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NEGOTIATED CERTAINTY, SYSTEMIC CONTINGENCY: THE FLEXIBILITY PARADOX OF ARTICLE 9 OF REGULATION

1/2003

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ABSTRACT

The commitment procedure established by Article 9 of Regulation 1/2003 occupies a structurally ambivalent position within EU competition enforcement. On its face, it represents an instrument of legal certainty. By rendering binding, the remedies proposed by investigated undertakings without concluding that an infringement has occurred, it resolves competition concerns rapidly, economises enforcement resources, and delivers swift market correction. That account is not wrong, exactly. It simply omits the costs. The commitment procedure generates negotiated certainty for the parties at the cost of systemic contingency for the legal order, a tension that this paper argues has reached a critical threshold in the context of digital markets.

The paper begins by establishing the normative asymmetry between Articles 7 and 9 of Regulation 1/2003. Unlike infringement decisions, commitment decisions produce no operative declaration of infringement, no fine based on established illegality, and no binding precedent capable of orienting subsequent enforcement. The Commission's own 2014 Communication acknowledges that prohibition decisions are to be preferred where there is a need for a clear legal precedent, an admission whose corollary is that systematic reliance on Article 9 constitutes an institutional choice against legal development. The empirical record confirms that this choice has become structural. As proof, commitment decisions now account for many formal Commission decisions in non-cartel cases, inverting the relationship of exceptionality that the Regulation's drafters envisaged.

Against this background, the paper identifies four structural dimensions of the procedure's flexibility paradox. First, Article 9 delivers only one of the six functions that a fully developed enforcement decision performs, the termination order, while systematically excluding public censure, deterrence, disgorgement of illicit gains, and the foundation for private follow-on damages actions. Second, the procedure has effected a shift in enforcement focus from the wrong to the remedy. The theory of harm is not adjudicated but used as leverage, producing outcomes that reflect the parties' bargaining positions rather than the requirements of law. Third, the Court of Justice's judgment in *Alrosa* eliminated the primary mechanism of judicial accountability over commitment decisions, confirming a reduced standard of proportionality review that has generated a vicious circle of increasing discretion and decreasing legal certainty. Fourth, the absence of procedural constraints has enabled the Commission to use Article 9 as a vehicle for accepting structural remedies that it could not lawfully impose under Article 7.

The paper further examines the institutional contrast with the United States, where the Tunney Act subjects consent decrees to judicial approval and public consultation, demonstrating that enforcement flexibility and external accountability are not mutually exclusive. It then advances three concrete reforms: the establishment of a procedural threshold providing that once a Statement of Objections has been issued the case may not be resolved by commitment without exceptional justification; the introduction of an independent arbiter empowered to assess the adequacy and proportionality of accepted commitments; and the attribution of limited precedential value to the legal determinations implicit in commitment decisions.

The paper concludes that Article 9 is a necessary instrument for which no adequate substitute currently exists, but that its present operation is constitutionally indefensible. The pursuit of enforcement effectiveness at the expense of enforcement legitimacy is not a trade-off that a Union founded on the rule of law can indefinitely sustain. What this paper ultimately argues is that the commitment procedure should not be removed from the Commission's toolkit; rather, the toolkit should be overhauled so that the results of its use are consistent with the rule of law principle, which is currently lacking to a significant extent. What the commitment procedure in its present form offers instead is administrative speed purchased at the cost of legal development. And that is a trade that the rule of law principle, properly understood, does not permit.

Keywords: Article 9 Regulation 1/2003; commitment decisions; EU competition enforcement; judicial review; Alrosa; rule of law; digital markets.

1. INTRODUCTION

The digital economy has fundamentally altered the conditions under which EU competition law operates. Markets characterised by network effects, data-driven dominance, and critical tipping points demand regulatory responses of a speed and flexibility that the traditional enforcement architecture of Regulation 1/2003 struggles to provide.¹ It is against this backdrop that Article 9 of Regulation 1/2003, the commitment decision procedure, has emerged as the dominant instrument of EU competition enforcement in non-cartel cases, accounting for sixty percent of all formal Commission decisions applying Articles 101 and 102 TFEU outside hardcore cartel proceedings.²

On its face, Article 9 appears ideally suited to this challenge. By allowing the Commission to accept binding remedies proposed by investigated undertakings without concluding that an infringement has occurred, it resolves competition concerns rapidly, economises enforcement resources, and produces forward-looking market corrections without the delay and cost of full adversarial proceedings under Article 7. Both the Commission and the investigated undertaking appear to gain from this arrangement. The Commission resolves the competitive concern without proving infringement; the undertaking avoids a formal finding of abuse and the fines and damages exposure that would follow. Whether this mutual gain reflects a genuine alignment of interests or a structural imbalance in bargaining power is a question the paper returns to in Section 3, because the answer matters considerably for the legitimacy of the procedure. The result is a practice that prioritises the remedy over the wrong, a shift whose systemic consequences were not adequately anticipated when the procedure was designed.³

The central research question this paper addresses is the following: does the systematic use of the commitment procedure under Article 9 of Regulation 1/2003 as the dominant instrument for resolving complex non-cartel competition cases produce structural deficiencies in EU competition enforcement that cannot be adequately justified by reference to the procedure's recognised advantages of speed and flexibility? The paper

¹ European Commission, *Ten Years of Antitrust Enforcement under Regulation 1/2003*, Communication COM (2014) 453 final, 9 July 2014.

² Wils, W. P. J. (2015). Ten years of commitment decisions under Article 9 of Regulation 1/2003: Too much of a good thing? Paper presented at the Concurrences Journal 6th International Conference 'New Frontiers of Antitrust', Paris, 15 June 2015, p. 9.

³ Gerard, D. M. B. (2014). Negotiated remedies in the modernization era: The limits of effectiveness. In P. Lowe & M. Marquis (Eds.), *European competition law annual 2013: Effective and legitimate enforcement*. Hart Publishing, p. 2.

advances the following hypothesis: the commitment procedure, as currently designed and applied, generates a form of negotiated certainty for the parties to the proceeding at the cost of systemic contingency for the legal order. That contingency operates across four identifiable structural dimensions and has reached a critical threshold in the context of digital markets. The first is the effective unreviewability of the Commission's enforcement discretion after *Alrosa*.⁴ The second is the fiction of voluntariness on which the procedure's legitimacy formally rests. The third is the systematic loss of deterrence, public censure, and the evidentiary foundation for private damages claims. The fourth, and in the long run possibly the most damaging, is the progressive emptying of Articles 101 and 102 TFEU as living legal standards in digital markets. The paper takes each in turn.

This paper employs a doctrinal legal method, examining the text, structure, and teleology of Regulation 1/2003 and the case law of the Court of Justice and the General Court as primary sources. Where the legislative text and judicial reasoning are ambiguous or contested, interpretive priority is given to the internal coherence of the Regulation's enforcement architecture and to the constitutional constraints imposed by the rule of law principle under Article 2 TEU. The analysis is supplemented by a comparative dimension with a targeted examination of the United States consent decree procedure under the Tunney Act. It is not an exercise in systematic comparative law, but instrumentally, to test whether the combination of enforcement flexibility and external accountability that this paper advocates is institutionally achievable within a mature competition law system. The statistical data cited regarding the relative frequency of commitment and infringement decisions are drawn from existing secondary literature and used to establish the factual premise of the structural inversion argument, not to generate original empirical findings. The normative proposals advanced in Section 5 are explicitly presented as *lex ferenda* proposals for reform of the existing framework.

A note on scope. This paper focuses on the Commission's use of the commitment procedure as an enforcement instrument in non-cartel cases at the EU level. It does not examine the application of equivalent procedures by national competition authorities under the ECN+ Directive, which raises related but distinct questions of institutional design. Nor does it assess the commitment procedure's interaction with the Digital Markets Act, which has introduced a parallel enforcement architecture whose relationship with Article 9 of Regulation 1/2003 deserves separate treatment. These are limitations of the present analysis, not of the broader research agenda.

2. THE NORMATIVE FRAMEWORK: ARTICLES 7 AND 9 OF REGULATION 1/2003

2.1. The textual and teleological asymmetry

Regulation 1/2003 equipped the Commission with two principal instruments for the formal resolution of non-cartel competition cases. Article 7 empowers the Commission, where it finds an infringement of Article 101 or 102 TFEU, to require the undertakings concerned to bring that infringement to an end, to impose behavioural or structural remedies proportionate and necessary to the infringement, and to impose fines for past conduct.⁵ The operative logic of Article 7 is retrospective and declaratory. It presupposes

⁴ CJEU, *Commission v. Alrosa Company Ltd*, C-441/07 P, EU:C:2010:377, paras. 38–48.

⁵ Council Regulation (EC) No 1/2003 [2003] OJ L 1/1, Art. 7(1).

a finding of infringement, establishes legal responsibility, and produces a decision that is binding on national courts pursuant to Article 16(1) of the Regulation.⁶

Article 9 operates on an entirely different foundation. Where the Commission intends to adopt a decision requiring the termination of an infringement and the undertakings concerned offer commitments to meet the Commission's concerns, the Commission may, by decision, make those commitments binding without concluding that an infringement has occurred or is occurring.⁷ The operative consequence is equally different: pursuant to Article 9(1), the proceedings are closed on the ground that there are "no longer grounds for action". This formula is neither a finding of infringement nor an acquittal, but rather a suspension of enforcement conditioned on compliance with the accepted commitments.⁸ Three legal consequences follow from this asymmetry with immediate doctrinal significance. First, no operative declaration of infringement is made because the legal characterisation of the conduct under Articles 101 or 102 TFEU remains formally indeterminate. Consequently, no binding statement of abuse or restriction of competition is produced. Second, no fine may be imposed, since fines under Article 23 of the Regulation presuppose a finding of infringement, which Article 9 proceedings structurally exclude.⁹ Third, no binding precedent is created. National courts applying Article 16(1) of the Regulation are bound only by Commission decisions that establish an infringement, not by commitment decisions that expressly decline to do so. The Commission's own 2014 Communication acknowledges this asymmetry with directness, stating that a prohibition decision under Article 7 is to be preferred where "there is a need for a clear legal precedent."¹⁰ Where the Commission proceeds under Article 9, it makes an institutional choice against the production of that precedent. That admission, buried in a Commission Communication, deserves more attention than it has received.

The asymmetry is not merely textual; it is a teleological issue. The Court of Justice confirmed in *Alrosa* that Articles 7 and 9, despite pursuing the broader objective of maintaining effective competition, operate through fundamentally different mechanisms and therefore cannot be governed by the same proportionality standard.¹¹ Article 7 imposes obligations on undertakings unilaterally; Article 9 makes binding what the undertaking itself has proposed. It is from this distinction that the Court derived the reduced intensity of judicial review applicable to commitment decisions. Recital 13 of the Regulation confirms that the commitment procedure is intended as a tool for cases where the Commission considers that commitments offered adequately address its concerns; Recital 17 adds that the principle of proportionality applies.¹² As subsequent practice has demonstrated, however, the absence of external judicial control over the content of accepted commitments renders these normative constraints substantially unenforceable in practice.

One further feature of the architecture deserves attention, though it is rarely remarked upon: Article 9 is expressly excluded from cartel proceedings.¹³ The instrument is thus confined to unilateral conduct under Article 102 and vertical or horizontal

⁶ Council Regulation (EC) No 1/2003 [2003] OJ L 1/1, Art. 16(1).

⁷ Council Regulation (EC) No 1/2003 [2003] OJ L 1/1, Art. 9(1).

⁸ Wils, W. P. J. (2006). Settlements of EU antitrust investigations: Commitment decisions under Article 9 of Regulation No. 1/2003. *World Competition*, 29(3), 345, pp. 15–16.

⁹ Council Regulation (EC) No 1/2003 [2003] OJ L 1/1, Art. 23(2).

¹⁰ European Commission, COM (2014) 453 final *op.cit.*, para. 21.

¹¹ CJEU, *Commission v Alrosa*, Case C-441/07 P, *op. cit.*, paras. 38–48.

¹² Council Regulation (EC) No 1/2003 [2003] OJ L 1/1, Recitals 13 and 17.

¹³ Council Regulation (EC) No 1/2003 [2003] OJ L 1/1, Recital 13 *in fine*. The commitment procedure is excluded from proceedings in which the Commission intends to impose a fine, a formulation that in practice confines the exclusion to cartel investigations.

agreements under Article 101 that fall outside the cartel category. Precisely, the domain where the legal questions are hardest, the market structures least well understood, and the Commission's theories of harm most likely to be contested. Judicial scrutiny is most absent precisely where it is most needed.

2.2. From exception to dominant instrument

Recitals 13 and 17 of Regulation 1/2003 impose constraints of proportionality and necessity on the commitment procedure. Whether those constraints have any practical force is a different question. The energy sector cases examined in Section 4, and the extension of commitments to third parties, suggest that without meaningful judicial oversight the answer is: not much.¹⁴ The result is a hybrid instrument situated between public law and contract law, closer in its logic to economic regulation than to legal adjudication and carrying none of the procedural safeguards that either tradition demands.

The drafters of Regulation 1/2003 conceived Article 9 as an exceptional instrument, appropriate for specific cases where the Commission's concerns could be addressed swiftly and cooperatively without the need for a formal finding of infringement.¹⁵ What actually happened over the following twenty years is instructive, and not in a way that reflects well on the drafters' assumptions.

In the ten years following the Regulation's entry into force, commitment decisions had come to account for more than half of all formal Commission decisions applying Articles 101 and 102 in non-cartel cases.¹⁶ Commitment decisions have become common for the majority of antitrust cases investigated by the Commission over the past decade. During the period from May 2004 to December 2013, 75% (eighteen out of twenty-four) of all abuse of dominance cases were resolved with commitment. The speed of the process is also open to question, given that in cases of breaches of Article 102, commitment decisions were 15% slower than prohibition proceedings under Article 7.¹⁷ The inversion is structural, not incidental: Article 9 has ceased to function as an exceptional alternative to infringement proceedings and has become the Commission's default instrument for the resolution of complex non-cartel cases including, with increasing frequency, cases involving the most significant undertakings operating in digital markets.

The Commission has broad prosecutorial discretion, and no provision of the Regulation requires it to proceed under Article 7 in any category of case. The issue does not rest on the claim that the Commission has acted unlawfully. It rests on something that is, in a way, more troubling. On the evidence that the Commission has acted entirely within its legal powers, and that the result is nonetheless constitutionally indefensible.¹⁸ The significance of the statistical inversion lies in the fact that it demonstrates that the balance between the two instruments has shifted in a manner that systematically produces unintended consequences such as doctrinal indeterminacy, reduced deterrence and weakened private enforcement. What was designed as a procedural shortcut for straightforward cases has become the standard route for the most complex ones.

¹⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 [2003] OJ L 1/1, Recitals 13 and 17.

¹⁵ Wils (2006), *op. cit.*, p. 12; Schweitzer, H. (2008). Commitment decisions under Art. 9 of Regulation 1/2003: *The developing EC practice and case law*. EUI Working Papers Law No. 2008/22. European University Institute. SSRN 1306245, pp. 1–2.

¹⁶ Wils (2015), *op. cit.*, pp. 12–13.

¹⁷ Mariniello, M. (2014). *Commitments or prohibition? The EU antitrust dilemma*. Bruegel Policy Brief 2014/01, p. 2; as cited in Jenny, F. (2015). Worst decision of the EU Court of Justice: The Alrosa judgment in context and the future of commitment decisions. *Fordham International Law Journal*, 38(3), 701, p. 732

¹⁸ Schweitzer (2008), *op. cit.*, p. 2.

3. THE FLEXIBILITY PARADOX OF ARTICLE 9: FOUR STRUCTURAL DIMENSIONS

3.1. The six functions of enforcement and their systematic loss

Any assessment of the commitment procedure must begin with a clear account of what enforcement is designed to achieve. A fully developed competition enforcement decision does at least six things. It clarifies what the legal prohibition means in a concrete factual context, which is perhaps its most undervalued function. It orders the conduct to stop. It imposes a fine, which serves as public censure and sends a deterrent signal to other market participants. It disgorges, at least partially, the gains derived from the infringement. And it produces a factual and legal record on which injured third parties can anchor private damages claim without having to reconstruct the entire theory of harm from scratch before a national court. Six functions, but Article 9 delivers one of them: the termination order.¹⁹

The conduct is modified or the structure altered, and in that narrow sense the immediate competitive concern is addressed. All remaining enforcement functions are structurally excluded. No clarification of the legal prohibition is produced due to the absence of a finding of infringement leaves the legal characterisation of the conduct permanently indeterminate. No fine is imposed. No public censure attaches. No deterrent signal is sent to other market participants. No disgorgement of illicit gains occurs. And no binding Commission finding is available to sustain follow-on damages actions before national courts.²⁰

The scale of what is lost is easy to understate. In digital markets, where dominant platforms derive sustained competitive advantages from conduct that may have persisted for years before investigation, the absence of disgorgement means that the gains from potentially unlawful behaviour are fully retained. The absence of deterrence means that rational undertakings can calculate that, in the worst case, the consequence of anticompetitive conduct is a negotiated remedy. Doing so, they would avoid the consequences of a formal finding such as a fine, a public declaration of abuse or a precedent available to private claimants. And the absence of a binding infringement finding means that third parties who have suffered harm must reconstruct the entire theory of harm before national courts at their own expense, without the evidentiary foundation that an Article 7 decision would have provided. The Commission's systematic preference for Article 9 in complex cases is, at bottom, a choice about who bears the costs of enforcement. The speed advantages, themselves debatable, and the institutional convenience accrue to the Commission. The costs are absorbed by markets and by the parties the Regulation was designed to protect. That distribution of costs and benefits may not be only an accident of institutional design, but rather an entirely predictable outcome of a procedure with no external check on how the Commission exercises its discretion.²¹

3.2. The legitimacy deficit: from wrong to remedy

The functional losses catalogued above are, in a sense, the more tractable part of the problem. They can in principle be addressed through targeted reform. It can be approached from the building of disgorgement mechanisms into accepted commitments,

¹⁹ Wils (2006), *op. cit.*, p. 7.

²⁰ *Ibid.*; Council Regulation (EC) No 1/2003 [2003] OJ L 1/1, Art. 16(1).

²¹ Dunne, N. (2014). Commitment decisions in EU competition law. *Journal of Competition Law and Economics*, 10(2), 399, p. 442.

or by extending the evidentiary value of commitment decisions to follow-on damages claimants. What is harder to address, because it goes to the instrument's foundational logic, is the shift in the object of enforcement that Article 9 has produced. Article 9 has effected a shift in the focus of enforcement from the wrong to the remedy. The question that drives the proceeding is no longer what the undertaking did and whether it constituted an infringement, but rather what remedy the Commission wants and whether the undertaking is prepared to offer it. The theory of harm is not adjudicated; instead, it is used as leverage. The Commission need not spend energy formulating or defending a theory of harm, because it is never required to prove it.²²

The result is an enforcement mechanism that operates closer to economic regulation than to legal adjudication.²³ Commitment decisions emphasise prospective market improvement over the punishment of past transgression; they prescribe ongoing market obligations rather than establishing legal responsibility for past conduct; and they pursue longer-term efficiency concerns rather than vindicating the rights of those harmed. This regulatory conception can be considered a double-edged sword since it expands the utility of the enforcement toolkit, but raises serious concerns regarding the rule of law, the separation of powers, economic coherence, and political interference.²⁴ It is worth considering if we accept the imbalance in the weights.

Commitment decisions sit in a procedural no-man's land. They are not adjudication, as no legal standard is applied and tested. But they are not regulation either, at least not in any sense that carries the procedural guarantees that formal regulatory regimes require. They borrow the binding force of law and the flexibility of contract and inherit the accountability mechanisms of neither.²⁵

A further underlying asymmetry compounds the problem. In commitment proceedings, the Commission has access to a range of available remedies substantially greater than what it could impose unilaterally under Article 7.²⁶ The proportionality constraint that limits Article 7 remedies does not operate with equivalent force under Article 9, precisely because the commitment is formally proposed by the undertaking. This asymmetry creates perverse incentives: undertakings with strong aversion to litigation risk may propose remedies that go significantly beyond what the conduct in question would have warranted under a full Article 7 analysis. Consequently, the legitimacy of this process, which is being presented as a free agreement between the parties, may be flawed. It is neither the product of adversarial adjudication nor a proportionate regulatory response, but a negotiated settlement whose content reflects the relative bargaining positions of the parties rather than the requirements of law.

These concerns reveal a fundamental misalignment between the instrument's operational logic and the legal order it purports to serve. Article 9 is not incompatible with effective competition enforcement in markets characterised by rapid tipping points and structural irreversibility; enforcement speed is a genuine necessity. The Intel proceedings lasted approximately twenty-four years from the original complaint to the final judgment of the Court of Justice. The market that the Commission sought to protect had already tipped irreversibly long before any judicial resolution was possible. If that is what Article 7 enforcement looks like in practice, the case for Article 9 is not trivial. I have not found a satisfying answer to this objection within the current legal framework.

²² Gerard (2014), *op. cit.*, p. 2.

²³ Dunne (2014), *op. cit.*, p. 415.

²⁴ *Ibid.*, p. 401.

²⁵ *Ibid.*, p. 441.

²⁶ Wagner-von Papp, F. (2012). Best and even better practices in commitment procedures after Alrosa: The dangers of abandoning the 'struggle for competition law'. *Common Market Law Review*, 49(3), 929, p. 967.

What I argue instead is that the answer is not to abandon the rule of law requirements that Article 7 embodies, but to reform the procedure so that enforcement speed and legal accountability are not treated as mutually exclusive.²⁷ But effectiveness without legitimacy is not enforcement. The field of work must remain law; and within that field, the rigorous defence of theories of harm and the production of judicially accountable outcomes are not optional features but constitutive elements of what it means to enforce competition law in a Union founded on the rule of law. Competition law's claim to authority rests not on its capacity to produce efficient market outcomes but on its claim to enforce legal prohibitions through legally accountable processes. Once enforcement is reduced to the negotiated optimisation of market conditions, that claim evaporates. What remains is economic governance with a legal label.

3.3. The judicial review vacuum: Alrosa and the vicious circle

The legitimacy deficit catalogued does not arise in a judicial vacuum. One might reasonably object that robust external review of commitment decisions could compensate for the procedural deficits identified, that what Article 9 lacks in transparency, it could recover in accountability before the courts. The General Court's original judgment in *Alrosa* had precisely this effect because it imposed on the Commission a duty of full proportionality review, full protection of procedural rights including access to the file and the right to be heard, and a duty to clearly formulate the competitive concern underlying its intervention.²⁸ The General Court identified four conditions as foundational to the accountability of the procedure: a duty of investigation, a requirement to clearly formulate the competitive concern, full proportionality review, and full protection of procedural rights. Taken together, they constituted a coherent framework for ensuring that the Commission's exercise of discretion under Article 9 remained judicially controllable. The Court of Justice dismantled it.²⁹

By holding that the proportionality standard applicable to Article 9 decisions is structurally less intensive than that applicable to Article 7 decisions, the Court effectively removed the primary external constraint on the Commission's enforcement discretion.³⁰ The Court's reasoning rests on the formal voluntariness of the commitment, because the undertaking proposes the remedy rather than having it imposed. Therefore, the Commission is not required to demonstrate that the commitment represents the minimum necessary intervention. This reasoning is structurally deficient. The undertakings' freedom to liberally propose commitments is subject to a threatening alternative. They do so in the knowledge that the other option is a full infringement investigation with the prospect of fines of up to ten percent of worldwide turnover, and that once the Commission has communicated its concerns it will not withdraw them. Undertakings do not freely propose commitments. Calling that 'voluntary' is one of those legal fictions that the law sometimes needs and sometimes abuses. In this context, the argument for voluntariness is the latter kind of fiction.³¹

The practical consequence is a feedback loop that is easier to describe than to interrupt. Reduced judicial review makes Article 9 more attractive as an enforcement instrument; its increased use crowds out infringement decisions; the absence of

²⁷ CJEU, *Intel Corporation Inc. v Commission*, Case C-240/22 P, ECLI:EU:C:2024:921. The reference to Intel as an illustration of the structural enforcement speed problem.

²⁸ CFI, *Alrosa Company Ltd v Commission*, Case T-170/06, ECLI:EU:T:2007:220, paras. 197–199.

²⁹ Schweitzer (2008), *op. cit.*, p. 26.

³⁰ CJEU, *Commission v Alrosa*, Case C-441/07 P, *op. cit.*, paras. 38–48.

³¹ Jenny (2015), *op. cit.*, p. 761.

infringement decisions leaves Articles 101 and 102 increasingly underdeveloped in precisely the domains, platform self-preferencing, data-access obligations, ecosystem tying, where authoritative interpretation is most urgently needed; and that legal vacuum, in turn, increases pressure on the Commission to resolve cases quickly through commitments rather than wait for the decade-long process that an Article 7 decision and its subsequent judicial review would require. I am not aware of any mechanism within the current institutional architecture that would interrupt this dynamic, and that is precisely the structural problem this paper seeks to address.³² The Commission simultaneously embodies investigative, prosecutorial, and decision-making functions. This combination constitutes a concentration of power that makes external judicial review not merely desirable but constitutionally necessary.³³ Alrosa has erased the primary mechanism through which that review was exercised, and neither the legislature nor the Court has moved to restore it.

There is one consequence of binding commitment decisions that the literature has not, in my view, sufficiently examined: regulatory estoppel. The existence of a binding commitment creates expectations, whether for the investigated undertaking, for third parties, and for national competition authorities, that constrain subsequent enforcement even where the underlying conduct was never found to be unlawful.³⁴ Third parties affected by commitment decisions face the compounded disadvantage of not having the right of standing to challenge the decision, a difficult access to the Commission's file, and no binding finding of infringement on which to anchor a damages claim. Their interests may be substantially affected by commitments that extend far beyond the parties to the proceeding and the markets at issue, without any procedural mechanism for their protection, as the Coca-Cola case illustrated with clarity.³⁵

4. UNCONSTRAINED DISCRETION: THE ACCOUNTABILITY DEFICIT AND THE STRUCTURAL REMEDIES PARADOX

4.1. The comparative perspective: transparency, judicial accountability, and the Tunney Act

The consent decree of the US Department of Justice is the American precursor to the commitment procedure. This is a connection that the legislative history of Regulation 1/2003 acknowledges and that the academic literature has examined, though not always with the critical attention it deserves.³⁶ The comparison is instructive, not as an exercise in comparative law for its own sake, but because it illuminates with clarity what the European procedure systematically lacks.

Under the Tunney Act, consent decrees in federal antitrust proceedings require judicial approval following a mandatory period of public consultation.³⁷ The court is empowered to assess whether the proposed decree is in the public interest. This standard, whatever its limitations in practice, introduces an external check on the prosecutorial discretion of the enforcing authority. Third parties may submit comments. The theory of harm underlying the government's concerns is publicly articulated and judicially

³² Wagner-von Papp (2012), *op. cit.*, p. 930.

³³ Schweitzer, H. (2012). Judicial review in EU competition law. In D. Geradin & I. Lianos (Eds.), *Handbook on EU Competition Law: Enforcement and Procedure*. Edward Elgar, p. 2.

³⁴ Jenny (2015), *op. cit.*, p. 723.

³⁵ *Ibid.*, pp. 724–726.

³⁶ Wagner-von Papp (2012), *op. cit.*, p. 967.

³⁷ Antitrust Procedures and Penalties Act (Tunney Act), 15 U.S.C. § 16; Wagner-von Papp (2012), *op. cit.*, p. 967.

scrutinised. The outcome, however negotiated, is anchored in a public interest determination made by an independent institution.

The European commitment procedure offers none of these safeguards in equivalent form. The Commission communicates its preliminary concerns to the investigated undertaking, invites commitments, conducts a market test, and adopts a binding decision and all of the above without meaningful judicial involvement in the substantive assessment of the remedy's adequacy.³⁸ There is no independent arbiter empowered to assess whether the commitments offered serve the public interest rather than the institutional and political interests of the Commission. There is no structural mechanism for ensuring that the theory of harm underlying the Commission's concerns bears a proportionate relationship to the remedies ultimately accepted. The market test that Regulation 1/2003 requires is a consultative procedure, not a judicial one, and its results do not bind the Commission's final assessment.³⁹

The absence of any external accountability mechanism is the precondition for every other distortion this paper has identified. Without it, neither the scope creep of Article 9 into structural remedies, nor the vicious circle of reduced judicial review, could have developed as it has. Without a Tunney Act equivalent the commitment procedure operates as a closed negotiation between a regulator with unlimited prosecutorial discretion and an undertaking with strong incentives to settle, producing outcomes that are binding on the market but accountable to no one. The call for greater transparency in commitment proceedings and for the introduction of some form of independent adequacy review is not merely a procedural reform. It is, at minimum, what the rule of law principle requires of any public authority that exercises binding regulatory power over markets and private parties without the constraints of adversarial adjudication. And this is precisely what the Commission does under Article 9.⁴⁰

4.2. The structural remedies paradox: Article 9 as legislative and regulatory bypass

The most acute distortion produced by the commitment procedure's unconstrained discretion emerges not in the domain of behavioural remedies, but in that of structural ones. Article 7(1) establishes an explicit hierarchy of remedies: structural measures, such as divestiture, ownership unbundling, reorganisation, may only be imposed where no equally effective behavioural alternative exists, or where the behavioural alternative would be more burdensome.⁴¹ The reason is not hard to see. Structural remedies are permanent. They alter ownership configurations that cannot easily be reconstituted if the underlying theory of harm later proves mistaken. They are, in competition enforcement terms, the last resort which is why Article 7 reserves them as such.

Article 9 does not replicate this hierarchy. Because commitments are formally proposed by the undertaking, the Commission is not bound by the proportionality constraints that Article 7 imposes on unilaterally adopted remedies. The paradox that arises is that an instrument designed as a procedural shortcut for straightforward cases has become the vehicle through which the Commission imposes structural remedies that it could not lawfully adopt under the instrument designed for serious infringements. The energy sector provides the most striking illustration of this paradox. Over a period of approximately six years, the Commission accepted a series of structural commitments in energy market cases that required major undertakings to divest infrastructure assets,

³⁸ Council Regulation (EC) No 1/2003, Article 9; Schweitzer (2008), *op. cit.*, p. 27.

³⁹ Council Regulation (EC) No 1/2003, Article 27(4).

⁴⁰ In the same sense, Wagner-von Papp (2012), *op. cit.*, p. 967.

⁴¹ Council Regulation (EC) No 1/2003, Article 7(1).

unbundle network operations, and open access to competitors in ways that fundamentally restructured the affected markets.⁴² These structural outcomes were not merely proportionate responses to identified competitive concerns. They were, in several instances, the regulatory outcomes that Member States had refused to achieve through legislative means. In other words, the Commission used Article 9 to accomplish by negotiated enforcement what the political process had declined to deliver by legislation. This is constitutionally troubling for reasons that go beyond the specific content of any individual commitment. When the Commission accepts structural commitments that restructure markets in ways that Member States have politically declined to endorse, it exercises a form of regulatory power that lacks democratic legitimacy. At that point, the commitment procedure is no longer doing what competition enforcement is supposed to do. It is restructuring markets in ways that Member States have declined to authorise through legislation, using a procedural instrument that carries no democratic mandate and is subject to no meaningful judicial scrutiny. The literature calls this technocratic governance. The description is accurate, but it understates the problem because at least technocratic regulatory agencies are typically subject to parliamentary oversight and judicial review of their decisions. The Commission acting under Article 9 is subject to neither.⁴³

The Coca-Cola commitment decision illustrates the same dynamic in a different register. The commitments accepted by the Commission in that case extended to bottlers and distributors who were not parties to the original proceeding, and produced binding obligations in markets and territories that had not been the subject of the competitive concern under investigation.⁴⁴ Under Article 7, such an extension would have required the Commission to establish an infringement affecting each of those parties and markets, and to justify the proportionality of each remedy in relation to each established infringement. Under Article 9, no such justification was required — the formal voluntariness of the commitment rendered the proportionality question largely moot. The result was a binding restructuring of contractual and commercial relationships across multiple markets, imposed without legal findings, without proportionality review, and without procedural protection for the affected third parties.

The Coca-Cola case is not an anomaly that can be attributed to circumstances or to an unusually expansive Commission formation. The extension of commitments beyond the parties and markets at issue was possible precisely because Article 9 contains no mechanism that would have prevented it. What is possible under a procedure with unlimited discretion will, over time, become normal. The shift is both conceptual and procedural, from an instrument that terminates infringements to an instrument that constructs market conditions.⁴⁵ That shift has occurred without legislative authorisation, without judicial validation, and without democratic accountability. It represents, in the most precise sense, an abuse of the margin of discretion that Alrosa conferred.

5. TOWARDS A REFORMED ARTICLE 9: NECESSITY, LEGITIMACY, AND THE LIMITS OF DISCRETION

The analysis developed in the preceding sections does not lead to the conclusion that Article 9 should be abolished. That conclusion would be both legally unnecessary and practically indefensible. The commitment procedure responds to a genuine structural

⁴² Jenny (2015), *op. cit.*, pp. 727–730.

⁴³ *Ibid.*

⁴⁴ *Ibid.*, pp. 724–726.

⁴⁵ Gerard (2014), *op. cit.*, p. 2.

problem in EU competition enforcement: the inherent slowness of Article 7 proceedings, characteristic of dealing with new and complex situations, in markets where competitive harm accumulates irreversibly and tipping points are reached long before any judicial resolution is possible.⁴⁶ A legal order that can only enforce competition law through instruments that arrive a quarter of a century after the harm they address has failed at its most fundamental task. Article 9 exists, at its best, as a response to that failure.

But the necessity of an instrument does not validate its current operation. The question is not whether the commitment procedure should exist, but whether it should continue to exist in its present form. The Commission will, by institutional logic, always tend to expand the scope of its own discretion and to prefer instruments that insulate its enforcement choices from judicial scrutiny. That tendency is a structural feature of any enforcement institution operating without adequate external constraints more than a moral failure. It is precisely the role of the legislature and the judiciary to impose those constraints. Neither has done so with the rigour that the current state of the commitment procedure demands.⁴⁷

What follows are three proposals. They are not of equal feasibility, and I present them in that order: from what could be done within the existing legal framework, through what would require legislative intervention, to what would require the Court of Justice to revisit its own reasoning in *Alrosa*. The third may be the least realistic, but its weight lies in the importance of its approach.

The first is procedural and immediately achievable within the existing legal framework. The Commission should establish, through a binding Notice or through revision of the 2014 Communication, an explicit criterion providing that once a Statement of Objections has been issued articulating a detailed preliminary theory of harm, the case may not be closed by commitment decision unless exceptional and publicly stated circumstances justify the departure. The Statement of Objections marks the threshold at which the doctrinal cost of Article 9 becomes disproportionate. Before its issuance, the competitive concern is preliminary, and the commitment's speed advantage is legitimate. After its issuance, the Commission has developed a theory of harm in sufficient detail to sustain an infringement decision, and the legal order has a legitimate claim to the precedent that such a decision would produce. The Commission's current practice of issuing a Statement of Objections and then closing the case by commitment represents a choice to deploy the investigative machinery of Article 7 while insulating the outcome from the accountability that the rule of law demands. The objection that this proposal would reduce enforcement flexibility is not without force. There will be cases where a Statement of Objections has been issued and circumstances nonetheless change in ways that make a commitment decision genuinely preferable. The proposal does not exclude that possibility, but it requires that the Commission publicly justify the departure. The proposed threshold is a modest constraint; the current practice imposes none.⁴⁸

The second reform addresses the structural absence of independent adequacy review through the introduction of a judicial or quasi-judicial arbiter, empowered to assess, on the application of third parties or *ex officio*, whether the commitments accepted by the Commission are proportionate to the concerns identified and adequate to protect the interests of affected parties. This would restore a degree of external control that *Alrosa* eliminated.⁴⁹ The objection that this would judicialize the commitment procedure and

⁴⁶ CJEU, *Intel Corporation Inc. v Commission*, Case C-240/22 P, *op. cit.*

⁴⁷ Wagner-von Papp (2012), *op. cit.*, p. 931.

⁴⁸ *Ibid.*; Botteman, Y., & Patsa, A. (2013). Towards a more sustainable use of commitment decisions in Article 102 TFEU cases. *Journal of Antitrust Enforcement*, 1(2), 347.

⁴⁹ Jenny (2015), *op. cit.*, p. 762.

thereby defeat its purpose is a reasonable one, and I do not want to dismiss it. The proposal does not attempt a full adversarial review of the Commission's enforcement choice, but an independent assessment of whether the commitments accepted are proportionate to the concerns identified and adequate to protect the interests of affected parties. The analogy with the Tunney Act is instructive not as a model to be replicated wholesale but as evidence that the combination of enforcement flexibility and judicial accountability is institutionally achievable.⁵⁰

The third reform is the most structurally ambitious, which is why it is the most legally complex. It entails the attribution of limited precedential value to the legal determinations implicit in commitment decisions. At present, the Commission's decision to accept commitments addressing a particular type of conduct carries no formal legal weight as to the characterisation of that conduct under Articles 101 or 102 TFEU. Undertakings, national competition authorities, and national courts can derive no binding guidance from commitment decisions on the legal standards applicable to the conduct in question. This reproduces the vicious circle identified in the preceding section where the more the Commission relies on Article 9, the less the legal order knows about what Articles 101 and 102 require, and the more it depends on further commitment decisions to manage competitive concerns whose legal contours remain undefined.⁵¹

The problem is compounded by what might be termed regulatory estoppel. The existence of a binding commitment generates expectations, for the investigated undertaking, for national competition authorities, and for third parties, that constrain subsequent enforcement even where the underlying conduct was never found to be unlawful. The Commission cannot easily reopen a case whose competitive concern has been formally addressed by a commitment decision, even where the commitments prove inadequate or the market develops in ways that the original negotiation did not anticipate. Attributing limited precedential value to the legal determinations implicit in commitment decisions would not resolve this estoppel effect entirely, but it would ensure that the legal standards informing subsequent enforcement are at least publicly articulable rather than tacitly embedded in negotiated outcomes.

Breaking this circle requires that commitment decisions be accompanied by a reasoned statement such as a public articulation of the theory of harm and the legal standard against which the Commission assessed the conduct, that national courts and competition authorities may consider in subsequent proceedings. This would not transform commitment decisions into infringement decisions. It would restore the connection between enforcement action and legal development that the current procedure serves and would ensure that the Commission's engagement with novel theories of harm in digital markets produces something of legal value beyond the immediate market correction.

None of these three proposals abolishes the commitment procedure or strips it of its most useful features. What they share is a refusal to accept that enforcement speed and institutional accountability are inherently in tension, a claim that the Tunney Act experience in the United States demonstrates to be false. The costs of the current arrangement are too significant to be accepted without scrutiny. The procedure can be fast and legitimate. It is currently fast and unaccountable. That is not a trade-off the rule of law authorises. Without these conditions, the commitment procedure will continue to expand the Commission's regulatory reach at the expense of the legal order's coherence and so the pursuit of enforcement effectiveness will continue to be purchased at the price

⁵⁰ Wagner-von Papp (2012), *op. cit.*, p. 967. In the same sense, Georgiev, G. S. (2007). Contagious efficiency: The growing reliance on US-style antitrust settlements in EU law. *Utah Law Review*, 971.

⁵¹ Wagner-von Papp (2012), *op. cit.*, p. 931.

of enforcement legitimacy. That is a transaction that a Union founded on the rule of law cannot indefinitely sustain and should not be asked to.

6. CONCLUSIONS

The commitment procedure established by Article 9 of Regulation 1/2003 presents EU competition law with a dilemma that cannot be resolved by institutional inertia. The argument of this paper can be stated simply, though its implications are not. The commitment procedure has become something its drafters did not design, and its defenders cannot fully justify. It has become the Commission's default instrument for resolving its most consequential non-cartel cases, operating without meaningful external scrutiny, producing no binding legal standards, and insulating the Commission's enforcement choices from the judicial accountability that the rule of law principle requires. The procedure's apparent virtues: speedy as possible, flexibility, market correction without adversarial delay. And all of those are real, and so is the price. The legal order has been slow to calculate it honestly.

These are not incidental deficiencies. The drafters of Regulation 1/2003 designed Article 9 as an exceptional instrument for straightforward cases where the Commission's concerns could be addressed quickly and cooperatively. It is now the preferred instrument for the most complex and consequential cases in the enforcement portfolio. That inversion did not happen because of individual decisions that can be criticised in isolation. It happened because a procedure without meaningful external constraints will, given sufficient institutional time and prosecutorial interest, expand to fill the available space. That is not a failure of the Commission's intentions. It is a predictable feature of institutional design without adequate checks. The connection between enforcement action and legal development and the capacity of competition law to articulate, through adversarial adjudication and judicial review, what Articles 101 and 102 TFEU require, has been progressively severed by each commitment decision that resolves a novel legal question without answering it.

This paper has argued for three reforms that would restore the conditions of legitimate operation without sacrificing the instrument's genuine utility. The Statement of Objections threshold would ensure that the Commission's investigative investment translates into legal development rather than administrative settlement. Independent adequacy review would restore the external accountability that Alrosa eliminated. Limited precedential value for the legal determinations implicit in commitment decisions would break the vicious circle through which increased reliance on Article 9 generates the legal uncertainty that makes further reliance on it inevitable. None of these reforms abolishes the commitment procedure. All of them insist that it operate as law rather than as mere administration.

The deeper question that this paper has raised is whether the systematic displacement of infringement decisions by commitment decisions in digital markets reflects a deliberate and legitimate choice about the kind of enforcement the Union wishes to pursue, or an institutional drift that has proceeded without conscious decision and without democratic validation. If the former, it should be acknowledged and defended on its merits. If the latter, it must be reversed. That question, ultimately, only the legislature and the judiciary can answer.

The argument that procedural legitimacy is a luxury the legal order cannot afford in markets where harm accumulates in months is not one I accept. Far from mere procedural formalism, enforcement that cannot be publicly justified, that cannot articulate what rule was violated, why the remedy is proportionate, and who scrutinised both, is not

enforcement in any meaningful legal sense. It is a pure administrative act with a competition law label. The difference matters, not as a matter of principle divorced from consequence, but because the authority of competition law in digital markets depends on its capacity to produce standards that bind the Commission as much as they bind the undertakings it investigates. The values and principles enshrined in the Treaty, the procedural rights of undertakings and third parties, the coherence of the legal order, and the democratic accountability of enforcement institutions are not obstacles to effective competition policy. They are its foundation. When enforcement effectiveness is purchased at their expense, it is not competition law that prevails, it is, rather, the administrative convenience of the enforcer.

Three questions remain open that this paper has identified but not resolved. First, the empirical relationship between the frequency of commitment decisions and the development of competition law doctrine in digital markets deserves systematic study. Specifically, whether the legal standards applicable to self-preferencing, data-access obligations, and ecosystem tying have developed more slowly in jurisdictions with high rates of commitment-based resolution than in those with a higher proportion of infringement decisions. Second, the interaction between Article 9 and the enforcement architecture of the Digital Markets Act raises questions about institutional coordination and procedural duplication. Third, the proposal for limited precedential value requires further development. The precise legal mechanism through which such value could be attributed, and the limits of its application in subsequent proceedings, are questions that go beyond what this paper can resolve.

The certainty that Article 9 produces is genuine, but it is the certainty of a settlement, not of a judgment. It resolves the immediate dispute between the Commission and the investigated undertaking; it contributes nothing to the legal order's understanding of what Articles 101 and 102 require. In markets where competitive harm accumulates irreversibly and where the absence of legal standards encourages further abuse by undertakings that can calculate the worst-case outcome, that distinction is not academic. A procedure that resolves cases without deciding them has not enforced the law. It has administered around it. Effective competition enforcement in the digital economy does not require the abandonment of adversarial procedure and judicial accountability, quite the opposite. It requires institutional arrangements capable of combining both. What the commitment procedure in its present form offers instead is administrative speed purchased at the cost of legal development. A trade that the rule of law principle, properly understood, does not, or must not, permit.

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