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The European Commission's  
Practice Under Article 9  
Regulation 1/2003:  
A Commitment a Day Keeps the  
Court Away?

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# The European Commission's Practice Under Article 9 Regulation 1/2003: A Commitment a Day Keeps the Court Away?

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## I. INTRODUCTION

No less than three recent high profile cases have put the EU antitrust commitment procedure in the spotlights. First, while the U.S. Federal Trade Commission ("FTC") recently announced that it had terminated its investigation into Google's services regarding search engines and web advertising, the EU Commission's parallel attempts to reach an agreement with Google on similar commitments have been ongoing for about a year and are expected not to be finalized before Autumn 2013. Second, on March 6, 2013 the Commission imposed a EUR 561 million (U.S.\$794 million) fine on Microsoft for having breached its 2009 "choice screen" commitment intended to offer consumers a choice of web browsers. Finally, on March 13, 2013, the Commission published in the *Official Journal* the text of the December 2012 commitment decision regarding the e-Books investigation involving Apple and four publishers. These three matters underscore the importance of the EU commitment procedure, and the controversies surrounding the use of this EU-style consent decree procedure.

As with all good things in life, the commitments procedure should be used with moderation to avoid indigestion. Although the commitment procedure was only introduced in 2004 in EU antitrust proceedings as a means to rapidly resolve cases, it has over the past years become a cornerstone of the Commission's antitrust policy. Such success was not foreseen. In fact, when the Article 9 of Regulation 1/2003 was introduced,<sup>2</sup> a prominent former EU Commission official expected the commitment procedure to remain an exceptional, alternative enforcement instrument in the Commission's toolbox.<sup>3</sup>

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<sup>2</sup> Article 9 of Regulation 1/2003 states that:

1. *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.*

2. *The Commission may, upon request or on its own initiative, reopen the proceedings:*

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*

<sup>3</sup> John Temple Lang, *Commitment Decisions and Settlements with Antitrust Authorities and Private Parties under European Antitrust Law*, INTERNATIONAL ANTITRUST LAW AND POLICY: FORDHAM CORPORATE LAW Ch. 13, p. 270 (Barry Hawk, ed., 2005, 2006).

While the Commission already had the means to informally settle antitrust investigations prior to the adoption of Regulation 1/2003, Article 9 provided it with a clearer legislative framework<sup>4</sup> and, importantly, clarified the rights of third parties.<sup>5</sup>

It is sometimes argued that the commitment procedure of Article 9 has been inspired by a long standing U.S. procedure which allows the Department of Justice (“DOJ”) and the FTC to settle investigations by “consent decrees” (DOJ) or “consent orders” (FTC). These instruments are used in the vast majority of proceedings and allow the agencies to close a case on the basis of agreed concessions.<sup>6</sup> One important difference with the EU system is, however, that DOJ decrees are reviewed by courts to determine whether the decree is in the public interest. Also, contrary to the EU system, U.S. negotiated settlements may include fines imposed on companies.

The frequent use of the EU commitment procedure supports the idea that the EU and the U.S. systems are converging. The frequency of negotiated outcomes on both sides of the Atlantic leads to similar questions, in particular with respect to the desired level of legal certainty and guidance, as well as the role and interests of third parties.

An antitrust enforcement system based solely on infringement procedures without any room for negotiated outcomes would undoubtedly be inefficient and inappropriate. But the question is whether the extensive use by the Commission of this new enforcement tool and the (partly self-inflicted) marginalization of the European Court of Justice (“ECJ”) in this area have not overshadowed the need to establish a balance between enforcement efficiencies on the one hand, and imperatives of legal certainty, due process, and non-discrimination on the other.

## II. THE IDEAL PRESCRIPTION?

In line with several Commission statements, the commitment procedure appears to be very positive in several circumstances as it offers an efficient, time-saving, and relatively cheap enforcement tool.<sup>7</sup> But is this specific procedure indeed only used in those circumstances where it is best suited?

At first glance, circumstances justifying the use of commitments occur rather often: Since 2004 the Commission has issued 14 prohibition and 26 commitment decisions in proceedings categorized by the Commission itself as non-cartel antitrust matters.<sup>8,9</sup> Indeed, no Article 9

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<sup>4</sup> Notably under the former settlements practices, no formal decision was taken by the Commission whereas under Regulation 1/2003 a binding decision is adopted which is subject to appeal before the European Court of Justice.

<sup>5</sup> Apart from the market test, which is undertaken before any decision, the complainant has to be duly informed of the preliminary conclusion of the Commission on commitments.

<sup>6</sup> See George Stephanov Georgiev, *Contagious efficiency: the growing reliance on US-style antitrust settlements in law*, UTAH L. REV. 971 (2007), who points to the very wide use made by US authorities of this procedure (over 90% of the cases).

<sup>7</sup> See, for example, the speech of Vice-President Almunia, *Remedies, commitments and settlements in antitrust*, Brussels (March 8, 2013) and the Report on the Functioning of Regulation 1/2003 (COM(2009) 206 final)

<sup>8</sup> This includes proceedings based on Article 102 TFEU solely, or on both Articles 101 and 102 TFEU combined but which were not categorized as “cartels” by the Commission’s data-base.

<sup>9</sup> The 26 Article 9 commitment decisions adopted by the Commission at time of writing are the following: COMP/37.214 - *German Bundesliga* (2005); COMP/39.116 - *Coca-Cola* (2005); COMP/38.381 - *De Beers* (2006); COMP/38.173 - *The Football Association Premier League Limited* (2006); COMP/38.348 - *Repsol* (2006);

procedure has been applied to conventional hardcore cartels. In more recent years, this trend has become even more pronounced—since 2008 only two non-cartel prohibition decisions have been adopted<sup>10</sup> compared to 19 commitment decisions. The Commission has, therefore, favored a negotiated outcome in 90 percent of non-cartel cases in the past five years.

This frequency of Article 9 decisions is reflective of the paradigm shift from an “adversarial” to a more “negotiated” approach.<sup>11</sup> This is also reflected in the procedural steps that precede the adoption of commitment decisions. The option to depart from the general Article 7 infringement procedure<sup>12</sup> is available at any time to the company under investigation, which can request a State of Play meeting to open negotiations with a view to offering commitments. If the case team is convinced that the company’s offer is serious and credible, it will issue a Preliminary Assessment summarizing its concerns.<sup>13</sup> On this basis, the parties will then have the opportunity, generally within a one-month period, to submit the text of its commitment offer, which should adequately address those concerns. This offer may be subject to further negotiations, while at this stage the case team may be more proactive with regard to the definition of the commitments.

According to the Commission’s *Manual*, the Commission tends to favor structural commitments, although behavioral ones are not excluded.<sup>14</sup> This is because behavioral commitments are more difficult to monitor and their effect on the market may be less predictable than structural commitments. The Commission is also reluctant about commitments if the implementation is dependent on third parties. A trustee may, however, be involved for the future monitoring phase.

If the Commission believes that the commitments offered adequately address its concerns, it will conduct a market test to provide an opportunity for third parties to comment. If no further changes are deemed necessary, the commitments will be finally approved by the Commission. No conclusion as to whether there is or was an infringement is drawn. The

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COMP/38.681 - *Cannes Agreements* (2006); COMP/37.966 - *Distrigaz* (2007); COMP/39.388 - *E.ON / German Electricity Wholesale Market* (2008); COMP/39.389 - *E.ON / German Electricity Balancing Market* (2008); COMP/39.402 - *RWE* (2009); COMP/39.416 - *Ship Classification* (2009); COMP/39.316 - *GDF Foreclosure* (2009); COMP/38.636 - *Rambus* (2009); COMP/39.530 - *Microsoft (tying)* (2009); COMP/39.386 - *EDF / Long Term Electricity Contracts in France* (2010); COMP/39.351 - *Swedish Interconnectors* (2010); COMP/39.317 - *E.ON Gas Foreclosure* (2010); COMP/39.596 - *British Airlines / American Airlines / Iberia* (2010); COMP/39.315 - *ENI* (2010); COMP/39.398 - *Visa MIF* (2010); COMP/39.592 - *Standard & Poors’* (2011); COMP/39.692 - *IBM Maintenance Services* (2011); COMP/39.736 - *Siemens-Areva* (2012); COMP/39.847 - *Ebooks* (2012); COMP/39.230 - *Rio Tinto Alcan* (2012); COMP/39.654 - *Reuters Instrument Codes* (2012).

Several commitment proceedings are also pending, such as COMP/39.727 - *CEZ* (market test notice released in July 2012), and COMP/39.595 - *Continental/United/Lufthansa/Air Canada* (market test notice released in December 2012).

<sup>10</sup> Cases COMP/37.990 - *Intel* (2009) and COMP/39.525 - *Telekomunikacja Polska* (2011),

<sup>11</sup> See Heike Schweitzer, *Commitment Decisions: An overview of EU and national case law*, E-COMPETITIONS, N°48150, p. 2.

<sup>12</sup> Article 7 of Regulation 1/2003 provides that, if the Commission establishes an infringement, it can require bringing the infringement to an end and imposing “proportionate” remedies.

<sup>13</sup> If a Statement of Objection has already been sent, it will serve as a Preliminary Assessment. See, for example, COMP/39.230 - *Rio Tinto Alcan* (2012) and COMP/39.386 - *EDF / Long Term Electricity Contracts in France* (2010).

<sup>14</sup> Antitrust Manual of Procedures, *Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU*, Commitment decisions, p.8 (hereafter “the Manual”).

committing company or third parties are entitled to lodge an appeal before the ECJ against the Commission decision.

The typology of the 26 commitment decisions reveals that the Commission considers the Article 9 route particularly appropriate in certain markets. Indeed, no fewer than 11 of the commitments cases have dealt with energy markets, including electricity,<sup>15</sup> fuel,<sup>16</sup> gas,<sup>17</sup> and nuclear energy.<sup>18</sup> IT<sup>19</sup> and financial<sup>20</sup> services are also markets in which the Commission apparently favors a more negotiated approach.<sup>21</sup>

It is hardly surprising that energy markets are over-represented in this area. The emphasis of the Commission in the past years has been on a number of markets it considers as particularly strategic, including energy. The 2005 sector inquiry in energy resulted in the opening of proceedings against several national energy providers.<sup>22</sup> Obviously, traditionally, energy markets are often characterized by limited competition due to the prevalence of historic state-owned national players. Tailor-made commitments, rather than fines, may therefore constitute a more efficient and faster approach to foster the liberalization of such markets.

Infringement proceedings indeed generally result in negative obligations, *i.e.* prohibitions, while commitments may involve targeted positive obligations such as divestments, provisions aimed at providing competitors access to fixed infrastructures, or specific licensing terms. Whereas prohibitions of particular conduct may put an end to market foreclosure, they may be less appropriate to remedy the consequences of the absence of competitors in markets which are structurally and historically monopolistic.<sup>23</sup>

The specific nature of Article 9 procedures allows the Commission to tailor the remedies to the specific market conditions and the competition concerns at hand. In all energy cases to date, the issue has been the difficulty for competitors of incumbent market players to enter the market. The commitment procedure has allowed the Commission to reach agreement on very detailed plans to introduce flexibility in market access, *inter alia* through divestment of specific

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<sup>15</sup> See COMP/39.388 - *E.ON / German Electricity Wholesale Market* (2008); COMP/39.389 - *E.ON / German Electricity Balancing Market* (2008); COMP/39.402 - *RWE* (2009); COMP/39.386 - *EDF / Long Term Electricity Contracts in France* (2010); COMP/39.351 - *Swedish Interconnectors* (2010); COMP/39.736 - *Siemens-Areva* (2012).

<sup>16</sup> See COMP/38.348 - *Repsol* (2006).

<sup>17</sup> See COMP/37.966 - *Distrigaz* (2007); COMP/39.316 - *GDF Foreclosure* (2009); COMP/39.317 - *E.ON Gas Foreclosure* (2010); COMP/39.315 - *ENI* (2010).

<sup>18</sup> See COMP/39.736 - *Siemens-Areva* (2012).

<sup>19</sup> See COMP/38.636 - *Rambus* (2009); COMP/39.530 - *Microsoft (tying)* (2009); COMP/39.692 - *IBM Maintenance Services* (2011).

<sup>20</sup> See COMP/39.398 - *Visa MIF* (2010); COMP/39.592 - *Standard & Poor's* (2011); COMP/39.654 - *Reuters Instrument Codes* (2012).

<sup>21</sup> Other commitment decisions relate to carbonated soft drinks, broadcasting rights, recorded media, transport, food, and diamonds.

<sup>22</sup> The Final Report of the Commission was published in 2007 and pointed to several concerns in this sector, such as market concentration, vertical integration of supply, generation and infrastructure, and possible collusion between operators to share markets.

<sup>23</sup> The prohibition to discriminate competitors may not be sufficient to allow competitors to enter the market, whereas the obligation to divest pipelines or to limit the contract durations may be more effective. See, for example, *Distrigaz* or *RWE*.

production or importation capacities such as in the *E.ON* electricity case,<sup>24</sup> but mostly through behavioral remedies relating to contractual practices such as the limitation of contract durations, as in *Distrigaz*.<sup>25</sup>

Interestingly, and contrary to its implied preference for structural remedies, it seems that the Commission actually favors behavioral commitments in the vast majority of the cases. Indeed, behavioral commitments were imposed in approximately 70 percent of the 26 decisions.<sup>26</sup> Structural commitments mostly tackle the form of divestments and have been imposed almost exclusively in the energy sector.

Outside the energy sector, the Commission has shown a clear preference for behavioral commitments, generally targeting the contractual practices of companies. Article 9 proceedings have allowed the Commission to impose a large variety of commitments such as the limitation of contract duration,<sup>27</sup> limitation of royalties for patent licensing,<sup>28</sup> reduction of the scope of non-compete obligations,<sup>29</sup> and the inclusion of a choice screen for competing web browsers.<sup>30</sup>

In light of the above, a commitments-based approach may appear particularly relevant and appropriate in specific areas. The conclusion is, however, less positive when taking into account the fact that the use of the commitment procedure has over the past few years become systemic.

### III. CONTROVERSIAL SIDE-EFFECTS

The extensive use by the Commission of the Article 9 commitment procedure raises a number of intricate questions. These relate *inter alia* to due process, transparency, legal certainty, and the protection of third parties' interests.

#### A. Aligned Interests?

According to the Commission, Article 9 procedures allow it to save time and resources. They enable a quicker correction of the negative effects of antitrust breaches, which is particularly helpful in fast-moving markets.<sup>31</sup> However, when one compares the actual duration of proceedings involving prohibition decisions with commitments decisions, the time-saving argument appears to have very limited value only. Indeed, the average time lapse between the

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<sup>24</sup> See COMP/39.388 - *E.ON / German Electricity Wholesale Market* (2008); COMP/39.389 - *E.ON / German Electricity Balancing Market* (2008); COMP/39.402 - *RWE* (2009); COMP/39.316 - *GDF Foreclosure* (2009); COMP/39.317 - *E.ON Gas Foreclosure* (2010).

<sup>25</sup> See COMP/37.966 - *Distrigaz* (2007); and COMP/39.386 - *EDF / Long Term Electricity Contracts in France* (2010)

<sup>26</sup> The Commission imposed structural commitments only in the following cases:

COMP/39.388 - *E.ON / German Electricity Wholesale Market* (2008); COMP/39.389 - *E.ON / German Electricity Balancing Market* (2008); COMP/39.402 - *RWE* (2009); COMP/39.316 - *GDF Foreclosure* (2009); COMP/39.351 - *Swedish Interconnectors* (2010); COMP/39.596 - *British Airlines / American Airlines / Iberia* (2010); COMP/39.315 - *ENI* (2010); COMP/39.317 - *E.ON Gas Foreclosure* (2010).

<sup>27</sup> For example COMP/39.386 - *EDF / Long Term Electricity Contracts in France* (2010).

<sup>28</sup> For example COMP/38.636 - *Rambus* (2009).

<sup>29</sup> For example COMP/39.736 - *Siemens-Areva* (2012).

<sup>30</sup> See COMP/39.530 - *Microsoft (tying)* (2009).

<sup>31</sup> See *inter alia* the statement by Vice-President Almunia on Microsoft, Press conference in Brussels, March 6, 2013.



initiation of proceedings and the final decision (prohibition/commitment) appears to be astonishingly similar. On average, a commitment procedure lasts approximately 22 months, while a non-cartel infringement procedure lasts approximately 23 months.<sup>32</sup> Therefore, the idea that commitment procedures are more effective has only limited relevance.

Furthermore, Vice-President Almunia has emphasized on several occasions that commitments are particularly helpful when dealing with fast-moving markets such as the IT sector. It appears, however, that the three commitments decisions in IT markets were not reached particularly swiftly (*IBM* (2011): 17 months; *Microsoft* (2009): 24 months; and *Rambus* (2009): 29 months).

Finally, if the concern of the Commission in such fast-moving markets is to put an end as swiftly as possible to the infringement, one may legitimately ask why it has so far never made use of interim measures under Article 8 of Regulation 1/2003.<sup>33</sup> Indeed, it has been argued that interim measures may very well address the necessity of a prompt reaction to safeguard competition on markets.<sup>34,35</sup>

Several commentators do, however, see another advantage that the procedure has for the Commission: Article 9 provides the Commission with quasi-regulatory powers.<sup>36</sup> The procedure indeed allows the Commission to impose desirable market conduct, which it would otherwise could not. The limitation of contract duration is a typical example of such influence as, for example, the limits that EDF committed to with a view to facilitating competitors' entry on the French market.<sup>37</sup>

These types of commitments also support the suggestion that Article 9 proceedings can be considered as a useful alternative to 101(3)-type justifications in several cases.<sup>38</sup>

But the commitment procedure also has undeniable advantages for companies. The first is to avoid fines. In addition, the non-finding of an infringement is an attractive aspect for a company, as it may limit reputational damages typically associated with prohibition decisions and may be helpful in follow-on litigation in national courts. Moreover, and perhaps paradoxically, as a commitment decision, if properly implemented, shields the company from further antitrust scrutiny, it may serve as a quasi Article 101 (3) TFEU exemption.

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<sup>32</sup> Based on the average time lapse between the decision of the Commission to open proceedings and the final commitments decision.

<sup>33</sup> Under Article 8 Regulation 1/2003, the Commission may by decision "in cases of urgency due to the risk of serious and irreparable damage to competition [and] on the basis of a prima facie finding of infringement, order interim measures."

<sup>34</sup> Following the section on interim measures of the Antitrust Manual of Procedures, the average period required for granting interim measures is of three to eight months (based on the practice before the entry into force of Regulation 1/2003).

<sup>35</sup> An illustration is provided by the decision of the French *Autorité de la Concurrence*, which imposed interim measures on Google in June 2010 to safeguard the interests of a complainant, before reaching a decision on binding commitments in October 2010.

<sup>36</sup> See *inter alia* Heike Schweitzer above.

<sup>37</sup> See COMP/39.386 - *EDF / Long Term Electricity Contracts in France* (2010)

<sup>38</sup> See in this regard Heike Schweitzer *supra*.

Despite these positive aspects for the Commission and companies under investigation, the use of the Article 9 procedure in the vast majority of proceedings is contestable in several aspects.

### ***B. Potentially Compromised Third Parties' Interests***

The systemic use of the commitment procedure potentially harms the interests of third parties in a number of ways:

1. While infringement decisions are a valuable source of legal certainty, for instance in the area of discounts, commitment decisions provide less guidance on permitted and prohibited practices under the European competition rules. This is potentially worrying in light of the drastic decline of infringement decisions and the fact that under the regime of Regulation 1/2003 companies, in particular dominant firms, are required to self-assess their business conduct.<sup>39</sup>
2. Commitment decisions may not favor third parties, including disadvantaged competitors, distributors, or customers, as they may not be able to intervene in a meaningful way in the commitments procedure. While third-party interests should not always be decisive, it is important to take due account of these parties' positions.
3. The fact that commitment decisions do not include a finding of a violation may create hurdles for third parties in follow-on litigation at national levels. When an infringement decision is taken, third parties are able to rely on the Commission's decision, which is binding for national courts.<sup>40</sup> In the absence of an infringement decision, third parties are in a considerably less comfortable situation. As a result, the positive enforcement efficiencies generated at the EU level may be counter-balanced by inefficiencies at the national level.

### ***C. Inadequate or Disproportionate Commitments***

The above concerns could, at least in part, be alleviated by effective legal review of the Commission's decisional practice by the ECJ. But this is far from being the case. In fact, the scope for companies that have agreed to a commitment under Article 9—as well as for third parties—to successfully appeal a commitment decision is extremely limited. This situation worsened with the ECJ's *Alrosa* judgment.

In that case, Alrosa Company Ltd., which was involved in the Commission proceedings but did not have to offer commitments, appealed the decision before the General Court ("GC"), arguing *inter alia* that the commitments were disproportionate. While the GC considered that commitments could not go beyond what would have been imposed under an infringement procedure, since the proportionality test is the same in both procedures,<sup>41</sup> the ECJ applied a stricter interpretation.

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<sup>39</sup> This is particularly the case due to the removal of the possibility to notify agreements or decisions (which was possible under Regulation 17) with the entry into force of Regulation 1/2003.

<sup>40</sup> See Article 16 of Regulation 1/2003.

<sup>41</sup> See Case T-170/06 *Alrosa v Commission*, 11 July 2007, [2006] ECR II-2601, ¶. 101



The Court came to the conclusion that, while the principle of proportionality is applicable to both infringement and commitment procedures, the obligation for the Commission to comply with that principle does not have the same meaning in Article 7 and Article 9 proceedings. For this reason, the Court defined the obligation of the Commission under Article 9 as limited to the verification that the offered commitments address the concerns expressed and that the companies have not offered less onerous commitments that also address those concerns adequately.<sup>42</sup> An Article 9 decision is therefore not vitiated because the commitments go beyond what could have been imposed under the infringement procedure of Article 7.

Based on this decision it is obvious that the control by the Court of the proportionality of commitments decisions is severely limited. One particular argument on which the Court's decision rests, *i.e.* that—contrary to Article 7 procedures—companies in Article 9 procedures take the initiative on the definition of commitments while the Commission simply validates them, may be questioned in several aspects.

First it is difficult to maintain that companies that enter in Article 9 procedures while they are facing heavy fines can be considered as entirely independent and relieved from any pressure to offer commitments. Considering the nature of the Article 9 procedure, one can hardly believe seriously that a company could tell the case team that, if its commitment offer is not satisfying, they should go for an infringement procedure. To put it mildly, the pressure is not exactly the same on both sides of the table during discussions on commitments.<sup>43</sup>

Second, it is a clear fact that companies do not have the monopoly of initiatives on commitments. A look at the *Antitrust Manual of Procedures* published by the Commission clearly reveals that it considers itself entitled to put commitments on the table:

Although the commitments are voluntarily submitted by the parties, the Commission can make proposals during discussions on how to modify certain elements of the text, and may even provide concrete drafting proposals on specific issues. It is up to the parties to decide whether to accept such proposals.<sup>44</sup>

(The last phrase may leave a bitter taste for companies that have faced this situation.)

It is therefore undeniable that, in some cases, commitments may have been initiated by the Commission. But this then directly calls into question the Court's reasoning in *Alrosa*, which bases the differentiated proportionality test between Article 7 and 9 proceedings squarely on the freedom of initiative of companies.

As a result, since the control of the Court on the proportionality of the commitments is very restricted, appeals against commitment decisions are discouraged. The consequence is that, apart from the lack of Commission decisions stating the existence or absence of infringements, there is increasingly less guidance provided by ECJ case law on non-cartel violations where legal

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<sup>42</sup> See Case C-441/07P *Alrosa v Commission*, 29 June 2010, [2010] ECR I-05949, ¶. 41

<sup>43</sup> See also D. Waelbroeck, *Le développement en droit européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions): que va-t-il rester aux juges ?*, GCLC Working Paper 01/08.

<sup>44</sup> ANTITRUST MANUAL OF PROCEDURES, Commitment Decisions, p.7.

uncertainties are far from rare.<sup>45</sup> This is true for companies, but also for the Commission itself, which has benefited in the past from clarifications provided by ECJ judgments on which it could base its later decisions.

All these concerns, therefore, call for a more balanced use of Article 9 commitments.

#### IV. A HEALTHIER BALANCE

Most of the aforementioned difficulties could be alleviated by a more targeted use of Article 9 of Regulation 1/2003. It appears that, contrary to what the Regulation states, the Commission does not restrict the use of commitments to procedures where a fine is not envisaged. Further, there are actually no guiding principles limiting the appropriate use of this procedure. It would therefore be appropriate to introduce a balancing test weighing the uncontested advantages offered by commitments with other public interests that might be harmed by an over-extensive reliance on Article 9 proceedings.

##### A. *The Need for a Balancing Test for the Use of Article 9 Procedures*

Recital 13 of Regulation 1/2003 states that:

Commitment decisions are not appropriate in cases where the Commission intends to impose a fine.

When looking at the list of commitment decisions, it is hard to believe that, in each one of these cases, the Commission had good reasons not to impose fines. For example, it seems that the *Coca-Cola* case or, more recently, the *E-Books* case dealt with anticompetitive conducts that may ordinarily have attracted fines if infringements proceedings had been followed.<sup>46</sup> But potentially of greater concern is that the Commission has accepted commitments in cases that might be considered akin to cartels, although the Commission excludes this possibility in its *Manual of Procedures*.<sup>47</sup> And, not unsurprisingly, the Commission also applied the Article 9 route to cases of agreements violating Article 101 TFEU.<sup>48</sup>

It will be interesting to see what will be the position of the Commission in its investigation concerning the Libor and Euribor cases.<sup>49</sup> If the allegations are founded, the Commission may face a difficult choice: imposing potentially high fines on banks it has allowed to be supported by state aid schemes or, alternatively, open commitment procedures to avoid putting at risk the recovering of the EU financial system. But this latter process might imply the wrongful application of Article 9 to a secret hardcore cartel.

To remedy these concerns, it might be helpful to devise a balancing test to determine more clearly the suitable application of Article 9. Based on such a test, commitments would be

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<sup>45</sup> Issues relating to the delimitation of abuses regarding rebates are a good illustration of such need of legal guidance.

<sup>46</sup> Exclusivity requirement and tying arrangements in *Coca Cola* or a vertical price arrangements scheme in *E-Books*.

<sup>47</sup> ANTITRUST MANUAL OF PROCEDURES, Commitment Decisions, p.3 (“The Commission does not apply the article 9 procedure to secret cartels [...]”).

<sup>48</sup> See the *British Airlines/American Airlines/Iberia* and the *Areva/Siemens* decisions.

<sup>49</sup> See for illustration the speech by Vice-President Almunia, *La concurrence au service de l'achèvement du marché unique*, 22 February 2013.

reserved for situations where the efficiencies deriving from commitments, such as saved administrative resources or increased market access, would be weighed against the necessity to offer a certain level of legal certainty and of deterrence.

In addition to taking interim measures seriously, revamping Article 9 proceedings could very well be compensated by a revision of the *Guidelines* on the setting of fines.<sup>50</sup> This would allow the cooperation of investigated companies as a mitigating circumstance to be taken into account to a greater extent. This way, efficiencies obtained under the commitment procedure could be preserved while allowing a greater consideration of third parties' interests.

The need for a more balanced approach becomes even greater as the Commission is currently experiencing several difficulties with past decisions and current proceedings.

### **B. Over-reliance on Commitments?**

In March, 2013, the Commission imposed a EUR 561 million fine on Microsoft for failing to comply with its Article 9 commitment to allow Windows users to choose between several web-browsers. This is the first time the Commission has imposed a fine for a breach of antitrust commitments.<sup>51</sup> Interestingly, in this case no trustee was appointed to monitor the implementation of the commitment. The Commission had left to Microsoft the responsibility to report regularly on the process. Vice-President Almunia stated that the Commission had been "naïve" in this respect and that self-monitoring would be more restrictively allowed in commitments procedures.<sup>52</sup> This case suggests that the Commission has been over-relying on the commitments procedure and may have been too confident in its reliability.

Similarly, the complaints raised against Standard and Poor's' alleged failure to implement its commitments may, if confirmed, increase the skepticism about the extensive use of Article 9.

Perhaps even more reflective of the limits of the Article 9 system are the current proceedings against Google. In that case, the Commission has raised several concerns, in particular concerning potentially exclusionary practices on the web advertising market and the use by Google of information from competing search engines for its own search engine.<sup>53</sup> Although we do not express any opinion on the merits of this case, it is regrettable that important issues regarding the legality of the conduct at hand remain undecided.

## **V. CONCLUDING REMARKS**

The increased frequency of Article 9 commitment decisions is reflective of the paradigm shift in European antitrust law from an "adversarial" to a more "negotiated" enforcement approach. In many respects, this trend is to be welcomed. However, at this point in time the pendulum may have swung too far out. Indeed, in light of the fact that in the past five years 90

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<sup>50</sup> *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003*, OJ C210, p. 2 (2006).

<sup>51</sup> Whereas several national competition authorities have already adopted fines in such circumstances. The Spanish CNC for example imposed fines on Prisa (€88.000 / \$113,000) and Telefonica (€100.000 / \$128,000) in January 2013 for failure to meet antitrust commitments.

<sup>52</sup> See James Kanter, NY TIMES (March 6, 2013) available at <http://www.nytimes.com/2013/03/07/technology/eu-fines-microsoft-over-browser.html?pagewanted=all&r=1&>

<sup>53</sup> See the statement of Vice-President Almunia, *On the Google antitrust investigation*, Brussels (May 21 2012).

percent of the non-cartel cases under Articles 101 and 102 TFEU have resulted in commitment decisions, the lack of guidance on the legality of various types of market conduct is troubling. In addition, Article 9 commitments raise a number of other issues.

It might be helpful to reconsider the use of Article 9 procedures and to limit this procedure to cases where the efficiencies associated with this procedure can be clearly shown to outweigh its disadvantages.