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Piero Cavicchi

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Editor:

Europa-Kolleg Hamburg
Institute for European Integration
Prof. Dr. Peter Behrens (Managing Director),
Dr. Konrad Lammers (Research Director)
Windmühlenweg 27
22607 Hamburg, Germany
http://www.europa-kolleg-hamburg.de

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The European Commission's discretion as to the adoption of Article 9 commitment decisions: Lessons from *Alrosa*

Piero Cavicchi, Bologna Italy*

Abstract

Introduced by Article 9 of Regulation 1/2003, commitment decisions represent a tool – alternative to Article 7 infringement decisions – available to the European Commission in order to ensure an effective implementation of the EU antitrust rules. Over the last few years there has been an increased recourse to commitment decisions in antitrust cases. This paper explores the reasons for the apparent success of this new instrument and anticipates the consequences of the recent Alrosa *judgment rendered by the European Court of Justice, which limits the judicial review of commitment decisions to the manifest incorrectness of the Commission's assessment. The paper concludes that, in light of the extent of the Commission's discretion as to the adoption of commitment decisions defined by the Court in* Alrosa*, the observed trend seems likely to continue. In particular, given the generous boundaries set by the Court to the Commission's discretionary power, hopes of avoiding system failures in commitment decisions seem actually to be pinned on the Commission's self-restraint more than on the potential for control by the Luxembourg Courts.*

Key words: Article 9 of Regulation 1/2003, Article 7 of Regulation 1/2003, commitment decisions, infringement decisions, Commission's discretionary power, principle of proportionality, ECJ Alrosa judgment

* The author worked for the European Commission's Directorate-General for Competition in Brussels from 2008 to 2010. The author is most grateful to Prof. Dr. Peter Behrens for his invaluable input and comments in the redaction of this paper. Any inaccuracy remains fully the author's, as well as the views expressed. The author would also like to thank the German Academic Exchange Service (DAAD), the Europa-Kolleg Hamburg and the Max Planck Institute for Comparative and International Private Law in Hamburg for having supported this study.

Address:

The author welcomes comments at cavicchi.piero@libero.it.

The European Commission's discretion as to the adoption of Article 9 commitment decisions: Lessons from *Alrosa*

Piero Cavicchi

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1. Introduction

Introduced by Article 9 of Regulation 1/2003,[1] commitment decisions represent a tool – alternative to Article 7 infringement decisions – available to the European Commission in order to fulfill the objective of applying the European antitrust rules effectively. There has been an increased recourse to Article 9 decisions[2] in antitrust cases over the last few years: the Commission adopted two in 2008, five in 2009 and six in 2010.[3]

The increasing popularity of commitment decisions is not surprising if one considers that, under the old implementation system of the European antitrust rules, the Commission used to close cases by way of informal settlements with the undertakings under investigation.[4] Furthermore, Article 9 decisions are designed to be even more appealing to the Commission in that commitments, as opposed to informal settlements, are made legally binding on the undertakings offering them and are therefore enforceable.

However, on closer inspection, the introduction of commitment decisions does not seem to represent an attempt to regulate enforcement practice which is void of legal effects. The Commission still continues, now as before entry into force of Regulation 1/2003, to settle

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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), in force since 1 May 2004 replacing Council Regulation No 17/62. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are in substance identical.

2 "Article 9" and "commitment" decisions are used as synonyms in this paper. The same applies to "Article 7" and "infringement" decisions mentioned *infra* in the text.

3 Data collected from the website of the Commission's Directorate-General for Competition, selecting "commitments decision" from the "document type" scroll-down menu at http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=1. The result list (latest access on 24 March 2011) omits the four commitments decisions adopted on 13 September 2007 in Cases COMP/39.140 to 39.143. These four decisions (see press release IP/07/1332 at http://europa.eu/rapid/searchAction.do) also figure in the annex to the Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003 (SEC(2009) 574 final, 29.4.2009), hereinafter "Staff Working Paper".

4 It has been calculated that cases closed by informal settlements actually accounted for around 90% of all competition cases closed under Regulation 17/62 : Van Bael & Bellis, *Competition Law* of the European Community, 4th edition, Kluwer, 2005, p. 1136, also quoted by Bellamy & Child, European Community Law of Competition, 6th edition, Oxford University Press, 2008, § 13.113, footnote n. 602.

cases informally, [5] provided it considers such a solution appropriate in its antitrust enforcement action.

This paper explores, on the one hand, the reasons for the apparent success of commitment decisions,[6] and anticipates, on the other, the consequences of the recent judgment rendered by the European Court of Justice (ECJ) in the *Alrosa* litigation,[7] which defines the extent of the Commission's discretion as to the adoption of Article 9 decisions and the limits of judicial review.

2. The mechanism of Article 9 of Regulation 1/2003

A correct understanding of the context in which the Commission operates when it launches the special procedure potentially leading to the adoption of a commitment decision is crucial for the purposes of this paper.[8] Accordingly, the analysis that follows is based on what can be reasonably understood as the Commission's perspective throughout its enforcement of the European antitrust rules.

2.1. Procedural steps

Article 9 provides first and foremost that the Commission may not opt for the commitment route unless it "intends to adopt a decision requiring that an infringement be brought to an end". The commitment solution may therefore be taken into consideration, if ever, only from the time when the Commission would be able, on the basis of an appropriate investigation, to make an informed choice about proceeding to a formal finding of an infringement through an Article 7 decision.

In this scenario, according to Article 9, the Commission is entitled to accept the commitments offered by the relevant undertakings "to meet the concerns expressed to them by the Commission in its preliminary assessment". The Commission's preliminary assessment is then intended to inform the undertakings under investigation of the concerns over competition raised by their conduct, so that commitments may be proposed.

It is understood, in line with the objective of enhanced administrative efficiency of Regulation 1/2003[9] and all the more so after the intervention of the ECJ in *Alrosa*,[10] that the preliminary assessment pursuant to Article 9 is not supposed to offer the same level of detail as a

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5 For a recent example of preliminary investigations closed without the need to open formal proceedings, see press release IP/10/1175 at http://europa.eu/rapid/searchAction.do, where the Commission welcomed the new iPhone policies announced by Apple. Formal antitrust proceedings were commenced against Apple in 2007 in cases COMP/39154 PO/iTunes and COMP/39174 Which/iTunes, before the Commission decided to close them in light of Apple's announcement that it would equalise prices for downloading songs from its iTunes online store in Europe (see press release IP/08/22).

6 The Commission has expressed its satisfaction by stating: "Experience so far indicates that the instrument of commitment decisions has functioned well", Staff Working Paper, § 102.

7 Judgment of the Court (Grand Chamber) of 29 June 2010, Case C-441/07 P, *European Commission v Alrosa Company Ltd* (OJ C 234/3, 28.8.2010), hereinafter "ECJ *Alrosa*".

8 The special procedure referred to consists essentially of the preliminary assessment and the market test, unknown to Article 7 infringement decisions, see *infra* in the text.

9 See in particular the abolition of the notification of agreements to the Commission for individual exemption pursuant to Article 101(3).

10 "Article 9 of the regulation is based on considerations of procedural economy", ECJ *Alrosa*, § 35.

statement of objections for the purposes of Article 7.[11] It follows logically that a statement of objections always meets the requirements of a preliminary assessment within the meaning of Article 9.[12]

Should commitment negotiations opened on the basis of a preliminary assessment be unsuccessful, the Commission may not proceed right away to the adoption of an Article 7 decision. Before doing so, the Commission would in fact be required to draft a statement of objections and send it to the undertakings in question. Therefore, the objectives of administrative efficiency and procedural economy underlying Regulation 1/2003 would push the Commission to explore with the undertakings concerned the room for possible satisfactory commitments before drafting a preliminary assessment in the first place.[13]

In the *Coca-Cola* case, a few days elapsed between the adoption of the preliminary assessment (15 October 2004) and the submission of commitments in response (19 October 2004).[14] It is thus evident that sometimes the negotiations over the proposed commitments may take place *de facto* well before the notification of the preliminary assessment. Still, the preliminary assessment plays a fundamental role in the Article 9 architecture, based on the relationship between final commitments and competition concerns, for which it represents the one and only source, not least for the purposes of judicial review.[15]

Once "convinced that the commitments offered *prima facie* address the competition concerns identified",[16] the Commission gives interested third parties the opportunity to submit their observations by publishing in the EU Official Journal a notice ("market test notice") including the main content of the proposed commitments along with a concise summary of the case.[17] Should the comments received in response to the market test so require, the Commission then confronts the undertaking concerned with these comments before making the final commitments binding.

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11 According to some authors, "Art.9 is conceived as a mechanism to bringing administrative procedures, rather than infringements, to an end", O. Armengol and A. Pascual, *Some reflections on Article 9 commitment decisions in the light of the Coca-Cola case*, E.C.L.R. 2006, 27(3), p. 126.

12 Several commitment decisions have actually been adopted that make binding commitments offered to address competition concerns expressed in a statement of objections. Of these statements of objections, some were issued before (e.g., Case COMP/38.173 Football Association Premier League), and some after (e.g., Case COMP/39.530 Microsoft Tying) the entry into force of Regulation 1/2003. With regard to the former, one author observes: "it would appear that the Article 9 procedure has been used to some extent as a way of clearing the backlog of difficult 'legacy' cases from the days of Regulation 17/62", R. Whish, *Commitment Decisions under Article 9 of the EC Modernisation Regulation: Some Unanswered Questions*, in Liber Amicorum in Honour of Sven Norberg (2006, Bruylant, Brussels), p. 564.

13 "Once DG Competition is convinced of the genuine willingness of the undertakings to propose commitments effectively suited to address the competition concerns, a Preliminary Assessment will be issued", Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU, hereinafter "Best Practices", available at http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_articles.pdf, § 107 (last consulted on 24 March 2011).

14 Case COMP/39.116, closed by commitment decision of 22 June 2005.

15 C.J. Cook qualifies instead the preliminary assessment, at least in some cases, as "a largely symbolic document that is not a central element of the Article 9 process", *Commitment Decisions: The Law and Practice under Article 9*, World Competition 29(2), 2006, p. 215.

16 Best Practices, § 114 (emphasis in the original).

17 Article 27(4) of Regulation 1/2003.

As the Commission indicates, yet without expressing any preference, the commitments which undertakings may offer to address its competition concerns can be behavioural or structural in nature.[18] So far, behavioural commitments are predominant in the Commission's output of Article 9 decisions.[19] Regulation 1/2003 remains silent under Article 9 on the nature of the commitments, whereas it dictates a rule under Article 7 as to the nature of the remedies that the Commission can impose to bring an infringement of the European antitrust rules to an end. In that respect, clear priority is given to behavioural remedies and the application of structural ones subordinated to situations where "there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned".[20]

Although technically possible by means of a broad interpretation of the law, the extension of this priority rule from the nature of the remedies to the nature of the commitments does not seem to be supported by the doctrine.[21] Nor does the ECJ in its *Alrosa* ruling appear to limit the Commission's discretion as to the nature of the commitments to be made binding on the undertakings concerned.[22]

2.2. The scope of commitment decisions

The Commission has made clear since the early stages of the implementation of Article 9 that it will not consider a commitment solution in hard-core cartel cases.[23] This is a logical consequence of the closing statement under Recital 13 of Regulation 1/2003 whereby "(c)ommitment decisions are not appropriate in cases where the Commission intends to impose a fine".

Since hard-core cartels amount to the most serious infringements of the European antitrust rules, it follows that an effective reaction aimed at restoring legality cannot but include the use of fines as the most powerful instrument available to the Commission to sanction and deter. Irrespective of the legal value of Recital 13, should the Commission not stick to its words and close a hard-core cartel case by way of an Article 9 decision, this would raise most serious doubts in light of the ECJ ruling in *Alrosa*.[24]

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18 Best Practices, § 112.

19 At § 97 of its 2009 Staff Working Paper, the Commission observed that it had made structural commitments binding on the undertakings concerned (E.ON and RWE respectively) in only two of the thirteen decisions adopted until then, all other commitments being behavioural in nature. A quick overview of the Article 9 decisions adopted since confirms this trend.

20 Recital 12 of Regulation 1/2003 restates the concept and elaborates further on the suitability of structural remedies: "Changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking".

21 According to J. Temple Lang, "the Commission will presumably always have a preference for commitments which it does not need to supervise", *Commitment decisions under Regulation 1/2003: Legal aspects of a new kind of competition decision*, E.C.L.R. 2003, 24(8), p. 349. See also E. Wind, *Remedies and sanctions in Article 82 of the EC Treaty*, E.C.L.R. 2005, 26(12), p. 660.

22 See *infra* at paragraph 3.2.

23 "The Commission ... can consider such a decision if and when: ... the case is not one where a fine would be appropriate (this therefore excludes commitment decisions in hardcore cartel cases)", see MEMO/04/217 of 17 September 2004 at http://europa.eu/rapid/searchAction.do.

24 See *infra* at paragraph 3.1.

The fact that fines can only be imposed insofar as an infringement is found and that commitment decisions do not establish "whether or not there has been (…) an infringement"[25] excludes at the same time that an Article 9 decision may contain fines or make binding any commitment to pay money by the undertaking concerned.[26]

The question arises whether there are other situations apart from hard-core cartels where the Commission would not be entitled to adopt commitment decisions. By analogy, it has been maintained that the scope of Article 9 decisions should be limited to "less serious" cases, in order to save and devote resources to the pursuit and resolution of the most serious infractions by way of Article 7 decisions.[27]

This approach would then introduce a restriction of the Commission's discretion in enforcing the European antitrust rules, whereby the Commission should refrain from using commitment decisions to close serious cases, as only infringement decisions could adequately deal with them. It remains to be seen whether this interpretation is compatible with the ECJ's findings in *Alrosa* as to the extent of the discretion in question and the limits of judicial review.

Even before engaging in that analysis,[28] however, it is hard to agree with such an interpretation. Nothing in the letter of the law seems in fact to indicate the seriousness of the case as categorically excluding recourse to commitment decisions. Inferring this from Recital 13 of Regulation 1/2003, when it qualifies the adoption of commitment decisions as inappropriate in cases where the Commission intends to impose a fine, does not appear convincing either. The conclusion that commitment decisions would not be appropriate to resolve the most serious competition cases, since hard-core cartels are sanctioned with fines and amount to the most serious breaches of the antitrust rules, is not plausible. It is of course undisputed that Regulation 1/2003 is designed to enable the Commission to focus its enforcement action on the investigation of serious cases. However, it does not follow that only cases where in the end an infringement has been established can be labelled as serious.

Generally speaking, the notion of "seriousness" of a competition case is quite relative. As early as the initial assessment and priority setting, the Commission engages in the selection of those cases that are serious enough to deserve further investigation.[29] Of these, the most serious cases make it to the later and crucial stage where the Commission may choose between the commitment or the infringement route, whereas the less serious cases are disposed of along the way. Coming to this stage normally requires that the Commission has devoted significant resources to the investigation of the alleged anti-competitive practice in question. If there are grounds for a distinction between more serious and less serious cases, then it is in relation to the outcome of the Commission's investigations. Introducing this

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25 Recital 13 of Regulation 1/2003.

26 Eddy de Smijter and Lars Kjoelbye, *The enforcement system under Regulation 1/2003*, in Faull & Nikpay, The EC Law of Competition, Oxford 2007, § 2.121, p. 125.

27 Consistently with this approach, commitment decisions are degraded to the status of a "marginal tool" available to the Commission, see A. Pera and M. Carpagnano, *The law and practice of commitment decisions: a comparative analysis*, E.C.L.R. 2008, 29(12), p. 671.

28 See *infra* at paragraph 3.1.

29 "In this regard, DG Competition focuses its enforcement resources on cases in which it appears likely that an infringement could be found, in particular on cases with the most significant impact on the functioning of competition and risk of consumer harm, as well as on cases which are relevant with a view to defining EU competition policy and/or to ensuring coherent application of Articles 101 and/or 102 TFEU", Best Practices, § 12.

distinction at the subsequent moment when the Commission is pondering the enforcement benefits of an Article 9 decision rather than an Article 7 decision therefore appears incorrect.

Recital 13 of Regulation 1/2003 should not be relied upon either to argue that, had the Commission expressed its intention to impose a fine in the statement of objections addressed to the party subject to the proceedings, it would no longer be in a position to issue an Article 9 decision. This would imply that in such circumstances the Commission could no longer depart from the Article 7 route, irrespective of the content of the commitments potentially offered by the undertaking concerned. This is not acceptable, since Article 9 is a flexible instrument intended to extend the range of solutions available to the Commission to solve (serious) cases. It must therefore remain accessible at any time before the adoption of an infringement decision, provided that all requirements are met and insofar as the Commission's enforcement priorities so recommend.[30]

If only hard-core cartel cases can be reasonably excluded from the scope of commitment decisions, it appears conversely that there are no situations where the Commission is under an obligation to adopt an Article 9 decision.[31]

Observing the Commission's record to date, several commentators have identified some market sectors that would benefit considerably from the swift solution to competition concerns that commitment decisions can in principle secure. Recourse to Article 9 decisions would be particularly welcome in fast-moving technology markets, where any failure to address promptly the competition problems arising out of the clash between small newcomers and powerful incumbents could run the risk of stifling innovation.[32] However, the energy sector would seem to take the lead in the Article 9 output of the Commission.

The fact remains that the Commission is not bound to privilege a commitment over an infringement solution for the technology sector, the energy sector or any other because of any supposed "precedential value" of its Article 9 repertoire in that field. The Commission should be able to assess its enforcement priorities anew in each case and ultimately take a different route despite similarities with earlier cases. This is particularly true should the Commission's competition concerns mirror those of another case resolved by way of an Article 9 decision, and should the undertaking under investigation be willing to offer comparable commitments. Even in such circumstances, the Commission should retain the discretion whether or not to enter into commitment negotiations and should exercise it in accordance with its enforcement objectives.[33]

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30 "(T)here is no reason why a commitment decision cannot be adopted in a case in which the Commission intended to impose a fine when it sent the statement of objections, but later decided that a fine was not necessary or justified, and the undertaking offered an adequate commitment", J. Temple Lang, *ibidem*, p. 347.

31 The Commission has taken this position *ab ovo*: "(t)he Commission is never obliged to terminate its proceedings by adopting an 'Article 9' commitment decision", see MEMO/04/217.

32 See M. Dolmans, T. Graf and D.R. Little, *Microsoft's browser choice commitments and public interoperability undertaking*, E.C.L.R. 2010, 31(7), p. 274. By the same token, in nascent technology markets where the market definition is controversial and the position of market players not yet established, closing a potential competition case informally could be particularly efficient, especially before opening formal proceedings. This would of course require a certain degree of cooperation from the undertakings under investigation, most likely the first-movers on the nascent market in question.

33 See *infra* at paragraph 3.1.

3. The extent of the Commission's discretion in the *Alrosa* ruling of the ECJ

Many points raised in the previous paragraphs as to the actual implementation of Article 9 have an element in common in that they may question the Commission's discretion as to the adoption of a commitment decision. A closer look reveals that this discretion is actually two-fold: the Commission exercises it first when choosing to follow the commitment route instead of opting for an infringement decision, and second when measuring the proposed commitments against its competition concerns as expressed in the preliminary assessment. Even if in practice this can be regarded as a single exercise, given the interplay between its two legs, it may nonetheless be useful for the purposes of this study to analyse them separately.

3.1. The first leg of the Commission's discretion: the choice between Article 9 and Article 7

On 29 June 2010, the ECJ put an end to the *Alrosa* litigation, delivering a judgment of capital importance for the future of commitment decisions. In particular, the ECJ provided guidance on the extent of the Commission's discretion and the related boundaries of judicial review, coming to radically different conclusions than the General Court in its first instance ruling and setting this aside in the appeal.[34]

With regard to the Commission's discretionary choice between a commitment and an infringement decision, the ECJ emphasises expediency and procedural economy as the *atout* of Article 9 compared with Article 7 decisions.[35] This does not of course make the former preferable as a matter of principle. Later on in the ruling,[36] the ECJ in fact refers more generally to the "aims pursued" by the Commission in the enforcement of the antitrust rules. This reference recalls the balance struck by the Commission to determine the priorities of its antitrust action and resolve cases accordingly.

As commitment decisions were conceived by the legislator as a substitute for infringement decisions, the Commission is actually expected to weigh these two different instruments in light of the circumstances of a given case before making its final choice. In this process, the strengths of one tool are normally the weaknesses of the other. For instance, unlike commitment decisions, Article 7 decisions compensate for the more lengthy and burdensome procedure with the finding of an infringement and the possible imposition of fines.

Convincingly, after having listed six possible ways in which infringement decisions can contribute to the implementation of the European antitrust rules, one author has concluded that only as long as expediency and procedural economy outweigh these lost benefits can commitment decisions be qualified as "optimal" from the perspective of antitrust

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34 Judgment of the Court of First Instance of 11 July 2007, Case T-170/06, *Alrosa v Commission* (OJ C 199/37 of 25.8.2007), hereinafter "GC *Alrosa*". As from 1 December 2009, the Court of First Instance has been renamed the General Court.

35 ECJ *Alrosa*, § 35.

36 ECJ *Alrosa*, § 40.

enforcement.[37] As a corollary to this reasoning, Article 9 decisions should otherwise not be adopted at all.

In *Alrosa*, however, the ECJ affirms that the Commission's assessment may be challenged before the Luxembourg Courts only for "manifest incorrectness".[38] It is then clear that, for the purposes of judicial review, the court must not engage in a new appraisal of the situation, potentially substituting its own understanding of "optimal" enforcement for the Commission's. Instead, the court must limit itself to ascertaining whether the Commission may have committed a manifest error of assessment. This also means that Article 9 decisions possibly striking a less-than-optimal balance could nevertheless withstand the court's scrutiny.

Against this background, it is actually quite difficult to envisage cases where the Commission's discretion to opt for an Article 9 rather than an Article 7 decision could be attacked. As mentioned above,[39] it is generally accepted on the basis of Recital 13 of Regulation 1/2003 that Article 9 decisions are excluded in hard-core cartel cases.

In the case of hard-core cartels, the most blatant breach of antitrust rules, the enforcement benefits originating from an infringement decision are so overwhelming that it would be extremely problematic for the Commission to justify its choice of Article 9. The impact in terms of punishment, on the parties involved, and deterrence, on third undertakings as well, resulting from the combination of fines with the finding of infringement paving the way for damages actions could hardly be outweighed by the reasons of a more rapid solution of the case and the savings associated with the lighter administrative burden. Should an interested third party, then, lodge an application in court against any such commitment decision, it would most likely have several arguments to persuade the judges that the Commission's assessment is manifestly flawed and that only an Article 7 decision could have resolved the case.[40] However, as noted above,[41] the Commission has been resolute since the entry into force of Regulation 1/2003 not to accept commitments in any such case and there are no hints that it would change its mind any time soon.

As to the allegation that some cases are "too serious" to accept commitments, this is most likely based on a misunderstanding that has dragged on since the time of the Commission's initial assessment of a case to set enforcement priorities.

Here again, the focus should not be on the seriousness of the potential infringement, but on the seriousness of the case as a whole. The seriousness of an alleged infringement, to be

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37 W.P.J. Wils, *Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003*, World Competition 29(3), 2006, p. 349. From the same author, see also the later *The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles*, World Competition 31(3), 2008, p. 342. Among the six possible contributions to antitrust enforcement of infringement decisions, it is worth remembering here how the finding of an infringement makes it easier for its victims to take action for redress.

38 ECJ *Alrosa* § 42.

39 See *supra* at paragraph 2.2.

40 This being true, the wording of Recital 13 could actually be retrieved to conclude that the Commission should always ensure through its Article 9 production an "appropriate" rather than an "optimal" implementation of the antitrust rules, to avoid the risk of being successfully challenged in court.

41 See footnote 23.

appraised by the Commission taking into account its "duration and extent" as well as its "effect on the competition situation in the Community",[42] is not the only indicator that a *case* is serious. Cases offering the Commission a unique opportunity to take a stand on a competition policy issue or put an end to the ambiguous implementation of the antitrust rules, indicating the way forward, are in fact as serious as those of hard-core cartels[43] and may well require a swift solution for which Article 9 is, on balance, preferable to Article 7.

There is nothing in the *Alrosa* ruling of the ECJ which confirms that commitment decisions are in principle not appropriate for serious cases. Nothing that supports the idea that an Article 9 decision could be successfully challenged before the Luxembourg Courts on the grounds of the alleged "seriousness" of the case. Again, the legal test is different and based on the "manifest incorrectness" of the Commission's assessment.

Neither does the ECJ in its judgment refer to any supposed obligation for the Commission to take into consideration the commitments proposed by undertakings which, subject to formal proceedings, seek to avoid the adoption of an infringement decision. A clear-cut statement on this, not contested in the appeal and therefore still retaining some degree of authority, is instead present in the ruling of the General Court at first instance in this litigation. The General Court affirmed that "the Commission is never obliged under Article 9(1) of Regulation No 1/2003 to decide to make commitments binding instead of proceeding under Article 7 of that regulation".[44] The Commission, continues the Court under the same paragraph, "is therefore not required to give the reasons for which commitments are not in its view suitable to be made binding".

The interpretation of Regulation 1/2003 given by the Court does perfectly match, then, the firm position taken in that respect by the Commission since its entry into force.[45] This has strong repercussions, in particular, on those undertakings which, faced with a statement of objections from the Commission, would believe that the competition concerns raised by their conduct are comparable to the situation of other parties before them, whose case was resolved by an Article 9 decision.

All their efforts to offer commitments similar to those made binding, should the Commission be unwilling to listen this time, would be to no avail. The fact that the Commission is not even required to provide the arguments why commitments would not be appropriate to address its concerns also prevents the said undertakings from challenging on these grounds the infringement decision eventually addressed to them. Any alleged "precedential value" of Article 9 decisions, within the meaning of this study,[46] is therefore to be excluded.

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42 Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (OJ C 101, 27.4.2004), hereinafter "Notice on the handling of complaints", § 44 second indent.

43 In its Notice on the handling of complaints, the Commission announces its intention to focus its enforcement resources on cases possibly amounting to "the most serious infringements" as well as cases where it "should act with a view to define Community competition policy and/or to ensure coherent application of Articles 81 or 82", § 11. The two sets of cases are therefore different, but have the same importance for the purposes of antitrust enforcement. The same intention is restated by the Commission at § 12 of the Best Practices, see footnote 29.

44 GC *Alrosa*, § 130.

45 See *supra* at footnote 31.

46 See *supra* at paragraph 2.2.

3.2. The second leg of the Commission's discretion: the proportionality of the commitments

Once the Commission has opted for the commitment route, Article 9 of Regulation 1/2003 provides that it may make binding on the undertaking in question those proposed commitments which meet the competition concerns expressed in the preliminary assessment. In this balancing exercise, as made clear by the ECJ in *Alrosa*, the Commission must observe the ubiquitous EU law principle of proportionality, which governs the lawfulness of any measure taken by EU institutions, including the Commission when acting as competition watchdog.[47]

For the purposes of Article 9, however, the tasks of the Commission in compliance with the principle of proportionality are "confined to verifying that the commitments in question address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately".[48] In so doing, the Commission is not required to take as a benchmark the infringement decision it could hypothetically adopt,[49] nor to solicit itself less onerous commitments.[50]

In addition to the different enforcement objectives pursued by Article 7 and Article 9 of Regulation 1/2003, which represent the main reason for the ECJ to reject any comparison between the two instruments,[51] measuring the proportionality of the commitments against a possible infringement decision would force the Commission to run two distinct enforcement actions in parallel. Not only would the Commission sit at the negotiating table to discuss appropriate commitments with the undertaking concerned, but it would also be required to think separately of the suitable infringement decision that it would adopt *au cas où*.

This is not acceptable, as it would adversely impact on the enforcement efficiencies – speed and administrative savings – produced by the recourse to the Article 9 procedure, which had made the envisaged adoption of a commitment decision preferable to an infringement decision. The consideration that, actually until the very adoption of the Article 9 decision,[52] nothing would prevent the Commission from reverting to the Article 7 solution, so that it would anyway be advisable to devote resources to its progress, is misplaced. What is relevant

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47 Despite not being expressly referred to under Article 9, the application of the principle of proportionality to commitment decisions, invoked by the applicant and acknowledged by the Commission, has never been contested during the *Alrosa* litigation. The actual extent of the Commission's obligations descending from the observance of that principle, and therefore the scope of the Commission's discretion as to the adoption of Article 9 decisions, was instead highly controversial.

48 ECJ *Alrosa*, § 41.

49 "There is therefore no reason why the measure which could possibly be imposed in the context of Article 7 of Regulation No 1/2003 should have to serve as a reference for the purpose of assessing the extent of the commitments accepted under Article 9 of the regulation, or why anything going beyond that measure should automatically be regarded as disproportionate", ECJ *Alrosa*, § 47.

50 "(T)he Commission is not required itself to seek out less onerous or more moderate solutions than the commitments offered to it", ECJ *Alrosa*, § 61.

51 Article 7 aims to put an end to the infringement that has been found to exist, whereas Article 9 aims to address the Commission's concerns following its preliminary assessment, see ECJ *Alrosa*, § 46.

52 "It is submitted ... that the relevant moment in time to assess whether the commitments meet the Commission's concerns is at the time when the decision is adopted", E. de Smijter and L. Kjoelbye, *ibidem*, p. 128, footnote 110.

here are in fact the enforcement benefits of the adopted commitment decision which would irremediably be lost or seriously compromised.

Not having to ponder the proposed commitments in light of a possible infringement decision also entails that the Commission may in principle make commitments binding which go beyond what it may have imposed on the same undertaking by way of an Article 7 decision. This important consequence is known to the ECJ, for which undertakings offering commitments "consciously accept" that their concessions may exceed the scope of an Article 7 decision and yet represent a more desirable outcome than the finding of an infringement and an additional fine.[53]

What counts for the purposes of the proportionality test is of course not the perspective of the undertakings, but that of the Commission. It is undeniable that the Commission, if given a chance to extract more concessions from an undertaking trying to avoid a possible infringement decision and so achieve better enforcement results, would be tempted to obtain as much as it can.

As reported by some commentators,[54] the outcome of the *Coca-Cola* case[55] would provide a good example of this *modus operandi*. There, the Commission accepted and made binding commitments concerning geographic and product markets not covered by the investigation.[56] The possibility that the Commission could have adopted an infringement decision having the same scope as its Article 9 decision can be reasonably excluded. Whereas before *Alrosa* legitimate doubts might have been raised as to the lawfulness of similar commitment decisions, now that the ECJ has qualified the extent of a possible Article 7 decision as totally irrelevant and that the Commission's assessment can be challenged only for "manifest incorrectness", the room for judicial review seems considerably reduced to the benefit of the Commission's discretionary power.

The recurring remark in the judgment of the ECJ that the tools provided in Article 7 and Article 9 of Regulation 1/2003 have different characteristics and pursue different enforcement objectives[57] is also a valid argument to conclude that any supposed preference for behavioural over structural commitments[58] is not justified. In practice, should the undertaking concerned spontaneously offer structural commitments, the Commission would then be dispensed from seeking behavioural commitments capable of addressing its concerns to the same extent.

More generally, the fact that the ECJ does not expect the Commission to take the initiative to suggest less onerous – whilst always adequate – commitments to the undertakings concerned puts the Commission in the best position it could have wished for itself. Since judicial review

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53 ECJ *Alrosa*, § 48.

54 S. Rab, D. Monnoyeur and A. Sukhtankar, *Commitments in EU Competition Cases. Article 9 of Regulation 1/2003, its application and the challenges ahead*, Journal of European Competition Law and Practice, 2010, Vol. 1, No. 3, p. 181.

55 See footnote 14.

56 In particular, notwithstanding the fact that the investigation concerned four Member States, the commitments did potentially extend to all Member States provided certain market conditions were met.

57 The Commission's obligations flowing from the observance of the principle of proportionality under each of these two provisions are thus different also.

58 Which would mirror the priority rule applicable to the remedies that may be imposed by way of an infringement decision.

is limited to manifest errors of assessment, which are very hard to establish, the Commission's discretionary power after *Alrosa* is as a result impressively wide.

Throughout the commitment operations and in line with its priorities, the Commission is free to play a proactive role, *de facto* adjusting, relaunching and soliciting those commitments that best suit its enforcement objectives, and yet as a result it is *de iure* responsible for checking that the commitments spontaneously offered by the undertaking in question do adequately meet its competition concerns. In so doing, as we have seen, the Commission may even push to obtain commitments going beyond the remedies that it would be able to impose by issuing an infringement decision instead, or formulate its competition concerns at the time of the preliminary assessment after having already negotiated in advance the commitments that would address them in the Article 9 decision, so turning upside-down the normal course of events.

4. Conclusion

If this reading of the situation following the ECJ ruling in the *Alrosa* case is correct, then there is no reason to think that the Commission's output of Article 9 decisions will decline in the near future. On the contrary, the increased recourse to commitment decisions observed over recent years seems likely to continue, as the generous boundaries set by the ECJ to the Commission's *marge de manoeuvre* appear capable of encouraging this trend further.

It is therefore for the Commission to manage the Article 9 instrument properly, so as to eliminate any concerns that it may somehow abuse its vast discretionary power.[59] Besides, given the threshold established in *Alrosa* for challenging any such possible "abuse", i.e., the manifest incorrectness of the Commission's assessment, nearly all hopes of avoiding system failures [60] in commitment decisions are actually pinned on the Commission's sensible assessment and self-restraint.[61]

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59 As early as 2005, one author had pointed out "some concerns that Art. 9 Decisions may become an instrument to impose obligations that go far beyond European competition law as it stands, and the wording of that provision seems to open a door for an uncontrolled exercise of power by the Commission and a strong unbalance of powers after the company has agreed to the commitments", M. Sousa Ferro, *Committing to commitment decisions – unanswered questions on Article 9 decisions*, E.C.L.R. 2005, 26(8), p. 451.

60 A possible system failure would in particular occur should the Commission try to explore the commitment route when not in possession of a strong competition case, with a view to achieving some result. An appropriate selection at the time of the initial assessment, aimed at pursuing cases where it is highly likely that an infringement could be found, should avoid this failure altogether. However, in the event of the Commission not having a strong case against a given undertaking, this would most likely refrain from offering commitments in the first place, challenging the Commission to proceed to the adoption of an Article 7 decision.

61 One author offers a different perspective: "the responsibility for avoiding disproportionate commitment decisions will lie in the first place with the companies concerned. It is for them to refuse commitments that go beyond what is required to solve the competitive concerns raised and to offer altenative, less onerous remedies", M. Kellerbauer, *Playground instead of playpen: the Court of Justice of the European Union's Alrosa judgment on art. 9 of Regulation 1/2003*, E.C.L.R. 2011, 32(1), p. 8.