument of enforcement of competition law.

## 1.3 Research Method and Perspective

The essay contains to some extent more descriptive parts, as a way of providing for the necessary information regarding the importance of competition law within the EU, as well as the relevant legal provisions and documents. The two case stemming from the EU Courts which to a certain extent form the basis for my analysis are also laid out in a more descriptive manner. For these more descriptive sections the legal doctrinal method (or 'legal dogmatics') proves a helpful and suitable method. Legal dogmatics include the inquiry into the law as it is (*de lege lata*), as well as the possibility to express an opinion of how the law should be (*de lege ferenda*). The method is not only used to discover existing law but also functions as a means to

assess it.[7] The legal doctrical method pursues knowledge of the present law, while at the same time providing for a further evaluation of it.[8] The method provides a means as to understand the universally recognised sources of law, such as legislation and preparatory work, as well as case law and relevant legal doctrine.[9]

As this essay is written from an EU law perspective, the EU legal method must also be considered. The method establishes the hierarchy of norms and general principles within the EU legal system. The superior norm consists of primary law, such as the founding Treaties TEU and TFEU. Secondary law consists of legal documents such as regulations, which are directly applicable in all EU Member States, and directives, which are binding upon Member States as to the results they aim to achieve.[10] The case law of the CJEU is considered a valuable source of guidance as to how EU legislation and principles are to be understood, and at times jurisprudence developed primarily by the ECJ may evolve into highly valued general principles of law.[11] Case law stemming from the ECJ holds the highest precedential value followed by jurisprudence from the GC. Subordinated sources to the case law of the EU Courts include Opinions by the Advocate Generals as well as legal doctrine.[12] Due to the principle of supremacy, EU law prevails over the national law of a Member State if a conflict between the two were to arise.[13]

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[7] Eng, Svein, *Fusion of Descriptive and Normative Propositions. The Concepts of 'Descriptive Proposition' and 'Normative Proposition' as Concepts of Degree*, Ratio Juris Issue 3, 2000, pp 236-260.
[8] Stelmach, Jerzy & Brozek, Bartosz, *Methods of legal reasoning*, Springer, 2006, pp 17 ff.
[9] Fredric Korling & Mauro Zamboni, *Juridisk metodlära*, Studentlitteratur, 2013, pp 21 ff.
[10] Article 288 TFEU.
[11] See e.g. case 6/64 *Costa v ENEL,* ECLI:EU:C:1964:66 & case 106/77 *Simmenthal S.p.A. vs Amministrazione Delle Finanze pello Stato*, ECLI:EU:C:1978:49 for jurisprudence on the principle on the supremacy of EU law.
[12] Jörgen Hettne & Ida Otken-Eriksson, *EU-rättslig metod – teori och genomslag i svensk rättstillämpning*, 2nd Edition, Norstedts Juridik, 2011, pp 40 ff; p 188 f.
[13] Craig, Paul and De Búrca, Gráinne, *EU Law: text, cases, and materials*, 6th Edition, Oxford University Press, 2015, p. 267.

## 1.4 Materials

As this essay centres around the commitment procedure available under EU competition law, the research is to a large extent based on EU materials. The primary EU legislation, Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), provide for the key EU competition law provisions, as well as some background to the interplay between the European Union and the area of competition law. The piece of legislation at the centre of the research carried out in this essay is undeniably Regulation 1/2003 on the implementation of the rules on competition laid down in Articles [101] and [102] of the Treaty, which constitutes secondary EU law. Other EU documents, mainly from the Commission, have proven useful as well, such as its 2014 Competition Policy Brief *'To Commit or Not to Commit? Deciding between prohibition and commitment'*.[14]

There is no lacking of literature in the field of EU competition law, meaning rather than having trouble finding material my challenge has been to select the works which would prove the most useful for my research. For the more introductory and descriptive parts of this essay the works of David Whish & Richard Bailey, and Alison Jones & Brenda Sufrin, have provided great help, as I find they present information in a well-structured and neutral manner, alerting the reader in the event of them taking a stand in a certain question.

In order to illustrate the positive aspects of the commitment procedure, the works of Professor Wouter Wils, mainly an article from 2015 where he draws on several previous articles he has written on the subject, is used, along with the Commission's abovementioned Policy Brief. The presentation of critical views on the commitment procedure, and more specifically on the Alrosa *jurisprudence*, includes articles and papers by Professor Florian Wagner-von

[14] European Commission, *To commit or not to commit? Deciding between prohibition and commitments*, Competition Policy Brief, Issue 3, March 2014, ISBN 978-92-79-35543-1, ISSN: 2315-3113.
Available via http://ec.europa.eu/competition/publications/cpb/2014/003_en.pdf.

Papp, Professor Frederic Jenny, former Bruegel[15] Research Fellow Mario Mariniello, and the duo Damien Geradin & Evi Mattioli. In selecting these authors my goal has been to provide for an assortment of interesting aspects and outlooks regarding the possible dangers of the commitment procedure in light of the Alrosa and Morningstar rulings. Upon choosing which critique to present I have aimed at such which relates to the broad margin of discretion granted to the Commission in *Alrosa*, in order for the opinions shown to best help answer my second research question.

The *Alrosa* and *Morningstar* rulings themselves are accounted for in some detail. I have found this to be of importance as a somewhat more detailed description of the circumstances leading up to the Commission decisions, as well as an accounting of the arguments of the parties before the courts, is needed for an adequate following analysis. I want to display the differences in scenario, and yet the similarity in the Courts' reasoning to the effect of proportionality and the Commission's discretional powers.

## 1.5 Outline and Disposition

This essay is divided into six main chapters. Chapter two provides for an introduction to EU competition law, and the role of the Commission and EU Courts in competition law enforcement. The second chapter also presents the main features of Regulation 1/2003. Chapter three focuses completely on Article 9 of the regulation, and explains the success of the commitment procedure, comparing this enforcement model to what was available under the previous governing regulation, Regulation 17, pertaining to commitments. The fourth chapter presents the case C-441/07 P *Commission v Alrosa*; the Commission Decision, GC ruling and ECJ ruling.

[15] An independent European think tank that specialises in economics, website: http://bruegel.org

Chapter five depicts critique regarding the implications of the commitment procedure and the *Alrosa* jurisprudence, as well as what possible detriments this may bring with respect to legal certainty, predictability and an adequate level of judicial review. The chapter also presents the more recent case ruled upon by the GC in 2016, T-76/14 *Morningstar v Commission.* The final chapter provides for an analysis of the implications of *Alrosa* and *Morningstar* as regards third party challenges to commitment decisions. The final chapter also develops on the limitation of the possibility for judicial review of commitment decisions, and offers some concluding remarks.

# 2 Introduction to EU Competition Law and Regulation 1/2003

As of 1 December 2009, when the Treaty of Lisbon came into force, the European Community (EC) gave way for the European Union (EU). The European Union is established by the EU Treaties, commonly referred to as 'the Treaties', consisting of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Through them, the currently 28 Member States limit their own state sovereignty by conferring certain competences to the EU.

Through the competences bestowed upon it, the Union can act in order to ensure the fulfilment of its objectives.[16] Amongst these objectives is the establishment of an internal market, which shall work for a highly competitive social market economy.[17] A large portion of EU law is aimed at eliminating possible obstacles to free movement, and promoting competition within the Union.[18] Hence it is safe to claim that competition law is an important part of present-day EU law. However, it is clear that establishing its own competition policy has been of importance to the EU since the Treaty of Rome entered into force in 1957. The treaty introduced that "the activities of the Community shall include … the institution of a system ensuring that competition in the common market is not distorted".[19] Since Lisbon the overarching aim of undistorted competition in the internal market can be found in Protocol 27[20] annexed to the Treaties. Having the same force as any Treaty provision[21], the

[16] Article 5(2) TEU.
[17] Article 3(3) TEU.
[18] Whish, Richard & Bailey, David, *Competition Law*, 8th Edition, Oxford Competition Law, 2015, pp 52 f; Craig, & de Búrca, pp 1001 f.
[19] Article 3(f), the Treaty of Rome, 25 March 1957, renumbered to Article 3(g) through the Treaty of Maastricht, 1 November 1993 and 3(1)(g) through the Treaty of Amsterdam, 1 May 1999.
[20] Protocol (No 27) on the internal market and competition, OJ C 115, 9.5.2008, p. 309–309.
[21] Article 51 TEU.

Protocol states that the establishment of an internal market as set out in Article 3 TEU includes creating a system ensuring that competition is not distorted. In Article 3(1)(b) TFEU "the establishing of the competition rules necessary for the functioning of the internal market" is listed as one of the areas in which the Union has exclusive competence.

The current EU rules on competition can be found in Articles 101-109 TFEU, with the two main provision in Articles 101 and 102, along with the EU Merger Regulation ('the EUMR')[22].

## 2.1 Articles 101 and 102 TFEU

The key EU competition law provisions are rather broadly drafted. They aim to guard against anti-competitive agreements between undertakings[23] and the abuse of a dominant position on a specific market[24].

Article 101(1) TFEU bars anti-competitive agreements[25]; meaning agreements between undertakings that restrict competition — the classic example being a cartel, on both horizontal and vertical levels, between undertakings. Article 101(3) provides for an exception which may declare Article 101(1) inapplicable if an agreement fulfils certain conditions.

Article 102 prohibits the abuse by a dominant undertaking of its own dominant position and reads as follows:

> *Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be*

[22] Council Regulation 139/2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1–22.
[23] Article 101 TFEU.
[24] Article 102 TFEU.
[25] The term here includes the notions of "decisions by associations of undertakings and concerted practices" as are also prohibited under Article 101(1) TFEU.

*prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:*

*(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
*(b) limiting production, markets or technical development to the prejudice of consumers;*
*(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
*(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*

Being dominant on a market is not a crime in itself, however there are certain actions you must refrain from in order not to abuse your position and hence breach Article 102 TFEU. Interesting to note is that these actions might have been allowed had the undertaking been smaller.[26]

## 2.2 The Role of the Commission and the EU Courts

The Commission is the EU institution at the centre of EU competition law.[27] It is the main enforcer of the competition rules on an EU level, and it also plays a very central part in the development of competition law.[28] The powers

[26] Rose, Vivien, & Bailey, David, *Bellamy & Child: European Union Law of Competition*, Oxford Competition Law, 7th Edition, 2013, p 752.
[27] Article 17(1) TEU; see also Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* ECLI:EU:C:2000:689, para 46.
[28] Whish & Bailey, p 94.

of the Commission and the rules regarding public enforcement of EU competition law are stipulated in more detail in Regulation 1/2003.

However, the Commission does not have unlimited power as its decisions can be submitted for appeal. Such an appeal will come first before the General Court, which will review the decision in accordance with the relevant provisions in TFEU.[29] The GC has the power to review a decision both on points of law and on points of fact, meaning the Court is able to assess evidence, annul a contested decision and alter the amount of a fine.[30] Generally, individuals (natural or legal persons) have a much harder time bringing a challenge before the GC compared to a Member State or an EU Institution. Article 263 TFEU reads: "Any natural or legal person may … institute proceedings against an act addressed to that person or which is of direct and individual concern to them…", meaning you need to be both directly and individually affected by a Commission decision in order to successfully ask the GC to review the legality of it. A decision from the General Court can in turn be appealed to the Court of Justice on points of law only.[31] The Court has a strict view of what falls within this scope, and has repeated that it does not review any factual circumstances.[32]

## 2.3 Regulation 1/2003

Playing an important part in the modernisation process of EU competition law, Regulation 1/2003[33] governs the public enforcement procedure acted out by the Commission and the National Competition Authorities (NCAs) as regards infringements of Articles 101 and 102 TFEU. The Regulation

[29] Article 256 (1) TFEU.
[30] Case C-386/10 P *Chalkor AE Epexergasias Metallon v European Commission* ECLI:EU:C:2011:815, para 67.
[31] Article 58, Protocol (No 3) on the Statute of the Court of Justice OJ C 115, 9.5.2008, p 210-229; Codified version of the Rules of Procedure of the Court of Justice, OJ C 177, 2.1.2010.
[32] Case C-7/95 P *John Deere v Commission,* ECLI:EU:C:1999:358, para 58; Case C-551/03 P *General Motors BV v Commission* ECLI:EU:C:2006:229, paras 50–51.
[33] OJ L 1, 4.1.2003, p. 1–25.

substituted the previously applicable Council Regulation 17.[34] The Regulation's main features are the establishment of direct effect of Articles 101 and 102 TFEU, the decentralisation of public enforcement, along with the principle of cooperation and uniform application of EU competition law.[35] The Regulation also removed the possibility for undertakings of obtaining negative clearance, an establishing that there has not been an infringement of competition law.[36]

## 2.4 Decentralised Enforcement

The modernisation of EU competition law under Regulation 1/2003 'decentralised' the enforcement of the competition law provisions, meaning that along with the Commission NCAs and national courts now have competence to apply Article 101 and 102 TFEU.[37] On the subject of commitment decisions recital 13 of the Regulation states "Commitment decisions should find that there are no longer grounds for action by the Commission without concluding whether or not there has been or still is an infringement. 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 22 adds that "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 81 and 82 of the Treaty."

However, it is important to notice that if the Commission initiates proceedings NCAs are relieved from their competence to apply Articles 101 and 102, and thus cannot take action under the same legal basis against the same undertakings(s) on the same relevant geographic and product market

[34] Council Regulation No 17, OJ 13, 21.2.1962, p. 204–211.
[35] Nazzini, Renato, *Competition Enforcement and Procedure*, Oxford Competition Law, 2nd Edition, 2016, p 8.
[36] This possibility was previously available under Article 2 of Regulation 17.
[37] For NCAs, Article 5 Reg 1/2003, for national courts, Article 6 Reg 1/2003.

regarding the same agreement(s) or practice(s).[38] For the sake of uniformity, Article 16 of Regulation 1/2003 states that in a matter where the Commission has already adopted a decision, a national court may not deliver a ruling running counter to that decision.[39] Same goes for NCAs in their decision making.[40] This showcases that despite the decentralisation of public competition law enforcement, the Commission has still wanted to maintain its key role in the legal area as a guardian of the Treaty, being ultimately responsible for developing policy and the safeguarding of consistency when it comes to the application of EU competition law.[41] This also raises the question whether national courts and NCAs have any *de facto* power in e.g. delivering a ruling based on a separate private claim against an undertaking, where the Commission has already adopted a commitment decision towards that same undertaking.

## 2.5 Powers of the Commission

Article 4 of Regulation 1/2003 states that the Commission shall have the powers provided for by the Regulation for the purpose of applying Articles 101 and 102 TFEU. The powers provided are included mainly in Chapters III, V and VI of the Regulation.

The Commission's powers of investigation into a suspected infringement are rather broad, and include *inter alia* requesting information[42], inspecting premises[43] and taking statements[44]. These powers are contained in Chapter V, Articles 17-22.

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[38] Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, p. 43–53, (NCA Cooperation Notice) para. 51.
[39] Article 16(1) Regulation 1/2003.
[40] Ibid, Article 16(2).
[41] NCA Cooperation Notice, para. 43.
[42] Article 18, Regulation 1/2003.
[43] Ibid, Article 20(2)(a).
[44] Ibid, Article 19.

The powers to impose penalties are provided by Chapter VI. Article 23 grants the Commission a right to impose fines on undertakings, for both procedural[45] and substantive infringements[46]. Substantive infringements are breaches of Articles 101(1) or 102 TFEU which have led to the adoption of an infringement decision under Article 7[47], and breaches of Commission decisions, such as the failure to comply with a commitment decision under Article 9 of the Regulation[48]. Such a fine can amount to as much as 10 per cent of an undertaking's worldwide turnover in the previous business year.[49] Article 23(3) requires the Commission to take regard to both the gravity as well as to the duration of the infringement, but in practice the Commission holds a wide margin of appreciation when determining the amount of a fine.[50] The discretional powers of the Commission will be developed on further in the context of adopting commitment decisions, however it is interesting to note that this permeates many aspects of EU competition law. In addition to a fine, the Commission may burden an undertaking with periodic penalty payments, e.g. for failing to comply with a Commission decision.[51] These may amount to a maximum of 5 % of the average daily turnover.

Details on the conduct of proceedings by the Commission can be found in Regulation 773/2004[52], however describing the process is not within the scope of this essay.

[45] Article 23(1) Regulation 1/2003.
[46] Ibid, Article 23(2).
[47] Ibid, Article 23(2)(a).
[48] Ibid, Article 23(2)(c).
[49] Ibid, Article 23(2).
[50] Cases C-189/02 P etc *Dansk Rørindustri A/S v Commission* ECLI:EU:C:2005:408, para 172; Whish & Bailey, p 292.
[51] Article 24, Regulation 1/2003.
[52] OJ L 123, 27.4.2004, p. 18–24.

## 2.6 Article 7 – Infringement Decisions

As one of two main provisions under Chapter III, Article 7 of Regulation 1/2003 states in its first paragraph that:

> *Where the Commission… finds that there is an infringement of Article [101] or of Article [102] of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy.*

The Commission can hence, if an infringement is found, adopt what is called an infringement decision, establishing that an infringement has been found and including remedies to put that infringement to an end. There are chiefly two types of remedies available for use in order to bring a competition law infringement to an end: behavioural and structural. Generally, behavioural remedies are considered less severe than structural and are thus preferred as a primary course of action.

Behavioural remedies concern, as the name may give away, remedies relating to an undertaking's behaviour. They can be positive – providing an obligation to do something, or negative – demanding a certain type of conduct or behaviour to seize.[53] The power and ability to adopt a decision including structural remedies, i.e. ordering changes to the structure of an undertaking, is a very powerful instrument in the Commission's toolbox. As is shown

[53] Whish & Bailey, p 266.

above Article 7(1) states a structural remedy is only to be resorted to if there is no equally effective behavioural one, or if a behavioural remedy would prove more burdensome for the undertaking compared to a structural one. No structural remedies have been imposed by the Commission under Article 7 yet[54], however there are a number of cases where structural commitments have been offered by undertakings under Article 9 of the regulation[55], particularly following the Commission's investigation of the energy sector[56].

[54] Whish & Bailey p 267; Jones & Sufrin, p 945.
[55] Whish & Bailey, p 274 f.
[56] Whish & Bailey, p 267; See European Commission, Report of the Sector Inquiry on Capacity Mechanisms Brussels, 30.11.2016, COM (2016) 752 final.

# 3 Article 9: Commitment Decisions

If the Commission intends to adopt a decision under Article 7 requiring an infringement of Article 101(1) or 102 TFEU to come to an end, the undertakings concerned by that decision, since the entry into force of Regulation 1/2003, now have the possibility of offering commitments to meet the Commission's concerns.[57] Article 9(1) reads:

> *Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.*

As is displayed, for Article 9 to be applicable the Commission needs to have the intention towards adopting an infringement decision under Article 7. However it does not have to have carried out a full assessment of the behaviour of the undertakings concerned, rather just made a 'preliminary assessment' of the situation.[58] This means an undertaking wanting to offer commitments should do so early on in the Commission's investigation process.

Commitments under Article 9 can include both behavioural and structural remedies, and are offered before the Commission has actually made a finding

[57] Article 9(1) Regulation 1/2003.
[58] Ibid. For more detailed info on the procedure see Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (Notice on Best Practices), OJ C 308, 20.10.2011, p. 6–32, paras, 115–133.

of infringement under Article 7 and decided on suitable remedies.[59] Accordingly, a commitment offered by an undertaking may entail obligations which go beyond what the Commission would have been able to impose.[60] The ECJ has developed on the reason for this, and why the Commission should be allowed to adopt decisions based on commitments which can be more burdensome for an undertaking than what the Commission could have decided under Article 7, in the case *Commission v Alrosa*[61]. According to the Court, there is a difference between a decision adopted under Article 9 and one adopted under Article 7. Whilst the purpose of Article 7 is to bring an infringement to a stop, commitments under Article 9 are offered with the intention of meeting the concerns the Commission has discovered following its preliminary assessment.[62] The measures which can be imposed under Article 7 and Article 9 thus, in the ECJ's view, do not have to be comparable in the same situation.[63] Undertakings may accordingly offer, and the Commission is allowed to accept, commitments under Article 9 which go beyond what the Commission could impose under Article 7.[64]

In a case where the Commission finds that the commitments which have been offered to them by an undertaking meet it concerns, and is willing to accept them, the commitments are put out for a so-called market test as is stipulated in Article 27(4) of Regulation 1/2003. The commitments are published in the EU's Official Journal[65] and third parties are invited to comment on them.[66] If the Commission finds, after the market test has been conducted, that the commitments offered are not enough to address the competition concerns at hand, it will notify the undertakings concerned. If they are in turn willing to amend their commitments the amended commitments will be sent out for another market test. However if they are not the Commission may revert to a

[59] Jones & Sufrin, p 946.
[60] Jones & Sufrin, p 946; Case C-441/07 P, *Commission v Alrosa*, paras 48-50.
[61] Case C-441/07 P *Commission v Alrosa*.
[62] Ibid, para 46.
[63] Ibid, para 47.
[64] Ibid, paras 48-50.
[65] The Official Journal of the European Union, commonly referred to as "the OJ", is the official gazette of the EU and the formal source of EU legislative information.
[66] Notice on Best Practices, paras. 129–133.

procedure under Article 7 instead.[67] If the Commission finds that commitments which have been offered do meet its concerns regarding the legality of an agreement or behaviour, the Commission may adopt a decision under Article 9 binding the undertakings concerned to their commitments.[68]

This possibility for the Commission of formally accepting commitments from undertakings and turning them into a binding decision is as mentioned new under Regulation 1/2003.[69] The rationale behind opening up for this possibility is a very practical one: saving the Commission's limited resources and lessening its heavy work-load.[70] A procedure under Article 9 can be more efficient than one under Article 7 since there are not as many procedural steps required. Utilising the Article 9 procedure in suitable cases can be a very effective way of addressing certain competition concerns, as it allows for more rapid solutions than infringement decisions do.[71] This helps ease the Commission's burden a great deal. However, it is worth to note that the GC has stated that Commission is never under any obligation to accept commitments offered under Article 9 instead of reverting to a procedure under Article 7 and a finding of infringement.[72] What else is noteworthy is that Article 9(2) allows the Commission to reopen the proceedings against the undertakings in cases

> *(a) where there has been a material change in any of the facts on which the decision was based;*
> *(b) where the undertakings concerned act contrary to their commitments; or*
> *(c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.*

[67] Notice on Best Practices, para 133.
[68] Article 9(1) Regulation 1/2003.
[69] Jones & Sufrin, p 945.
[70] Whish & Bailey, p 268.
[71] Ibid.
[72] Case T-170/06 *Alrosa Company Ltd v Commission* ECLI:EU:T:2007:220, para 130.

If an Article 9 decision is breached by the undertakings conerned, the Commission may adopt a decision imposing a fine under Article 23(2)(c) of Regulation 1/2003.

The regulation itself really only sets one limitation to when the use of Article 9 might not be appropriate to address competition concerns the Commission might have. Recital 13 states that commitment decisions are not appropriate in a case where the Commission intends to impose a fine. Thus, in cases of cartels[73] Article 9 is not available for use.[74] The Commission has also stated that neither should a commitment decision under Article 9 be an option in cases where the prime goal is to penalise past behaviour, rather it should be used mainly as a method of adjusting future behaviour.[75] Whereas Article 9 has not been used in cases of hard core cartels, the Commission has accepted commitments in a number of cases where its competition concerns regarded Article 102, and where, if proven, the infringements were severe enough to have amounted to serious fines.[76] This raises the question of whether the possibility of solving a competition concern under Article 9 is perhaps being used more than was intended when Regulation 1/2003 came into force in 2004.

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[73] As defined in paragraph 1 of the Commission Notice on Immunity from fines and reduction of fines in cartel cases, (Leniency Notice) OJ C 298, 8.12.2006, p. 17–22.

[74] Notice on Best Practices, para 116; Wils, Wouter P. J., *Ten Years of Commitment Decisions Under Article 9 of Regulation 1/2003: Too Much of a Good Thing?* (June 12, 2015). Concurrences Journal 6th International Conference 'New frontiers of antitrust' (Paris, 15 June 2015), p 3. Available via SSRN: https://ssrn.com/abstract=2617580. In 2008 the Commission created a specific settlement procedure for cartel cases.

[75] *To commit or not to commit? Deciding between prohibition and commitments*, Competition Policy Brief, Issue 3, March 2014, p 4.

[76] Jones & Sufrin, p 945; Commission Decision of 9.12.2009 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/38.636 – *RAMBUS*).
Commission Decision of 6.3.2013 addressed to Microsoft Corporation relating to a proceeding on the imposition of a fine pursuant to Article 23(2)(c) of Council Regulation (EC) No 1/2003 for failure to comply with a commitment made binding by a Commission decision pursuant to Article 9 of Council Regulation (EC) No 1/2003 (Case AT.39530 – *Microsoft (Tying)*).; Commission Decision of 13.12.2011 addressed to International Business Machines Corporation 2009 relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/C-3/39692, IBM Maintenance Services).

## 3.1 The success of the commitment procedure under Article 9

This section aims to provide an answer to the first research question posed, by elaborating on the positive aspects of the commitment procedure and the possibility given to the Commission to adopt decisions making commitments binding upon undertakings.

In my opinion, the Court of Justice summarises the enforcement procedure under Article 9 quit well in *Alrosa*. It "is a new mechanism introduced by Regulation No 1/2003 which is intended to ensure that the competition rules laid down in the Treaty are applied effectively, by means of the adoption of decisions making commitments, proposed by the parties and considered appropriate by the Commission, binding in order to provide a more rapid solution to the competition problems identified by the Commission, instead of proceeding by making a formal finding of an infringement. More particularly, Article 9 of the regulation is based on considerations of procedural economy, and enables [undertakings] to participate fully in the procedure, by putting forward the solutions which appear to them to be the most appropriate and capable of addressing the Commission's concerns" [77]

Since the procedure under Article 9 was made available it has become a well-used one. Aside from in cartel scenarios, accepting commitments has become the most common way for the Commission to deal with cases where it has identified competition concerns. According to the Commission's own Competition Policy Brief, between May 2004 and December 2013 the Commission adopted 33 commitment decisions under Article 9.[78] During that same period, 19 decisions establishing an infringement of Articles 101 or 102

[77] C-441/07 P *Commission v Alrosa*, para 35.
[78] See statistics presented in *To commit or not to commit? Deciding between prohibition and commitments*, Competition Policy Brief, Issue 3, March 2014, p 3.

TFEU were adopted under Article 7, excluding cartel cases.[79] Perhaps it is not too difficult to guess why undertakings may prefer a procedure where they themselves may participate more actively and suggest amendments, but undoubtedly there are more aspects to consider. The Commission has identified numerous advantages commitment decisions can have over infringement/prohibition decisions.[80]

Firstly, using Article 9 is likely to result in a swifter resolution of the competition concerns at hand, which in turn leads to a quicker market impact. This corresponds well with the the regulation's main objective, namely to ensure the effective application of the competition rules laid down under the Treaty.[81] The earlier on commitments are offered the more meaningful are the procedural gains. This is especially essential if the relevant market affected by the agreement/behaviour is fast-moving, such as the IT sector, where addressing competition concerns as rapidly and as effectively as possible is vital.[82] For reasons of procedural economy, the Commission limits its assessment under Article 9 to a preliminary one. A key feature of the commitment procedure is that the Commission must not carry out such an in-depth assessment as to be able to make a finding as to whether Article 101 or 102 TFEU has been infringed.[83]

Secondly, the remedies under Article 9 are believed by the Commission to be more effective. Even though the remedies available when adopting a decision under Article 7 and 9 are the same, there is one key difference. As mentioned above, the main goal of Article 7 is to put an end to an infringement, meaning the remedies will be ones which prohibit and sanction infringements which have already happened, and may be on-going. Of course, the goal of Article

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[79] See statistics presented in *To Commit or Not to Commit? Deciding between prohibition and commitments* Competition Policy Brief, Issue 3, March 2014, p 3.
[80] See *To Commit or Not to Commit? Deciding between prohibition and commitments* Competition Policy Brief, Issue 3, March 2014.
[81] Recital 5; Recital 6 Regulation 1/2003.
[82] Ibid, p 2.
[83] Opinion of Advocate General Kokott, delivered on 14 September 2017 in Case C-547/16 *Gasorba SL and Others v Repsol Comercial de Productos Petrolíferos SA*, ECLI:EU:C:2017:692, para 32.

9 is to address any competition concerns the Commission may have, but commitment decisions also have a more forward-looking perspective than infringement decisions.[84] An undertaking offering commitments will commit to behaving in a specific way, for a specified duration of time, and often that behaviour can go beyond abiding by legislation, or even include structural remedies which can have a long-lasting effect on the relevant market. It is the view of the Commission that commitments may be more suitable in avoiding a recurrence of competition concerns, in comparison to the deterrent effect a fine can have.[85]

In addition, the Commissions states that measures adopted through commitment decisions are implemented both faster and better. As it is the undertakings themselves who propose the commitments, implementation is simplified, whilst the risk of obtaining a fine for violating a commitment decision provides incentive enough to implement them correctly.[86] Another interesting potential motivator for the Commission, which is developed on under chapter 5, is that due to limitations to the possibility for judicial review, the Commission may, through the use of commitment decisions, resolve competition concerns as it sees fit in cases raising novel questions as concerns the interpretation and use of the EU competition law provisions, with a much limited risk of that decision being challenged before the General Court.[87]

Lastly, there are definitely a few advantages to be won for the undertakings under investigation if they choose to offer commitments, the most obvious being they get to have an actual input into which remedy will be used to address the competition concerns in their case. The entire procedure is less burdensome, especially if commitments are offered early on in the process.

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[84] *To Commit or Not to Commit? Deciding between prohibition and commitments* Competition Policy Brief, Issue 3, March 2014, p 2f.
[85] *To Commit or Not to Commit? Deciding between prohibition and commitments* Competition Policy Brief, Issue 3, March 2014, p 2f.
[86] Ibid, p 3.
[87] De la Mano, Miguel, Nazzini, Renato & Zenger, Hans, *Faull & Nikpay: The EU Law of Competition*, Eds Faull, Jonathan, Nikpay, Ali, & Taylor, Deirdre (Assistant Editor), 3rd Edition, Oxford Competition Law, 2014, p 342.

Avoiding the Commission commencing investigations under Article 7 can save a lot of time which would otherwise have been spend in lengthy proceedings.[88] Additionally, undertakings avoid being fined when subject to a commitment decision, unless they fail to comply with the commitments.[89] This differs from an infringement decision under Article 7 as the Commission may adopt a fine directly if they find Article 101 or 102 has been infringed.[90]As a commitment decision does not actually involve a finding of infringement[91], it cannot be the basis of private enforcement in the form of follow-on actions by private parties in of a national court[92], and undertakings subject to a commitment decision rather than an infringement decision stand less of a risk incurring a bad reputation[93]. As a result of all the above-mentioned, commitments have been regarded as a "win-win" solution for both undertakings and the Commission.[94]

A vast amount of the cases which have been dealt with under Article 9 have been suspected infringements of Article 102 TFEU, rather than Article 101.[95] Because of the lack of possibility to apply Article 9 in cases of hard-core cartels this is not surprising. Richard Whish and David Bailey add to this that a more negotiated outcome in Article 102 cases is beneficial to both the Commission and the undertakings subject to suspected infringement. As these types of cases are usually more complex than cartels, an outcome which satisfies the Commission's competition concern and at the same time does not

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[88] *To Commit or Not to Commit? Deciding between prohibition and commitments* Competition Policy Brief, Issue 3, March 2014.
[89] Article 23(2)(c) Regulation 1/2003.
[90] Article 23 (2)(a) Regulation 1/2003.
[91] Gautier, Alex & Petit, Nicolas, *Optimal Enforcement of Competition Policy: The Commitments Procedure under Uncertainty*, April 24, 2015, p 2. Available via SSRN: https://ssrn.com/abstract=2509729.
[92] Jones & Sufrin, p 953; see also Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Damages Directive), OJ L 349, 5.12.2014, p. 1–19, rec 3 & para 3.
[93] Gautier & Petit, p 2.
[94] Jenny, Frederic, *Worst Decision of the EU Court of Justice: The Alrosa Judgment in Context and the Future of Commitment Decisions*, Fordham International Law Journal, Volume 38, Issue 3, 2015, p 712. Available via http://ir.lawnet.fordham.edu/ilj/vol38/iss3/2.
[95] Whish & Bailey, p 274.

include an actual finding of an infringement on the part of the undertaking, can often be a welcome solution.[96]

Regulation 1/2003 formally offers dominant undertakings another possibility following an investigation into their behaviour than either being subject to an infringement decision or obtaining negative clearance. Undertakings concerned about potentially infringing Article 101(1) used to have the possibility of being granted an individual exemption under Regulation 17[97] but no such option was available to dominant firms. Officially introducing a possibility for dominant undertakings to alter their behaviour and accordingly avoid an infringement decision is of course an attractive option. However, claiming that all cases decided under Article 9 would, if the possibility to adopt commitment decisions had not been introduced, instead have been the subject of a full-on investigation under Article 7 is probably not true. The following section shows why.

### 3.1.1 Commitments under Regulation 17

As mentioned the possibility to make commitments binding upon undertakings was formally introduced with Regulation 1/2003. There seems to be be a quite broad consensus that the option has been used more than was anticipated and perhaps more than it should be.[98] Yet, even before the entry into force of Regulation 1/2003 the Commission would accept commitments from undertakings in cases of suspected competition infringement. However, at the time the Commission was without any possibility to make these commitments binding.[99] Professor and Hearing Officer for competition proceedings at the European Commission Wils Wouter, has compiled information on competition law cases from before the implementation of Regulation 1/2003.[100]

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[96] Ibid.
[97] Article 9(1) Regulation 17.
[98] Jenny, p 702; Jones & Sufrin, p 951; Whish & Bailey, p 274.
[99] Jenny, p 702; Wils, p 12.
[100] Wils. Available via SSRN: https://ssrn.com/abstract=2617580.

In non-cartel cases under Article 101, the Commission adopted 8 prohibition decisions, and granted exemptions or negative clearance in 18 cases, of which 14 were following commitments, between the years 2000 and 2003.[101] The statistics Wils displays do however not entail the many cases under both Articles 101 and 102 which were closed following commitments, and where no formal decisions were published.[102] As Regulation 17 did not offer the possibility under Article 102 of obtaining a formal decision establishing an individual exemption, whether that decision relied upon commitments or not, the vast majority of cases which were solved through the offering of commitments under Article 102 were simply closed. Thus, a compilation of cases regarding suspected infringements of Article 102 where commitments were offered and accepted is not included in Wils' paper.[103] However, research by Professor Laurence Idot[104] has shown that in 1997 six out of seven investigation into infringements of Article 102 were closed following commitments.[105] In the Commission's report from the same year, it stated, regarding undertakings in a dominant position:

*"As far as proceedings are concerned, the Commission ultimately imposed fines in only one case this year. In the remainder, it was able, after the complaint-notification stage, to accept from the undertakings involved commitments or changes to agreements which put an end to the offending practices. The attitude of undertakings reveals a genuine willingness to accept the principles of competition, but the approach must not be relaxed in future. This is why the Commission will continue to see that proposed commitments are honoured."*[106]

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[101] Wils, p 11.
[102] Wils, p 10.
[103] Wils, p 10.
[104] Professor at Paris College of European Law of the University Paris II Panthéon-Assas, Honorary President of the French Section of International League of Competition Law, member of the College of the French Competition Authority (Autorité de la concurrence) since 2009.
[105] Wils, p 10; see L. Idot, *A propos des engagements en droit de la concurrence: quelques réflexions sur la pratique communautaire et française* Cahiers de droit européen, 1999, p 569 ff.
[106] European Commission, XXVIIth Report on Competition Policy, 1997, p 25.

Drawing on all this, Wils claims it seems that under Regulation 17 non-cartel infringements, under both Articles 101 and 102, were more often than not closed following commitments, rather than through infringement decisions.[107] The percentage difference between how many cases were solved through commitments before and after the entry into force of Regulation 1/2003 is probably not very high, if there even is one.[108] However, the most important difference is that since 2004 there is a way of actually enforcing compliance with commitments. Instead of closing a case informally the Commission adopts a formal commitment decision under Article 9 of Regulation 1/2003, and not complying can result in fines or periodic penalty payments.[109] Formalising the commitment procedure has also, in Wils' view helped improve the quality of the commitments, and their effectiveness, due to the market testing stage as well as improved means of enforcement.[110]

In my view, Article 9 is a great compliment to Article 7, especially since it formalized and made official a procedure which was previously not enforceable. However, the procedure has received plenty critique, especially so after the ruling in *Alrosa.* The following chapter presents the case.

[107] Wils, p 12.
[108] Ibid.
[109] Article 23(2)(c) (providing for the imposition of fines) and Article 24(1)(c) Regulation 1/2003 (providing for the imposition of periodic penalty payments); see Commission Decision of 6 March 2013 in Case COMP/39.530, *Microsoft*, where the Commission imposed a heavy fine for non-compliance.
[110] Wils, p 13.

# 4 C- 441/ 07 P *Commission v Alrosa*

In December 2001 the two companies De Beers[111] and Alrosa[112] entered into an agreement. The agreement concerned the supply by Alrosa to De Beers of rough diamonds to a value of USD 800 million per year over a period of five years.[113] The agreement was a part of a long-standing trading relationship between the two undertakings. The two notified the agreement to the Commission in 2002, hoping to obtain the negative clearance that was at the time still available under Regulation17 as regards the agreement's compliance with Article 81 EC, today's Article 101 TFEU.[114]

It is noteworthy that De Beers was the largest diamond mining company in the world, active in the entire process from the exploration and mining for diamonds all the way to jewellery sales, thus covering basically the entire diamond pipeline.[115] Alrosa on its hand held 98% of the diamond production in Russia, the second largest diamond producing country in the world in value, making the company the second largest diamond mining company and diamond producer worldwide.[116]

## 4.1 The Commission Decision

In the beginning of 2003 the Commission sent a statement of objections to Alrosa and De Beers stating that the agreement could not be granted negative clearance and be exempted under Article 81(3) EC, but was capable of

[111] De Beers société anonyme, incorporated in Luxembourg, a holding company of the De Beers Group of companies.
[112] ALROSA Company Limited.
[113] Commission Decision of 22 February 2006 relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/B-2/38.381– *De Beers*), para 8.
[114] C- 441/ 07 P *Commission v Alrosa* para 10.
[115] COMP/B-2/38.381– *De Beers*, para 3.
[116] Ibid.

constituting such an anti-competitive agreement which was prohibited by Article 81 EC.[117] At the same time a separate statement of objections was sent to De Beers alone where the Commission expressed its concern that the agreement was also at risk of constituting an abuse of a dominant position and breaching Article 82 EC, today's Article 102 TFEU.[118]

In December 2004 Alrosa and De Beers submitted to the Commission joint commitments with the hopes of meeting the competition concerns expressed by the Commission.[119] The commitments proposed that the value in sales of rough diamonds by Alrosa to De Beers was to gradually be reduced, from USD 700 million in 2005 to USD 275 million in 2010, and were thereinafter to remain at that level.[120] The Commission put out the commitments for a market test, in accordance with Article 27(4) of Regulation 1/2003. 21 parties submitted observations to the Commission, mainly diamond manufacturers and traders. The majority of the interested third parties not only confirmed the Commission's competition concerns but also claimed that the commitments offered would not be sufficient in addressing the concerns.[121] Subsequently the Commission proposed the commitments should be amended, and in October 2005 it provided Alrosa and De Beers with an opportunity to submit new joint commitments, with intentions of terminating the trading relationship with one another as of 2009, before the end of November 2005.[122] No such commitments were received by the Commission in time.

In early 2006 De Beers decided to individually submit amended commitments. In these commitments De Beers undertook to decrease its purchasing of rough diamonds from Alrosa, from a value of USD 600 million in 2006 to USD 400 million in 2008. After this period the purchasing would

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[117] T-170/06 *Alrosa v Commission,* para 14.
[118] Ibid.
[119] Ibid, para 19.
[120] COMP/B-2/38.381– *De Beers*, rec 36.
[121] Ibid, rec 41-42.
[122] T-170/06 *Alrosa v Commission*, para 21.

seize completely as of the beginning of 2009, as the Commission had suggested.[123] Upon receiving these amendments the Commission made a preliminary assessment of the situation, taking into account its own investigation and concerns, as well as the concerns submitted by third parties. The Commission proceeded to adopt a decision making the newly offered commitments binding upon De Beers in accordance with Article 9(1) of Regulation 1/2003.[124]

The Commission's main competition concern was the agreement's sustaining or possibly even strengthening of De Beer's dominant position. As the world's second largest diamond producer would be hindered from fully competing with the largest one, potential customers would lose an alternate source of supply as a result.[125] Through De Beers' commitments, the portion of diamonds which Alrosa would have sold to De Beers had the agreement between the two undertakings withstood, would be freed up for others to buy. This, in the view of the Commission, was enough to "address the concern of reducing access to a viable source of alternative supply of rough diamonds and hindering the second biggest competitor from fully competing with De Beers."[126]

The amended commitments were offered to the Commission on January 25 2006. The day after the Commission sent a copy of the proposed commitments to Alrosa, together with a copy of the non-confidential versions of the comments from third parties, and invited Alrosa to submit its observations.[127] Alrosa provided observations to De Beers' proposed commitments as well as the third party comments in a letter on February 6 2006.

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[123] COMP/B-2/38.381– *De Beers*, rec 47.
[124] COMP/B-2/38.381– *De Beers*.
[125] Ibid rec 46.
[126] Ibid, rec 47.
[127] T-170/06 *Alrosa v Commission*, para 23.

On February 22 the Commission adopted its decision, making the commitments offered by De Beers binding upon them[128] and stating that the proceedings should be brought to an end.[129]

## 4.2 The GC Ruling

On June 29 2006 Alrosa brought an application for the annulment of the decision before the General Court. As stated above, Article 263 TFEU sets a high bar for private parties wanting to challenge EU acts. The GC did however find Alrosa to meet the established criteria, namely that of being of both directly and individually concerned by the contested decision.[130]

### 4.2.1 Arguments of Alrosa

In support of its application, Alrosa put forward three pleas in law[131], alleging

1. An infringement of the right to be heard;
2. An infringement by the contested decision of Article 9 of Regulation 1/2003, which does not allow commitments to which an undertaking concerned has not voluntarily subscribed to be made binding on the undertaking, *a fortiori* for an indefinite period;
3. The excessive nature of the commitments that were imposed, in breach of Article 9 of Regulation 1/2003, Article 82 EC, the freedom of contract and the principle of proportionality.

The Court began by assessing the second and third plea together.[132] Alrosa claimed that since the Commission's main competition concern regarded the trading relation between De Beers and Alrosa, the Commission should not

[128] COMP/B-2/38.381– *De Beers*, Article 1.
[129] COMP/B-2/38.381– *De Beers*, Article 2.
[130] T-170/06 *Alrosa v Commission*, paras 39-40
[131] T-170/06 *Alrosa v Commission*, para 42.
[132] Ibid, para 43.

have been allowed to accept commitments coming from only De Beers. Alrosa argued that it should have been considered as an undertaking concerned under Article 9 of Regulation 1/2003. Since the article aims to provide the Commission and the undertakings concerned with an opportunity of arriving at a mutually beneficial settlement, and joint commitments had been offered, Alrosa claimed only those commitments were allowed to be accepted and make binding by the Commission, however not commitments offered individually only by one of the concerned undertakings.[133]

In addition, Alrosa interpreted the second sentence of Article 9[134] to mean that the Commission is only allowed to adopt commitment decisions for a specified period, not for an indefinite period as was done.[135] Thus the decision breached Article 9 of Regulation 1/2003. Further, Alrosa considered the decision to be in breach of Article 102 TFEU and the principle of contractual freedom, as it renders impossible, in absolute terms, any supply of rough diamonds to De Beers by Alrosa, for a potentially indefinite period.[136] Article 102, with an aim to capture the abuse of a dominant position, should not be interpreted as making it illegal to enter into a contract based on the ground that one of the parties is in a dominant position.[137] Neither should it be allowed for the Commission to deprive Alrosa and De Beers of all freedom to enter into contracts with one another based on the fact that De Beers held a dominant position on the markets downstream from the market for the supply of rough diamonds.

Alrosa estimated that had the jointly offered commitment been made binding, the notified agreement would only have covered 18% of Alrosa's annual production and 3.6% of its annual worldwide sales of rough diamonds from 2010 and onwards.[138] All in all the competition concerns based on those

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[133] T-170/06 *Alrosa v Commission*, para 45.
[134] The sentence reads: Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.
[135] T-170/06 *Alrosa v Commission*, para 46.
[136] Ibid, para 47.
[137] Ibid, para 50.
[138] Ibid, para 51.

numbers did not justify the Commission's decision, especially since it had the effect of removing Alrosa's contractual freedom.[139] Alrosa expressed concern that the Commission Decision was rather at risk of having anti-competitive effects itself as it deprived Alrosa of access to the market's largest buyer, and as such allowed other purchasers to exercise greater market power in their negotiations with Alrosa, potentially imposing artificial prices.[140]

Alrosa further claimed the Commission had breached the principle of proportionality when adopting its decision. Article 5 TEU establishes "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties". This means where there is a choice between several measures, the choice should be the least onerous one, and the disadvantages caused must not be disproportionate to the aims pursued.[141] Alrosa claimed this principle should apply to all decisions adopted under Article 9 of Regulation 1/2003, meaning the Commission should not be allowed to accept commitments that exceed what is necessary to ensure that competition on the internal market is not distorted.[142] In the light of the objective of maintaining undistorted competition pursued by Article 102 TFEU, Alrosa claimed the decision produced disproportionate effects, as it closed of any future possibility for Alrosa to enter into a contractual relationship with De Beers. The jointly proposed commitments, limiting Alrosa's annual output and the share of worldwide output reserved to De Beers to 18% and 3.6%, respectively after 2010, would have been enough to address the concerns expressed by the Commission as to the risk of foreclosure of the market.[143]

According to Alrosa, the disproportionate and discriminating nature of the decisions also came to show as other sellers were still able to sell rough diamonds to De Beers in quantitates larger than the 3,6% of of annual

[139] T-170/06 *Alrosa v Commission*, para 52.
[140] Ibid, para 56.
[141] Ibid, para 58.
[142] Ibid, para 59.
[143] Ibid, para 63.

worldwide production which Alrosa would have done had the agreement as amended by the jointly offered commitments been in place.[144]

### 4.2.2 Arguments of the Commission

The Commission contended all pleas put forward by Alrosa to be unfounded. As regards Alrosa's status as an undertaking concerned it stated that only the party against whom proceedings have been initiated, in this case De Beers as the proceedings regarded an abuse of dominant position, can be regarded as such.[145] Further the Commission stated that the second sentence of Article 9 does not limit the Commission to merely adopting decisions for a specific period of time, rather it grants the Commission the power to do so.[146]

The Commission denied that its decision infringed on Alrosa's contractual freedom and had the effect of prohibiting lawful conduct.[147] There are limits to the principle of contractual freedom, such as the prohibition of anti-competitive behaviour established in Articles 101 and 102 TFEU. The agreement between Alrosa and De Beers, regarded in the context of the trading relationship between them, appeared to the Commission to breach those provisions.[148] Not merely because De Beers was dominant on the downstream markets, but also due to its dominance on the market for the production and supply of rough diamonds.[149] Moreover, the Commission was of the opinion that its decision did not eliminate Alrosa's freedom of contract as the decision was only binding De Beers to the commitments it had proposed itself, within the scope of its own freedom of contract. In addition, the will of a partner of tying itself to a dominant undertaking through an agreement should not have an effect on the application of Article 102 TFEU.[150]

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[144] T-170/06 *Alrosa v Commission*, para 64.
[145] Ibid, para 66.
[146] Ibid, para 67.
[147] Ibid, para 68.
[148] Ibid, para 69.
[149] Ibid.
[150] Ibid, para 70.

Alrosa's claim that the Commission's competition concerns did not justify the adoption of the commitments proposed by De Beers were further considered by the Commission to be incorrect.[151] The Commission's concerns "…were not limited to issues of the exclusion of competitors or foreclosure of the market. On the contrary, they extended to all the dealings between Alrosa and De Beers which sought jointly to regulate, by methods different from those consistent with normal competition, the volume, price and range of rough diamonds on the world market…"[152]. In addition, given the objective pursued by Article 9, the Commission had been lawfully entitled to accept the commitments proposed by De Beers.[153] Alrosa's expression of concern regarding the decision giving rise to anti-competitive effects were found by the Commission to be irrelevant and unsupported as it portrayed a false image of Alrosa as a supplier of De Beers rather than an actual competitor.[154]

As regards the proposed breach of the principle of proportionality the Commission agreed that the principle is applicable to decisions under Article 9 of Regulation No 1/2003.[155] However, unlike Article 7, Article 9 does not demand the Commission establishes a competition infringement, but merely that there is no need for further action in order to address its competition concerns given the voluntarily offered commitments by the undertakings concerned.[156] The specific nature of the provision must, was the Commission's view, be taken into account.[157] It agreed that commitments that are manifestly excessive must be rejected, on behalf of the principle of proportionality, however maintaining that since commitments are voluntarily offered by the undertakings concerned such a scenario would occur only exceptionally.[158] In any case, the Commission found it could not be required to conduct a parallel assessment in order to arrive at a hypothetical decision

[151] T-170/06 *Alrosa v Commission*, para 71.
[152] Ibid, para 73.
[153] Ibid, para 72.
[154] Ibid, para 74.
[155] Ibid, para 76.
[156] Ibid, para 77.
[157] Ibid.
[158] Ibid, para 80.

that could be adopted under Article 7, and compare this to the commitments offered, as this would undermine the whole purpose of Article 9 in terms of effectiveness.[159] The judicial review of commitment decisions by the EU Courts should be limited to assessing whether or not the commitments amount to a manifest breach of the principle of proportionality.[160]

The Commission was of the opinion that its decision did not breach the principle of proportionality, and also claimed that since 50% of Alrosa's annual output was always reserved for the Russian market the jointly offered commitments would still reserve 36%[161] of the remaining output to De Beers after 2010, and even more before that. The Commission also maintained that the agreement should be looked at against the background of the existing long-standing trading relations between Alrosa and De Beers, aimed at jointly regulating output and prices.[162]

Against the argument that Alrosa's contractual freedom had been limited for an indefinite period the Commission claimed this was not the case since proceedings may always be reopened under Article 9(2) of Regulation 1/2003.[163] Neither had Alrosa been discriminated against since its position vis-à-vis De Beers was different to the position of other suppliers due to its position as the primary competitor to De Beers as well as due to the long-standing trading relationship between the two.[164]

### 4.2.3 Findings of the Court

The General Court commenced by stating that the concept of an undertaking concerned "relates to undertakings which are responsible for the conduct in question and which are liable to be penalised because of it"[165] why Alrosa

[159] T-170/06 *Alrosa v Commission*.
[160] Ibid, para 81.
[161] 18% of the total annual output becomes 36% of the remaining 50% since 50% was reserved for the Russian market.
[162] T-170/06 *Alrosa v Commission*, para 83.
[163] Ibid, para 84.
[164] Ibid, para 85.
[165] Ibid, para 89.

could not be considered as such[166]. As concerns the claim by Alrosa that the Commission was in breach of Article 9 of Regulation 1/2003 as it had adopted its decision for an indefinite period the Court stated that while Article 9(1) provides a decision may be adopted for a specific period this is however not required.[167]

The GC held that the Commission is always obliged to comply with the principle of proportionality as it constitutes a general principle of Community law.[168] Moreover, the preamble of Regulation1/2003 states that in accordance with the principles of subsidiarity and proportionality the regulation should not go beyond what is necessary in order to achieve its objective.[169] Hence, decisions adopted under Article 9 are not relieved from compliance with the principle of proportionality. However, the Court withheld, the application of that principle should be different under Article 7(1) and under Article 9(1).[170]

In order to attain the regulation's main objective, to ensure the effective application of the competition rules laid down under the Treaty, the Commission possesses a margin of discretion as concerns whether it wishes to make commitments proposed by the undertakings concerned binding upon them under Article 9(1), or if it wishes to follow the procedure laid down under Article 7(1), in order to establish whether or not an infringement has occurred.[171] This possibility does not however alleviate the Commission from the need to comply with the principle of proportionality when it chooses the first option.[172] Article 9 should not be possible to exploit as a means of adopting decisions which would be regarded as disproportionate under Article 7.[173] The GC stated that the burdens imposed on undertakings to end an infringement should not not go beyond what is necessary in order to attain

[166] T-170/06 *Alrosa v Commission*, para 90.
[167] Ibid, para 91.
[168] Ibid, ara 92.
[169] Ibid, para 93.
[170] Ibid, para 94.
[171] Ibid, para 96.
[172] Ibid, para 97.
[173] Ibid, para 101.

the objective of re-establishing compliance with competition rules,[174] Hence, the Commission would not be allowed to adopt a decision under Article 7 "prohibiting absolutely any future trading relations between two undertakings unless such a decision is necessary to re-establish the situation which existed prior to the infringement"[175]. It went on to state that no difference between Article 7 and 9 can be invoked to allow any other conclusion to be reached regarding the limits to the Commission's capacity to lay down binding measures under Article 9(1).[176]

When adopting a decision, in a case where there is a choice between several appropriate remedies, the Commission must choose the least onerous, and any disadvantages must be proportionate to the aims pursued.[177] The GC stated that the Commission had admitted there might have been uncertainties, a "grey zone", between the commitments offered jointly by Alrosa and De Beers and the commitments offered solely by De Beers, as regards their suitability in addressing the competition concerns in an adequate manner.[178] However, the identification of which solution would have been most appropriate would have required such a complex economic assessment which Article 9 is intended to avoid. Due to this uncertainty, and the difficulty of establishing any alternative resolutions, the Commission concluded that that a complete prohibition represented the only appropriate solution.[179]

The GC held that the Commission's decision was vitiated by a manifest error in assessment, and that the aims of that decision could have been pursued through less onerous solutions than prohibiting all future trading between Alrosa and De Beers as of 2010.[180] The Court claimed that the principle of proportionality demands that when there are measures known by the Commission, which are less onerous than those the Commission intends to

[174] T-170/06 *Alrosa v Commission*, para 102.
[175] Ibid, para 103.
[176] Ibid, para 104.
[177] Ibid, para 112.
[178] Ibid, para 124.
[179] Ibid.
[180] Ibid para 126.

make binding, it should examine whether these less onerous measures may adequately address the competition concerns at hand, before adopting the more onerous measures.[181] The jointly offered commitments were, without a doubt, less onerous than those made binding through the Commission Decision.[182] Further, it was the view of the Court that they were, *prima facie*, capable of addressing the Commission's competition concerns.[183]

Further, the Court oppugned that the Commission had, in October 2005, proposed the commitments offered by De Beers and Alrosa to be amended in a way which would lead to them having no trading relations as of 2009.[184] An infringement decision, the GC stated, in the case at hand, prohibiting all direct or indirect trading relations between the two undertakings, with effect of 2009 and for an indefinite period, would have been a manifest breach of the principle of proportionality.[185] The Commission cannot, the Court said, "lawfully propose to the parties that they should offer it commitments which go further than a decision which it could have adopted under Article 7(1) of Regulation No 1/2003."[186]

The Commission also exceeded its powers under Article 102 TFEU, as its decision obliged Alrosa, which was not subject to the procedure initiated under that article, to make significant structural and behavioural changes in order to compete with De Beers.[187] Thus, the decisions had the effect of forcing a company not directly concerned by the proceedings to work for a change of the market structure.[188] The Commission's argument that the proceedings can be reopened under Article 9(2), and that the decision is thus not permanent, was not accepted by the Court.[189] The exhaustive list of reasons why proceedings may be reopened does not include grounds such as

[181] T-170/06 *Alrosa v Commission*, para 131
[182] Ibid, para 132.
[183] Ibid, para 133.
[184] Ibid, para 139.
[185] Ibid, para 140.
[186] Ibid.
[187] Ibid, para 148.
[188] Ibid, para 149.
[189] Ibid, para 155.

those Alrosa had based its application of annulment on, and further the Commission would still hold discretion in refusing to reopen the case.[190]

As regards the first plea, an infringement of the right to be heard, the Court concluded that although Alrosa could not strictly speaking be classified as an undertaking concerned under Article 102 TFEU, it should have been afforded the rights given to an undertaking concerned due to the circumstances surrounding the case.[191] Accordingly, Alrosa did hold a a right to be heard on the individual commitments proposed by De Beers.[192] This aspect of the ruling, although interesting to discuss, does however not fit within the scope of this essay.

The General Court found Alrosa's all three pleas to be well founded, and proceeded to annul the Commission Decision through its judgement delivered on 11 July 2007.[193]

## 4.3 The ECJ Ruling

The Commission proceeded to, through an appeal, request that the ECJ set aside the judgment of the GC, thus dismissing Alrosa' application to annul the Commission Decision. The appeal was brought on two grounds.[194]

1. The General Court infringed Article 9 of Regulation No 1/2003 and the principle of proportionality.
2. The General Court misinterpreted and misapplied the right to be heard.

The Commission criticised how the General Court essentially had demanded the same examination of proportionality whether a decision is adopted under

[190] T-170/06 *Alrosa v Commission,* para 155.
[191] Ibid, para 187.
[192] Ibid, para 203.
[193] Ibid, para 205.
[194] C-441/07 P, *Commission v Alrosa*, para 21.

Article 7 or Article 9 of Regulation 1/2003. The Commission agreed that the principle of proportionality should apply to both Article 7 and Article 9 decisions, however the Court's positioning disregarded "the fundamental differences between those two provisions."[195] Further, the GC's assessment, according to the Commission, deprived Article 9 of it practical effects, as it assessed the content of the principle of proportionality when applying it to a decision under Article 9, by reference to how it is applied onto a decision under Article 7.[196] The balancing exercise should not, claimed the Commission, be the same regardless of the legislative context in which it is carried out.[197] Interestingly, the Commission even confessed that "it had been unable to determine the precise level of sales which would safely address all its concerns regarding competition" why it had accepted a commitment which saved time compared to a complex investigation.[198]. Through this statement the Commission acknowledged that there were possibly less onerous commitments available which would have sufficed to address the competition concerns.

Alrosa stated that when a Commission decision is manifestly disproportionate under Article 7 even when an infringement is found, that same decision is even more disproportionate under Article 9, at least in such a case where that decision under Article 9 had "harmful consequences for a non-consenting undertaking which had the status of a party to the proceedings", which Alrosa considered itself to be.[199]

The ECJ began by confirming, as Advocate General Kokott had done in her Opinion on the case[200], that the principle of proportionality, although not expressly referred to in Article 9, remains a criterion for the lawfulness of

[195] C-441/07 P, *Commission v Alrosa*, para 25.
[196] Ibid, para 26.
[197] Ibid.
[198] Ibid, para 55.
[199] Ibid, para 31.
[200] Opinion of Advocate General Kokott delivered on 17 September 2009 in Case C-441/07 P, *Commission v Alrosa*, ECLI:EU:C:2009:555, point 42.

Commission decisions.[201] However, regard must be taken to the differences in the means made available under Article 7 and 9 respectively, and the specific characteristics of each of these mechanisms.[202] Hence, the Commission's obligation to safeguard that the principle of proportionality is observed will be different in its extent and content, depending on which article it is considered in relation to.[203] Article 7 requires a finding of infringement and provides the Commission with the power to impose any structural or behavioural remedy which is both proportionate to the infringement committed and necessary to effectively bring that infringement to an end.[204] Article 9 does not require a finding of an infringement[205], and thus merely confines upon the Commission to examine commitments that have been offered in order to meet its competition concerns.[206] The application of the principle of proportionality, the ECJ stated, is therefore limited to confirming that the commitments in question address the Commission's competition concerns and that the undertakings concerned have not offered less onerous commitments that would have also sufficed to address those concerns.[207] This means the Commission must only choose between those commitments which have been offered, and determine which are the least onerous while yet addressing the competition concerns. However, the ECJ stated, the Commission must, in carrying out this assessment, still take into consideration the interests of third parties.[208]

The ECJ further stated that the GC's conclusion that it would be contrary to the scheme of Regulation 1/2003 if a decision which would be regarded as disproportionate under Article 7 in relation to an established infringement, could still be taken under Article 9, was incorrect.[209] The two provisions pursue two different objectives. Article 7 aims to put an end to an established

[201] C-441/07 P, *Commission v Alrosa*, para 36.
[202] Ibid, para 38.
[203] Ibid.
[204] Ibid, para 39.
[205] Rec 13 Regulation 1/2003.
[206] C-441/07 P, *Commission v Alrosa*, para 40.
[207] Ibid, para 41.
[208] Ibid.
[209] Ibid, paras 44-45.

infringement and Article 9 serves to address competition concerns expressed by the Commission following a preliminary assessment.[210] Hence, the ECJ stated, there is no reason why a measure available in the context of Article 7 should also have to function as a reference as regards what commitments the Commission may accept under Article 9.[211] Neither is there any reason why something going beyond that measure automatically should be regarded as disproportionate. The application of the principle of proportionality differs depending on which of the two provisions is concerned.[212] An undertaking offering commitments does so knowing these commitments may very well go beyond what the Commission could impose under Article 7. However, if these are accepted, the proceedings are closed, allowing the undertaking concerned to avoid a finding of an infringement of competition law and a potential fine.[213] The ECJ proceeded to claim that despite the proportionality assessment applicable to a decision under Article 9 does not need to be as rigorous as if a decision was adopted under Article 7, this does not mean other undertakings are robbed of "the possibility of protecting the rights they may have in connection with their relations with that undertaking."[214]

Based on this assessment the ECJ concluded that the General Court had been in error when considering that the application of the principle of proportionality must be assessed, when adopting a decision under Article 9 by reference to how it is assessed in the case of decisions taken under Article 7 "despite the different concepts underlying those two provisions."[215]

Concerning the scope for judicial review of a commitment decision, the ECJ stated that this should relate "solely to whether the Commission's assessment is manifestly incorrect."[216] The Commission is not obligated to itself investigate whether there are less onerous solutions available than the

[210] C-441/07 P, *Commission v Alrosa*, para 46.
[211] Ibid, para 47.
[212] Ibid.
[213] Ibid, para 48.
[214] Ibid, para 49.
[215] Ibid, para 50.
[216] Ibid, para 42.

commitments which have been offered.[217] Here the Commission had concluded that the jointly offered commitments were not enough to address the competition concerns at hand, and thus fulfilled its only obligation in relation to the principle of proportionality.[218] If the GC had found this conclusion was obviously unfounded, having regard to the facts established, it could have held that the Commission had committed a manifest error of assessment.[219] The GC however, never made any such finding, according to the ECJ.[220] Instead, the GC made its own assessment of the possibility to adequately address the Commission's competition concerns through less onerous solutions than the one adopted by the Commission,[221] This assessment included how the jointly offered commitments could have been altered in order to achieve that effect.[222] In this, the General Court encroached on the discretion of the Commission, by itself conducting an assessment of complex economic circumstances, and substituting the Commission's assessment with its own.[223] The ECJ proclaimed that this error of the General Court "in itself justifies setting aside the judgment under appeal."[224]

The General Court had also misinterpreted the concept of 'undertaking concerned' within the meaning of Regulation 1/2003 and thus wrongfully established an infringement on Alrosa's right to be heard.[225] In fact, Alrosa enjoyed only the less extensive rights of an interested third party.[226] By its ruling on 29 June 2010 the ECJ rejected all pleas put forward by Alrosa and dismissed the application brought by it before the General Court.[227]

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[217] C-441/07 P, *Commission v Alrosa*, para 61.
[218] Ibid, paras 61-62.
[219] Ibid, para 63.
[220] Ibid, bara 64.
[221] Ibid, para 65.
[222] Ibid, para 66.
[223] Ibid, para 67.
[224] Ibid, para 68.
[225] Ibid, para 95.
[226] Ibid, para 91.
[227] Ibid, para 121.

## 4.4 Opinion of the Advocate General

Due to lack of space and the fact that Advocate General Kokott's opinion[228] at large was coherent with the view of the ECJ, it cannot be afforded much room here. However, interesting to note is the emphasis the Advocate General added concerning the right and interest of third parties. She expressed that "it is always necessary to examine, having regard to the interests of third parties, whether the commitments go beyond what is necessary in order to address the competition problems in question."[229]

[228] Opinion of Advocate General Kokott delivered on 17 September 2009 in Case C-441/07 P, *Commission v Alrosa*, ECLI:EU:C:2009:555.
[229] Ibid, point 55.

# 5 Issues and Uncertainties Regarding the Commitment Procedure

This chapter further elaborates on some of the critique the commitment procedure and the *Alrosa* ruling have received. In this chapter my intention is to answer the second research question posed: What are the dangers of granting the Commission such a wide margin of discretion for adopting commitment decisions as the ECJ did in *Alrosa*? The information provided in this chapter also helps me with providing an answer to my third research question.

The *Morningstar* ruling from 2016 is the only other case where the CJEU has ruled on the validity of a commitment decision. It is presented as an example, showing the effects of the *Alrosa* jurisprudence.

## 5.1 T-76/14 *Morningstar v Commission*

In 2009 the Commission opened proceedings against Thomson Reuters Corporation ('Reuters'), a Canadian news and financial data company, regarding an alleged abuse of a dominant position in the worldwide market for consolidated real-time datafeeds, which provide banks and other financial institutions with market data from a variety of sources.[230] In 2011 it adopted a preliminary assessment in accordance with Article 9(1) of Regulation 1/2003 affirming that Reuters held a dominant position on the market and might also be abusing that position.[231] The reason was that the company had been by imposing certain restrictions regarding the use of Reuters Instrument

[230] T-76/14 *Morningstar v Commission*, para 1.
[231] Ibid, paras 2-3.

Codes[232] ('RICs') mainly on its own customers but also on third parties and competing datafeed providers, thus creating substantial barriers for its customers to switching providers .[233]

### 5.1.1 The Commission Decision

Reuters, not agreeing with the assessment of the Commission, however offered commitments with the intention of addressing the competition concerns expressed by the Commission. The undertaking proposed to offer its customers the possibility to enter into a licence agreement concerning RICs, consequently allowing them to use RICs to retrieve data from datafeeds of competing providers.[234] After concluding two market tests in accordance with Article 27(4) of Regulation 1/2003 the Commission could finally accept Reuters' commitments, which had then been revised twice, in late 2012.[235] It adopted a decision[236] pursuant to Article 9(1) making the revised commitments binding upon Reuters, and concluding that upon doing so it no longer had any grounds for action against the company.[237]

### 5.1.2 The GC Ruling

In 2014, one of Reuters' competitors in the consolidated real-time datafeed market, Morningstar, challenged the Commission Decision before the General Court. Morningstar claimed that Reuters' excluded competing providers from the licence and therefore also from the possibility of offering a fully comparable and competing service to Reuters'[238] and that the GC should annul the Commission Decision as it was based on a manifest error of assessment, breached Article 9(1) of Regulation 1/2003 by not addressing the

[232] Short, alphanumerical codes developed to identify securities and their trading locations.
[233] T-76/14 *Morningstar v Commission*, paras 3-4.
[234] Ibid, para 5; Commission Decision of 20 December 2012 relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement (Case COMP/D2/39.654 — Reuters Instrument Codes (RICs)), rec 15.
[235] T-76/14 *Morningstar v Commission*, paras 7-14.
[236] COMP/D2/39.654 — Reuters Instrument Codes (RICs).
[237] T-76/14, *Morningstar v Commission*, para 14.
[238] Ibid, paras 48-49.

competition concerns, breached the principle of proportionality and infringed on the obligation to state reasons[239].

The Court first had to establish whether or not the action was admissible. In order for a private applicant to be allowed to challenge an EU act, in this case a Commission decision, the applicant must be both directly and individually concerned by that act, according to established case law.[240] Directly meaning that the applicant's legal situation must be directly affected, and individually meaning the act affects the applicant in a way which distinguishes it individually from all others.[241] The GC concluded that Morningstar fulfilled both requirements.[242]

However, vis-à-vis the remainder of the application Morningstar was less successful. The GC did not accept the argument that the Commission had made a manifest error in assessment by accepting commitments which did not address the competition concerns it had expressed.[243] Just because competitors were not granted a possibility to enter into a license agreement concerning RICs this did not mean the competition concerns would not be addressed through the commitments.[244] Rather, granting competitors this possibility would go beyond what was necessary in order to address the Commission's concerns.[245]

As response to Morningstar's pleas regarding a breach of both Article 9(1) of Regulation 1/2003 and the principle of proportionality, the Court essentially reaffirmed what the ECJ had stated in *Alrosa.* The Commission enjoys a wide margin of discretion in accepting commitments under Article 9[246] and

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[239] T-76/14, *Morningstar v Commission*, para 25; para 37.
[240] C-404/96 P *Glencore Grain* v *Commission*, ECLI:EU:C:1998:196, para 42; T-3/93 *Air France* v *Commission*, ECLI:EU:T:1994:36, para 80; Case 25/62 *Plaumann* v *Commission*, ECLI:EU:C:1963:17, p 107.
[241] T-76/14, *Morningstar v Commission*, para 30.
[242] Ibid, paras 31-36
[243] Ibid, para 72.
[244] Ibid, paras 60-63.
[245] Ibid, para 63.
[246] Ibid, para 40.

although decisions adopted on the basis of that article must abide by the principle of proportionality, the application of the principle differs from when a decision is adopted on the basis of Article 7, as the provisions pursue different aims.[247] When reviewing commitments, the Commission must establish whether the commitments offered to them are sufficient and can respond adequately to their concerns.[248] In its proportionality assessment the Commission must first verify whether the commitments address the competition concerns expressed in the case, and secondly whether the undertakings concerned had offered less onerous commitments which would also sufficiently address these competition concerns.[249] Any judicial review is limited to whether the Commission's assessment is manifestly erroneous.[250] As the Court had already concluded that the Commission had not committed a manifest error in assessment when accepting Reuters' final commitments it could not accept Morningstar's plea regarding a breach of Article 9(1) or the principle of proportionality.[251]

Lastly, the GC did not agree that the Commission had failed to state reasons as to how the final commitments addressed the competition concerns which had been identified. It has set out "clearly and unequivocally, the factual elements and legal considerations which led it to conclude that the commitments were sufficient to address the competition concerns which had been raised."[252] The Court added that the Commission never has an obligation to explain why it abstained from adopting a different, but merely provide reasons for the decision it does adopt.[253]

In September 2016 the GC delivered its ruling, dismissing Morningstar's action in its entirety.[254] Through this ruling the ECJ's reasoning in *Alrosa* was

[247] T-76/14, *Morningstar v Commission*, para 43 f.
[248] Ibid, para 45.
[249] Ibid, para 86.
[250] Ibid, para 87.
[251] Ibid, paras 78, 90
[252] Ibid, para 100.
[253] Ibid, para 101.
[254] Ibid, para 103.

manifested, and the GC proved that also for competitors the bar is set very high when it comes to successfully challenging commitment decisions. Through these rulings the CJEU has effectively limited its own scope of judicial review of commitment decisions to the point where the chances of a commitment decision ending up before it is close to non-existent.

One final aim of my research is to determine the effects of the *Alrosa* and *Morningstar* jurisprudence on the possibilities for third parties in challenging commitment decision. Thus a few words on the requirements for a private party to successfully challenge an EU act, such as a Commission decision, are given before the critique against the commitment procedure is presented.

## 5.2 Challenging Commitment Decisions - Article 263 TFEU

The article governing action against EU acts for private plaintiffs is, as has been mentioned above, Article 263 TFEU, more specifically the fourth paragraph. If an act is not addressed to the private party challenging the act, two requirements must be fulfilled; that the party is both directly and individually concerned. The meaning of these two requirements have been developed through ECJ jurisprudence. A direct concern means that the measure must directly affect the legal situation of the individual and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it.[255] A private plaintiff is individually concerned by an EU act only if that act affects the plaintiff in a manner which distinguishes it from all other persons (judicial and natural), either by reason of certain attributes particular to that plaintiff or by reason of circumstances.[256] This is quite high a threshold to surpass, and may certainly play a part in why a private third party may have difficulties challenging a commitment decision adopted by

[255] C-404/96 P *Glencore Grain* v *Commission*, para 42.
[256] Case 25/62, *Plaumann* v *Commission*, p 107.

the Commission. However, in this aspect, commitment decisions are not differentiated from other EU acts. Private parties are always disadvantaged when it comes to challenging an EU act, the reasons for which do not fall within the scope of this essay.

As for what amounts to a direct and individual concern in the case of a third party challenging a commitment decision, *Alrosa* provides no general guidelines. The GC merely examined whether in the situation at hand, Alrosa should be regarded as both directly and individually concerned.[257] I agree with the Court's reasoning that Alrosa held such a position. In *Morningstar* however, the GC elaborated some on the requirements for a third party to a commitment decision to be regarded as individually concerned.[258] One contributing factor was the market's limited number of competitors, making Reuters' abusive behaviour liable to having significant negative effects on Morningstar's business.[259] Secondly, Morningstar had actively participated in the procedure leading up to the decision.[260] Due to this very active participation in the procedure, Morningstar was found to be individually concerned. Morningstar had e.g. requested and participated in several meetings with the Commission and submitted its observations in relation to the commitments on multiple occasions.[261] The GC stated in its ruling that "Although mere participation in the procedure is, admittedly, insufficient on its own to establish that the contested decision is of individual concern to the applicant, the fact nevertheless remains that its active participation in the administrative procedure is a factor taken into account in the case-law relating to matters of competition including in the more specific area of commitments under Article 9 of Regulation No 1/2003".[262] This statement clarified something which was not addressed in *Alrosa*; that it takes more than participation in the procedure foregoing a Commission decision to fulfil the

[257] T-170/06 *Alrosa v Commission*, paras 36-41.
[258] T-76/14, *Morningstar v Commission*, paras 32-36.
[259] Ibid, para 35.
[260] Ibid, para 34.
[261] Ibid, para 32.
[262] Ibid, para 34.

requirements for admissibility for a private applicant. As the commitment made binding upon Reuters excluded its competitors from entering into license agreements concerning RICs, the decision affected Morningstar's legal situation, making it directly concerned.[263]

Yet, my main concern is not with the hinders Article 263 might cause an undertaking wishing to have a Commission decision annulled. Indeed, there are a few appeals by third parties against commitment decisions which have been declared by the GC as inadmissible due to a lack of *locu standi*. However dismissal was due to the appeals not having been brought within the time-limit for instituting proceedings.[264] My concern is rather that in a case where a private plaintiff is able to mount a challenge against a commitment decision the wide discretion granted to the Commission will be cause enough that the decision will not be overturned by a court. Both *Alrosa* and *Morningstar* are testaments to the fact that, although a private third party may achieve *locu standi* before the GC, or even the ECJ, under Article 263 TFEU, the discretion granted to the Commission is a larger hurdle to overcome, and may ensure that a commitment decision is at large protected from judicial review.

The following sections provide for some of the criticism the commitment procedure has received. All comments presented have been laid forth after the ruling in *Alrosa*.

[263] T-76/14, *Morningstar v Commission*, para 31.
[264] T-274/06 *Estaser El Mareny v Commission* and T-45/08 *Transportes Evaristo Molina v Commission*, upheld in judgment of 11 November 2010 in C-36/09 P, *Transportes Evaristo Molina v Commission*, ECLI:EU:C:2010:670. Both third-party applications for annulment of the Commission's commitment decision in the Repsol case (Commission Decision 2006/446/EC of 12 April 2006, relating to a proceeding under Article 81 EC (Case COMP/B-1/38.348 – *Repsol CPP*).

## 5.3 Critique Against the Commitment Procedure

### 5.3.1 A Threat to Legal Certainty

In his article from 2012, Florian Wagner-von Papp, professor at UCL[265], expresses a number of concerns relating to a potential increase in incentive to engage in a commitment procedure from both the Commission's and concerned undertakings' perspective, after *Alrosa*.[266] A limited scope of judicial review in combination with a negotiated outcome may lead to legal uncertainty and an inadequate protection of as well the public interest as third party interests.

Von Papp's largest concern relating to the commitment procedure is overuse, resulting in a decrease in litigated cases, which to a large extent define the limits of EU competition law and the legal principles surrounding it.[267] In a case regarding a common legal issues this is less of a problem. However, in cases offering an opportunity to provide clarification in a rare situation, or dealing with a novel legal issue, it is worrisome that a full investigation by the Commission and the possibility for judicial review might not be available.[268] As the ECJ limited the scope for judicial review of commitment decisions in *Alrosa*, adopting a commitment decision might be an easy way for the Commission to avoid such by the EU Courts. As was briefly brought up under chapter 2 national courts and NCAs are for the sake of uniform application of the Union competition rules very limited in their enforcement where the Commission has already adopted a decision. This is the case also

[265] University College London
[266] Wagner-von Papp, Florian*, Best and even better practices in commitment procedures after Alrosa: The dangers of abandoning the "struggle for competition law*, June 1, 2012. Common Market Law Review, Vol. 49, No. 3, 2012, pp 929-970.
Available via SSRN: https://ssrn.com/abstract=2262864.
[267] Ibid, p 961.
[268] Ibid, p 962.

when that decision is taken under Article 9.[269] This means not only can the Commission in adopting a commitment decision substitute its own full investigation for a bargained outcome, but it will probably also completely limit all possibility for judicial review of its decision, at the expense of legal certainty.[270] Adding to this, von Papp fears that it is in precisely these type of cases, dealing with novel legal issue, that the Commission might be tempted to adopt a commitment decision rather than conduct a full investigation.[271] Where an infringement decision is adopted, the risk of judicial review is higher if the issue is novel. However, if the Commission opts for the commitment procedure, a review of its reasoning and decision can at large be avoided.[272] It is my personal belief, that the fact that this possibility even exists inherently threatens legal certainty.

Frederic Jenny, professor of Economics at ESSEC Business School in Paris and Chairman of the OECD Competition Committee, wrote an article in 2015 titled "Worst Decision of the EU Court of Justice: The Alrosa Judgment in Context and the Future of Commitment Decisions"[273]. Hence, it is probably not hard to guess his stands in the debate. Jenny gives a more direct critique to the effects of the ECJ's reasoning in *Alrosa*. He highlights that it was initially the Commission's idea that the commitment should be a complete cessation of all commercial relations between De Beers and Alrosa. Further he claims that the Commission made this suggestion knowing the remedy went beyond what was necessary to address its competition concerns.[274] This means the main enforcer of EU law now has the power to both suggest and accept commitments which go beyond what is needed, and do so knowingly,

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[269] Article 16 Regulation 1/2003; rec 22; Opinion of Advocate General Kokott in C-547/16 *Gasorba SL and Others v Repsol Comercial de Productos Petrolíferos SA*, ECLI:EU:C:2017:692, points 28-29.
[270] Wagner-von Papp, p 962.
[271] Ibid.
[272] Ibid.
[273] Frederic Jenny, *Worst Decision of the EU Court of Justice: The Alrosa Judgement in Context and the Future of Commitment Decisions*, Fordham International Law Journal, Volume 38, Issue 3, Article 2, 2015, pp 701-765.
Available via http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2386&context=ilj
[274] Jenny, p 757 f; C-441/07 P, *Commission v Alrosa*, para 55.

in the name of effectiveness.[275] Such commitments may even end up putting unnecessary limits to the freedom of undertakings, concerned and interested,[276] to compete on the market. Jenny claims this behaviour contradicts the objectives of EU law.[277]

Another possibility opened up to the Commission is that of using Article 9 in a situation where its theory of harm, which explains why an agreement or a practice may harm competition, might not be strong enough and hence might be questioned. Jenny states that "Commitment decisions offer an easy way to bypass both the complexity of articulating a theory of harm that would withstand the scrutiny of courts and economic experts and the risk that there would be a court challenge to the decision."[278]

Mario Mariniello, former Research Fellow at Bruegel, and current adviser to the European Political Strategy Centre, also articulates concerns regarding the Commission's potentially insufficient theory of harm.[279] Whilst commitment decisions can prove more efficient compared to infringement decisions, they come at the cost of a lacking in finding of infringement.[280] Since there is no admittance of guilt, and a very slim chance that a commitment decision will be challenged in court, the Commission does not elaborate on its theory of harm in commitment decisions.[281] Just as von Papp, Mariniello argues that the Commission might have strong incentives to opt for the commitment procedure in cases where there might actually exist a demand for a clear legal precedent to be set, preferably through a prohibition decision.[282] This as the prospect of an Article 9 decision ending up in court is slim to none,[283] as has

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[275] Jenny, p 758.
[276] The ECJ only granted Alrosa the status of an interested third party, whilst De Beers was the only concerned undertaking in the procedure.
[277] Jenny p 758.
[278] Ibid, p 734.
[279] Mariniello, Mario, *Commitments or Prohibitions? The EU Antitrust Dilemma*
Bruegel Policy Brief, Issue 1, 2014.
Available via http://bruegel.org/wp-content/uploads/imported/publications/pb_2014_01.pdf
[280] Ibid, p 2.
[281] Ibid.
[282] Ibid, p 4.
[283] Ibid.

been previously established. A more novel legal issue, and development of theory of harm, consequently is open to a greater risk of judicial review by the EU Courts and possibly annulment. This lowers the interest of adopting infringement decisions in such cases, in favour of the commitment procedure.[284] As infringement decisions are at a much higher rate challenged by the defendants, the pressure is higher on the Commission to carry out a thorough and correct assessment, developing on its theory of harm.[285]

This brings with it two consequences which can counteract legal certainty. First, as the Commission does not develop on it competition concerns, there is less information which may facilitate independent action for damages by private parties.[286] The Commission's exposure to any external criticism is also limited, as there is often little information in a decision to expose.[287] Research by Mariniello shows commitment decisions tend to be as much as eight times shorter than infringement decisions.[288] Secondly, commitment decisions in themselves offer little guidance to the undertakings on a certain market as to how the Commission will assess certain conduct, compared to an infringement decision. Due to this, there is little way of knowing what type behaviour to avoid, and issues dealt with through commitment decisions may be more likely to reoccur over time.[289] Consequently, commitment decisions will also lack in deterrence compared to infringement decisions. Infringement decisions identify an infringement and set legal precedents as to what type behaviour should be avoided.[290] The accompanying costs, such as fines, periodic penalty payments and follow-on damage claims provide for an effective compliment to the decision itself as a means of dissuasion.[291] The very nature of a commitment decision on the other hand, provides for very

[284] Mariniello, p 4; von Papp, p 962.
[285] Mariniello, p 4.
[286] Ibid.
[287] Ibid.
[288] Ibid, p 7.
[289] Ibid, p 2.
[290] Ibid, p 5.
[291] Ibid.

little deterrence, demanding no admittance of guilt nor being accompanied by a fine .[292]

In September 2017 Damien Geradin, Professor of Competition Law and Economics at Tilburg University, and Evi Mattioli, research assistant at the Liege Competition and Innovation Institute, jointly wrote a paper on the commitment procedure. They ask the question whether commitment decisions are too much of a good thing.[293] Drawing from the substantial decline in number of appeals submitted before the GC[294], corresponding well with the Commission's increased reliance on commitments, they sound a note of warning as to the Commission using the commitment procedure to increase its own level of discretion in assessing infringements.[295] In cases investigated under Article 102 TFEU there is a larger tendency compared to e.g. in cartel cases that complex and novel legal questions come to rise.[296] Geradin and Mattioli are worried that the Commission's desire for effectiveness in procedure comes at the cost of thorough investigations. This brings with it a loss in guidance and evolution of case law by both the Commission and the the EU Courts.[297] Their concerns hence mirror those of von Papp and Mariniello, that the Commission will opt for the commitment procedure in cases dealing with novel legal issues, as a way to avoid judicial review in such scenarios.[298]

Their concerns regarding an enhanced Commission discretion in assessing potential infringements are not merely of a speculative nature. Geradin and Mattioli use the Commission's investigation into the energy sector, and the high number of commitment decisions adopted as a result, as testimony to the Commission's eagerness to apply an extensive interpretation to the concept

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[292] Ibid, p 5; Choné, Philippe, Souam, Saïd & Vialfont, Arnold, *On the optimal European competition law*, International Review of Law and Economics Volume 37, March 2014, p 177.
[293] Geradin, Damien and Mattioli, Evi, *The Transactionalization of EU Competition Law: A Positive Development?* TILEC Discussion Paper No. DP 2017-035, September 20, 2017. Available via SSRN: https://ssrn.com/abstract=3040306.
[294] See chapter 5.3.4 below.
[295] Geradin & Mattioli, p 7.
[296] Ibid, p 11.
[297] Ibid.
[298] Ibid, p 7

abuse of dominance.[299] More specifically the outcome in two of those investigations; *ENI*[300] and *E.ON electricity*[301]. In both cases the Commission adopted commitment decisions, the commitments being of a structural nature, in situations lacking in previous jurisprudence from both the Commission and the EU Courts, instead of conducting a full investigation.[302] Geradin and Mattioli question whether these two cases even constituted an abuse of dominance. No matter if the final conclusion and outcome as regard the suspected infringements would have been the same, I do agree with them that in such cases a full analysis from the Commission should be carried out, and review from the EU Courts be available.[303] Perhaps, this confirms the fear expressed by Jenny that the Commission will opt for the commitment procedure in cases it knows it theory of harm might not be strong enough, or where they knowingly have accepted commitments more onerous than necessary.

Jenny articulates further concerns regarding the elevated risk of privation of legal certainty in Commission decisions following *Alrosa*. With its ruling, Jenny claims the ECJ essentially granted the Commission a possibility to shift its focus from identifying and fighting existing violations of competition law, to reshaping and regulating markets using structural commitments.[304] The possibility to take such decisions, with no real court supervision, deprives the EU legal system of its legal predictability.[305] Another issue relating to predictability, as identified by Mariniello, is the lowered incentives for the Commission to provide for accurate assessments of the cases before it, as

[299] Ibid, p 12.
[300] Commission Decision of 29 September 2010 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union ('TFEU') and Article 54 of the EEA Agreement (Case COMP/39.315 – *ENI*).
[301] Commission Decision of 26 November 2008 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement, (Cases COMP/39.388 German Electricity Wholesale Market and COMP/39.389 German Electricity Balancing Market – *E.ON Electricity)*.
[302] Geradin & Mattioli, p 12.
[303] Ibid.
[304] Jenny, p 765.
[305] Ibid, p 766.

there is practically no risk its decision will be subject to *ex-post* legal review.[306]

### 5.3.2 A Threat to the Interests of Third Parties, Consumers and the Public Interest

Another issue identified by von Papp is the fact that in a commitment procedure, there is an elevated risk that neither the interest of identifiable third parties, nor the public interest, will be afforded a sufficient amount of protection.[307] Both interests will to a great extent be represented by the Commission, but von Papp means that the Commission is probably not an equally reliable agent in representing these interests in a commitment procedure as it is in an infringement procedure.[308] Firstly, because the Commission has not conducted a full investigation of the facts, and accordingly might not have a clear and correct picture of the case before it.[309] This means it cannot be sure that the remedies agreed upon are suitable, and a worst case-scenario is the Commission might agree to commitments that are actually anticompetitive.[310] Another important, however subtle, difference between the commitment procedure and the infringement procedure that might infringe on the safeguarding of third party and public interests, is the difference in the dynamics of the interaction.[311] In a negotiation, such as the commitment procedure, both parties are much more likely to make concessions as regards their own interests in the search for a mutually acceptable solution. This means the Commission's and an undertaking's interests can start to become more and more aligned as a consensual resolution seems closer and closer.[312] This can in turn result in the Commission forsaking certain aspects of the public, or consumer, interest for

[306] Mariniello, p 4; p 6.
[307] Wagner-von Papp, p 950.
[308] Ibid, p 951.
[309] Ibid, p 950.
[310] Ibid.
[311] Wagner-von Papp, p 950.
[312] Ibid.

the contentment of reaching such a consensual agreement, in ways it would not do in an infringement procedure.[313]

Von Papp also identifies a potential problem with the difference in bargaining power between an undertaking in the process of offering commitments and the Commission. He is concerned with the fact that the Commission has the possibility of using the fact that an undertaking cannot be subject to follow-on actions from private litigants when being subject to a commitment decision, as leverage. In the hopes of avoiding future private follow-on actions, an undertaking might be willing to agree to more far-reaching commitments, something the Commission might take advantage of, even more so knowing the scope for judicial review is so limited.[314]

Mariniello argues that often a commitment decision may seem as a "win-win" solution. The undertaking suspected of an infringement avoids a potential infringement decision an accompanying fine, and the Commission can evade showing up with empty hands following an investigation.[315] If the Commission has adopted a wrongful decision its own level of discretion protects it from judicial review of the courts.[316] However this "win-win" narrative takes no account of the fact that there is actually a losing end. Consumers and affected third parties will need to trust that their interests have been accounted for by the Commission, and that any previous anti-competitive effects to their detriment have been resolved through the commitment decision. However, they have very little means to check whether this is true, as very little information is given in a commitment decision.[317] Further, if they were to disagree with the Commission's decision, my own view is that *Alrosa* and *Morningstar* have provided enough guidance as to the possibility of their success in challenging such.

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[313] Ibid, p 951.
[314] Wagner-von Papp, p 948 f.
[315] Mariniello, p 6.
[316] Ibid.
[317] Ibid.

### 5.3.3 Implications of The Court's Assesment of Proportionality

The ECJ ruling in *Alrosa* lays down a requirement for the Commission to choose the least restrictive commitments offered, provided they still adequately address the competition concerns.[318] This is, according to the Court, the only requirement in order for the Commission to be acting in accordance with the principle of proportionality.[319] However, the reason there was even a choice to be made in *Alrosa* was due to the fact that Alrosa had been a subject in separate proceedings, regarding the same agreement's potential infringement of Article 101 TFEU. In that procedure commitments had been offered jointly by Alrosa and De Beers. However, as von Papp explains, this is not a usual situation.[320] Normally, third parties cannot submit alternative commitments. Rather the undertakings concerned will offer one set of commitments which the Commission can choose to accept or not. In such a case, the proportionality assessment demanded by the ECJ in *Alrosa* is entirely and effectively removed, according to von Papp.[321]

Frederic Jenny also critiques the ECJ's interpretation of the proportionality principle in *Alrosa*. He claims that the statement that the Commission has no duty to suggest or investigate less onerous commitments than those which have been offered but which could still address its competition concerns, completely disregards the subject of consistency between the effectiveness of the solution, i.e. the commitments, and the objectives of competition law.[322] This means the Commission could end up accepting commitments which

[318] Wagner-von Papp, p 937.
[319] Ibid; C-441/07 P, *Commission v Alrosa*, para 41.
[320] Wagner-von Papp, p 940.
[321] Ibid.
[322] Jenny, p 757.

actually terminate a competition violation but does so at the cost of interested undertakings "strategic freedom… to compete on the market"[323]. This is a similar concern to what von Papp expresses in his article, that the Commission might accept commitments having anti-competitive effects.

### 5.3.4 A Lack in Appeals

Upon analysing the number of appeals to commitment decisions between 2000 and 2016, Geradin and Mattioli finds that such an appeal has never come from an undertaking which was itself subject to a commitment decision.[324] This is no doubt explained by the, at least in theory, voluntary nature of commitments.[325]

As the ECJ's reasoning in *Alrosa* quite clearly limits to what extent a third party can challenge a commitment decision as disproportionate, Geradin and Mattioli state that the "responsibility" to avoid a disproportionate commitment decision lies on the undertakings subject to the decision upon their offering of commitments. They must resist offering commitments that go beyond what is necessary in order to address the Commission's competition concerns.[326] However I agree with Geradin and Mattioli when they conclude that this is an unlikely outcome, as the alternative for an undertaking offering less onerous commitments than the Commission requests may be a large fine.[327] Another spotted trend is that since 2011, the year after the ECJ's ruling in *Alrosa,* the number of appeals filed against Commission decisions, have decreased steadily.[328] Geradin and Mattioli draw

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[323] Ibid.
[324] Geradin & Mattioli, p 8.
[325] Müller, Amaryllis, *Morningstar v Commission – Setting the Bar High for Third Parties Challenging EU Commitment Decisions*, CPI Europe Column, edited by Tzanaki, Anna & Delgado, Juan, Competition Policy International, October 2016. Available via https://www.competitionpolicyinternational.com/morningstar-v-commission-setting-the-bar-high-for-third-parties-challenging-eu-commitment-decisions/
[326] Geradin & Mattioli, p 8.
[327] Ibid, p 8f.
[328] Ibid, p 8. While the average number of appeals for the period 2000-2010 was 54, the average number for the period 2011-2016 was 29. These statistics include infringement decisions, commitment decisions as well as settlement decisions in cases of cartels adopted in accordance with Commission Regulation (EC) No 622/2008 of 30 June 2008 amending

no such conclusions, but I would not be surprised if one reason for this tendency is the outcome in *Alrosa*, combined with the fact that the commitment procedure becoming the by far most common way to adjudicate suspected competition infringements.[329] Even before the *Alrosa* and *Morningstar* jurisprudence, undertakings subject to commitment decisions did not bring appeals against them. Since the ECJ raised the bar for third parties challenging commitment decisions, I find this development logical.

### 5.3.5 Regulating Markets through Commitment Decisions

Jenny fears the Commission is using the commitment procedure as a way of regulating markets, imposing structural remedies it could not enforce under Article 7.[330] The most expressive example is the Commission's treatment of the energy sector, as also mentioned by Geradin and Mattioli. In the years between 2004 and 2014 the Commission adopted eleven commitment decision in that sector[331], four of which regarded structural changes[332]. Article 7 limits the possibility to impose structural remedies to cases where there are no equally effective behavioural remedies. However, Article 9 includes no such distinction between which type of remedy is appropriate, why the Commission will be prone to favour the commitment procedure in a case where it pursues structural modifications on specific a market.[333] This chance increases even more since the risk of an appeal against a commitment decision was always lower than the risk of an appeal against an infringement

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Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, OJ L 171, 1.7.2008, p 3–5.

[329] Mariniello, p 6.

[330] Jenny, p 724: Article 7 Regulation 1/2003; Recital 13 Regulation 1/2003.

[331] Jenny, p 727.

[332] Commission Decision of 26 November 2008 Relating to a proceeding pursuant to Article 82 of the EC treaty and Article 54 of the EEA Agreement (Case COMP/39.388 – *German Electricity Wholesale Market*); Commission Decision of 18 March 2009 Relating to proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/39.402 – *RWE Gas Foreclosure*); COMP/39.315 – *ENI*); Commission Decision relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (AT/39727 - *CEZ*).

[333] Jenny, p 728.

decision[334], and it is my personal view that since *Alrosa* that risk has been reduced even more.

Geradin and Mattioli provide for a useful reminder in their paper in this context – namely that the role of the Commission acting as a competition authority is not to regulate specific markets and sectors, but to take action against breaches of competition law and adopting decisions with remedies suitable to end such breaches.[335]

[334] Ibid.
[335] Geradin & Mattioli, p 14.

# 6 Successfully Challenging a Commitment Decision

With this chapter I aim to conclude my own findings as concerns the implications of the two above depicted rulings, with an aim of determining their effects on the possibilities of third parties of challenging commitment decisions. I aim to, through analysing the rulings in Morningstar and Alrosa, together with the critique presented and discussed in all the above chapter, provide an answer to the third and final research question of this thesis, which is divided into two: Given the Commission's wide margin of discretion, and the rulings in both *Alrosa* and *Morningstar*, what are the real possibilities for a third party of successfully challenging a commitment decision? Are commitment decisions protected from an appropriate level of judicial scrutiny?

## 6.1 Implications of the Commitment Procedure and its Jurisprudence

As has been revealed, the undertakings concerned by a commitment decision are highly unlikely to challenge it. In fact, this has never happened in the now 13 years the procedure has been available for use. This can quite easily be explained by the, at least seemingly, voluntary nature of commitments. Additionally, the fear of an infringement decision and an accompanying fine probably leads undertakings to accept to commit, even if the commitments are more onerous than what they would want to offer. As the analysed case law has shown, it need not be that the Commission simply chooses to accept or decline, upon receiving commitment offers from an undertaking under investigation. On the contrary, the Commission might even itself make suggestions as to what it considers a suitable commitment might be.[336]

[336] See T-170/06 *Alrosa v Commission*, para 21

If such a situation were to occur the Commission even holds the ability to suggest commitments knowing that less onerous ones would suffice, as it did in *Alrosa*. Of course, the entire commitment procedure is a balancing act, between the legitimate objective of promoting effectiveness in enforcement on one hand, and values such as legal certainty and predictability, successfully restoring competition to affected markets and the protection of third parties on another. A suggestion regarding commitments, from the Commission, may lead to a swifter conclusion of the case at hand, saving resources and putting a faster end to the suspected anti-competitive behaviour which is being investigated. However, in such a case, where the Commission itself actually suggests commitments, knowing these go beyond what is necessary, and without carrying out such a complex economic assessment which would be necessary to determine which other, adequately efficient, commitments could have been accepted instead, clearly the commitment procedure is not appropriate. Still, there seems to be no obstacles to the Commission using it in such situations. In *Alrosa* the Commission admitted to having the knowledge that less onerous commitments would suffice, however not exactly what they would consist of.[337] I find it unsettling that the Commission can suggest such burdensome commitments, especially knowing undertakings are largely inclined to accept such due to the fear of being subject to an infringement procedure.

There are clear advantages of opting for the commitment procedure for the Commission. These advantages also apply in cases where the commitment procedure might not be the most suitable, or perhaps even more so. A lack of judicial review compared to what is available when an infringement decision is adopted under Article 7 brings with it the possibility to stretch the limits of what can be offered in, and achieved through, commitment decisions. Given the current legal situation, the Commission holds the power to use a commitment decision as an instrument to not only correct the individual situation at hand, but to reshape markets, restructure specific sectors and

[337] C‑441/07 P *Alrosa v Commission*, paras 54-55.

unsupervised decide upon novel legal issues. In addition, as stated above, the Commission itself may be the author of those commitments. This means the Commission can both suggest the commitments and go on to adopting the decisions making these binding. This creates a situation where an institution basically has the power to rule on its own suggestions, which produce actual legal effects. In addition to this, the scope for judicial review is limited to establishing whether the Commission's assessment is manifestly incorrect,[338] which is quite an easy test to pass. *Alrosa* displays a situation where the Commission both suggested the commitments that were made binding, and were aware of them being overly onerous. Still, the ECJ did not conclude that the Commission had carried out a manifestly incorrect assessment. Neither was that the conclusion in *Morningstar*.

The *ENI* and *E.ON electricity* decisions show another drawback of the commitment procedure. They were both adopted in situations lacking in previous jurisprudence, however without any appeals submitted against them. Accordingly, the Commission has successfully been able to substitute its own full investigation, and the possibility for judicial review by a court, for the commitment procedure in cases regarding novel legal issues. This does go against the intentions of the commitment procedure. The Commission itself clearly states in its Policy Brief from 2014 that when there is a need to set a legal precedent, the Commission should opt for the infringement procedure. There are two reasons for this. Firstly, infringement decisions are reasoned in more detail, providing more guidance to those active on the market, and developing on the theory of harm behind the decision.[339] Secondly, as an infringement decision is more likely to be challenged in front of the CJEU, providing an opportunity for further clarification of the law. However, it does not seem the Commission follows its own policy in every case. Certainly, this context opens up for a possibility for misuse of power, as the Commission

[338] C-441/07 P, *Commission v Alrosa*, para 42.
[339] *To commit or not to commit? Deciding between prohibition and commitments*, Competition Policy Brief, Issue 3, March 2014, p 2.

can now also expand its discretion regarding what behaviour in relation to the EU competition law provisions can be sanctioned.

The Commission might of course give a suggestion for commitments, or merely accept those offered to it, unknowing of the fact that actual less onerous options are available, as its preliminary investigation will not always be enough to get a clear overview of the situation at hand. This risk is pointed out by von Papp above. My concerns then still lie with the fact the wide margin of discretion granted to the Commission seems to impede the possibility of having a decision ordering such commitments binding successfully challenged and overturned.

## 6.2 The Real Possibilities for a Third Party to Succesfully Challenge a Commission Decision

While it is highly doubtful that any undertaking which is the addressee of a commitment decision will challenge it, third parties might still wish to do so, as they may be affected by the contents of such a decision. The two cases analysed in this essay portray two very different reasons for challenge. In *Alrosa* the commitments were regarded as too onerous by the third party, and in *Morningstar* they were not regarded as sufficient to address the competition concerns expressed by the Commission. No matter, the final rulings hold the same message. From where I stand, the EU Courts' jurisprudence is clear. The Commission's margin of discretion in assessing commitments and adopting commitment decisions, at large limits any real possibility for a third party to successfully challenge such a decision in front of a court. At the same time, in the only two cases where the EU Courts have ruled on the validity of commitment decisions the applicants have both been third parties. As it seems third parties are the only actual parties currently submitting appeals to commitment decision, the limiting of their doing so may

mean limiting the real possibility for judicial review of commitment decisions.

Hopefully this is not the case. Article 263 does favour other applicants compared to private parties, in their ability to challenge EU acts. These include the EU Institutions and all Member States.[340] However, even if I myself hope that these would interfere in the event that the Commission would adopt a decision able of generating particularly negative consequences for the public interest, or overall competition law, a challenge to a commitment decision from such an applicant has yet to come. Neither is there is any way of knowing whether the CJEU would adopt a different view on Commission discretion and its own scope for judicial review just because the challenge came from one of the above mentioned applicants. Their possibility for success might be just as limited as a third party's has proven to be.

As the EU Courts clearly have gone the route of taking a rather hands-off approach to commitment decisions, it does not seem likely that an appeal against such a decision will succeed. However, there are still chances for a third party to be able to affect a commitment decision before it is adopted. Active participation in the Commission's proceedings leading up to a decision is crucial in this respect.[341] This includes participating in the market testing stage, submitting opinions and evidence to the Commission regarding the identified competition concerns as well as the commitments' suitability as to address them. This can not only help shape the Commission's assessment as to what commitments are appropriate in a certain case, and reveal weaknesses in the draft commitments. In the case of *CISAC*[342] third party opinions lead to the Commission abandoning the commitment procedure entirely and choose

[340] Article 263(2), TFEU.
[341] Batchelor, Bill & Patsa, Agapi, *Another one bites the dust: appealing antitrust commitment decisions*, International Law Office, Contributed by Baker McKenzie, February 16 201. Available via http://www.internationallawoffice.com/Newsletters/Competition-Antitrust/European-Union/Baker-McKenzie/Another-one-bites-the-dust-appealing-antitrust-commitment-decisions?redir=1; Jones & Sufrin, p 953.
[342] Commission Decision relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/C2/38.698 – *CISAC*).

the infringement proceeding instead. That decisions was later annulled by the GC[343], something that probably would not have been possible if the Commission had adopted a commitment decision instead. In the case of *Google*[344] the Commission struggled with finding appropriate commitments for over four years without succeeding. In the end, the amount of opposition and hostility expressed towards the numerous commitments offered lead the Commission to revert to the process under Article 7.[345] Important to note however, is that these two cases are the only occasions upon which this has happened[346], and in Google the critique came also from within the EU Institutions, something which probably affected the outcome.[347]

Two very recent events are however offering further possibilities for the EU Courts to develop on what level of judicial scrutiny should be afforded commitment decisions, perhaps correcting some, in my view, previous mistakes.

### 6.2.1 A Hopeful Future?

The most recent development is the delivery of a preliminary ruling by the ECJ. For the sake of uniformity, in a matter where the Commission has already adopted a decision, a national court may not deliver a ruling running counter to that decision.[348] Accordingly, the national courts of the EU Member States do not constitute effective authorities for a party wishing to challenge a commitment decision. However, the preliminary ruling delivered by the ECJ on 23 November 2017, may have implications for the role of national courts.[349] The ruling centres around the question of to which extent

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[343] T-442/08 etc, *CISAC v Commission*, ECLI:EU:T:2013:188.
[344] Commission Decision relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area (AT.39740 - *Google Search (Shopping)).*
[345] Jones & Sufrin, p 952.
[346] Whish & Bailey, p 270ff; Jones & Sufrin, p 946.
[347]Jones & Sufrin, p 952.
[348] Article 16(1), Regulation 1/2003.
[349] C-547/16 *Gasorba SL and Others v Repsol Comercial de Productos Petrolíferos SA*, ECLI:EU:C:2017:692.

national courts are bound by a commitment decision. This is governed by Article 16(1) of Regulation 1/2003, which states the following:

> "*When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission…".*

The dispute related to agreements between undertakings Repsol, a global energy company, and a small undertaking named Gasorba, leasing and operating a service station. The Commission considered that the agreements were able to create a foreclosure effect on the Spanish retail fuel market and instituted proceeding against Repsol under Article 101 TFEU. Repsol replied offering commitments in accordance with Article 9, which were made binding upon them in 2006.[350] Following the decision, Gasorba and Others brought an action against Repsol before the Madrid Commercial Court in 2008. Their claims were firstly, an annulment of the lease agreement on the ground that it was contrary to Article 101 TFEU and, secondly, compensation for the harm arising from the application of that agreement.[351] The case ended up before the Spanish Supreme Court. Gasorba and Others held that a commitment decision should not preclude a national court from declaring an agreement to which that decision applies invalid for infringement of Article 101 TFEU, and thus brought an appeal on a point of law.[352]

The Supreme Court went on to send a request for a preliminary ruling to the ECJ, asking "whether Article 16(1) of Regulation No 1/2003 must be interpreted as precluding a national court from declaring an agreement between undertakings void on the basis of Article 101(2) TFEU, when the Commission has accepted beforehand commitments concerning that

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[350] Commission Decision of 12 April 2006 relating to a proceeding pursuant to Article [101 TFEU] (Case COMP/B-1/38.348 — *Repsol CPP*).
[351] C-547/16 *Gasorba and Others*, para 17.
[352] Ibid, para 19.

agreement and made them binding in a decision taken under Article 9(1) of that regulation."[353] The ECJ began by mentioning the importance of a uniform application of EU competition law, which Article 16(1) is meant to ensure.[354] However, recital 13 of the same regulation establishes that as a commitment decision does not include a finding of infringement, a commitment decision does not preclude a national court from making such a finding, nor from deciding on the case.[355] Recital 22 adds that a commitment decision does not affect the powers of a Member States court to apply Articles 101 and 102 TFEU.[356] Since a commitment decision does not involve a finding of infringement, or establish a lack thereof, a national court can conclude its own finding in this regard without jeopardising the uniformity of EU law. However up until now there has been no clear guidance as to how this could practically work. Nonetheless, the Court added, the principle of sincere cooperation laid down in Article 4(3) TEU and the objective of applying EU competition law effectively and uniformly both require that the national court take into consideration the Commission's preliminary assessment leading up to the commitment decision, before delivering a ruling.[357] The ECJ's answer to the posed question posed was that "…Article 16(1) of Regulation No 1/2003 must be interpreted as meaning that a commitment decision concerning certain agreements between undertakings, adopted by the Commission under Article 9(1) of that regulation, does not preclude national courts from examining whether those agreements comply with the competition rules and, if necessary, declaring those agreements void pursuant to Article 101(2) TFEU."

With this ruling a chance has been established for third parties to commitment decisions to bring action against an agreement being subject to a commitment decision before a national court, and being "released" from such an agreement as a result. Perhaps this can lead to other challenges, similar to that in

[353] C-547/16 *Gasorba and Others*, para 22.
[354] Ibid, para 24.
[355] Ibid, paras 27-28.
[356] C-547/16 *Gasorba and Others*, para 27.
[357] Ibid, para 29.

*Gasorba,* coming before the national courts of the Member States, meaning the ECJ might be given further opportunities to develop on the powers of national courts in relation to commitment decisions. This possibility could have helped an undertaking such as Alrosa, had it wanted to be completely released from its agreement with De Beers directly rather than first decrease its level of sales gradually over a few years before the termination of the agreement. However, this does not mean the commitment decision will not continue to bind the undertakings concerned by it, even if some of the commitments pertaining to a certain agreement might be hard to fulfil where that agreement has been declared void. It is my hope that *Gasorba* might lead to new possibilities of judicial review and a more appropriate level of possibility for judicial scrutiny of commitment decisions, even if in the case at hand the commitment decision was not what was being challenged, but the agreement subject to it. As the ECJ and Advocate General Kokott pointed out in *Gasorba*, commitment decisions do not have the power of legalising certain market behaviour, just because there is no finding of infringement involved.[358] Neither should a commitment decision have the power to bind a third party to an illegal agreement. Accordingly, the possibility for judicial review of a certain agreement or behaviour should not be limited just because the Commission has adopted a commitment decision regarding that same behaviour. The possibility for national courts to declare void an agreement or a type behaviour the Commission has made subject to a commitment decision challenges the perception that commitment decisions are essentially definitive and unshakeable. This is in my opinion a promising first step towards a more questioning and scrutinising attitude towards such decisions, which might keep the Commission away from potentially abusing its powers.

The second event is a new application for annulment of a commitment decision submitted by a third party. Though it may seem any actual possibility for a third party to successfully mount a challenge to a commitment decision has been erased, this has apparently not discouraged everyone. In February this year, details were published in the Official Journal of an appeal brought

[358] C-547/16 *Gasorba and Others,* para 28; Opinion of Advocate General Kokott, point 39.

in December 2016 by French undertaking Groupe Canal + (hereinafter 'Canal +') to challenge a Commission decision under Article 9, accepting commitments from Paramount Pictures.[359] Through its decision, the Commission made binding commitment offered by Paramount.[360] The commitments addressed the Commission's concerns regarding certain clauses in film licensing contracts for pay-tv between Paramount and British undertaking Sky UK. The clauses regarded territorial exclusivity, so-called "geo-blocking", meaning Sky was not allowed to offer customers outside the UK and Ireland the possibility of watching certain Paramount content. Paramount was to ensure that no other broadcaster could offer that same content in the UK and Ireland.[361] Paramount's commitment includes to neither act upon nor enforce such clauses in any of its existing licensing contracts for pay-tv with any broadcaster in the European Economic Area (EEA).[362] Neither shall Paramount (re)introduce such clauses in any film licensing contract for pay-tv with any broadcaster in the EEA.[363]

The decision was adopted on 27 July last year, and was made binding for a period of five years. Canal + submitted an appeal seeking that the decision be annulled, as the decision affects its existing agreements with Paramount.[364] Canal + claims that the geo-blocking clauses the Commission considers to be anti-competitive "are on the contrary necessary for effective competition on the merits on the pay-tv market."[365] This is yet another category of third party applicant than in *Alrosa* or *Morningstar*.

Whether the GC will accept the appeal or not has yet to show. However, the fact that a third party still feels inclined to submit an appeal sends a message

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[359] T-873/16: Action brought on 8 December 2016 — *Groupe Canal + v European Commission*, OJ C 38, 6.2.2017.
[360] Commission Decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement, (Case AT.40023 – *Cross-border access to pay-TV*).
[361] AT.40023 – *Cross-border access to pay-TV*, rec 25-33.
[362] Ibid, rec 56.
[363] Ibid, rec 55.
[364] Ibid.
[365] *Groupe Canal + v European Commission*, OJ C 38, 6.2.2017, para 1.

that not everyone is of the opinion that the chance of success is too insignificant for it to be worth a try.

## 6.3 Concluding Remarks

To conclude the findings of this essay, I feel safe in claiming that the commitment procedure available under Article 9 of Regulation 1/2003 brings with both positive outcomes as well as negative. My own greatest concerns lie with the very limited possibility for judicial review, and its effects on legal certainty.

The EU Courts have afforded the Commission a vast discretion in assessing commitments. This is paired with no actual limit set out in law as to which scenarios must be subject to full investigations and the possibility for review by the courts. Hence, the Commission can provide its own interpretation to novel legal issues, reshape specific markets and sectors, and enforce changes through commitments even in cases where its theory of harm might not hold up. The commitment procedure has become a loophole for the Commission, protecting its actions from judicial review from the EU Courts. Upon limiting its own scope of judicial review for commitment decisions the EU Courts have also granted the Commission discretion in assessing what type behaviour can be sanctioned in relation to Article 101 and 102 TFEU.

Through its case law the EU Courts have also drastically limited the possibility of having a commitment decision overturned. In doing so they have considerably raised the bar for third party applicants to successfully challenge a commitment decision. This is worrying as third parties have so far been the only to mount such challenges. Still, commitment decisions have not become untouchable *per se*, as other applicants may come to challenge such decisions in the future, probably depending on the Commission's behaviour. However, third parties' chances to affect a commitment decision are in the present situation greater before the decision has even been adopted,

and the current legal situation does not seem to provide third parties with any real possibilities of challenging commitment decisions. These limitations in my view shape a system with an overall lack in the existence of judicial scrutiny available against commitment decisions.

However, two recent developments provide some ease. The first one being the ECJ's ruling in *Gasorba* dating just a few weeks old, the second being Canal +'s application for annulment submitted in December 2016. Perhaps the possibilities for judicial review of commitment decisions are now starting to enhance, rather than diminish further.

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