

CHALLENGE OR CONVENIENCE? COMMITMENT DECISIONS IN EU COMPETITION LAW

Niamh Dunne
King's College London

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Article 9 of Regulation 1/2003

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

Commitment decisions: “give and take”

“Undertakings which offer commitments on the basis of Article 9 of Regulation No 1/2003 consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the regulation after a thorough examination. On the other hand, the closure of the infringement proceedings brought against those undertakings allows them to avoid a finding of an infringement of competition law and a possible fine.”

C-441/07 P *Commission v Alrosa*, para.48

The Mechanics of Article 9

- Market-testing (Art.27, Reg.1/2003)
 - The “democratic accountability” element?
- Compliance procedures (Arts.9(2) & 23(2)(c), Reg.1/2003)
 - See e.g. *Microsoft (Tying)* investigation (OJ C 120/15, 26.4. 2013)
- Judicial review?

“Application of the principle of proportionality by the Commission in the context of Article 9 of Regulation No 1/2003 is 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.”

C-441/07 P *Commission v Alrosa*, para.41

“Conveniences” of Article 9

- Procedural **economy** and **efficiency**
 - Quicker and cheaper
 - Reallocation of Commission resources (e.g. sector inquiries)
 - Faster solutions to on-going problems
- **Problem-solving**: positive, durable solutions
 - e.g. ratemaking, divestment, modification of T&Cs, increased consumer choice, investment...
 - Contrast with “proscription and punishment” approach of Article 7
- **Certainty**
 - For *firms*: avoidance of infringement decision, increased certainty re acceptability of future market behaviour...
 - For the *Commission*: improved markets, less judicial scrutiny...

“Challenges” of Article 9

- Recurrent use to address **novel/controversial case theories**
 - e.g. patent ambush, strategic under-investment as refusal to supply, excessive pricing
 - Legitimacy in absence of administrative/judicial scrutiny?
 - Precedential value of these decisions?
- **Strategic** application of Article 9
 - Weaker case theories (e.g. *Rambus*)
 - Supplement other competition provisions (e.g. airline alliance cases)
 - Achieve goals outside realm of antitrust (e.g. energy cases)
 - Part of a bargaining process (e.g. *E-BOOKS (Penguin)*)
- **Politicisation** of competition law via Article 9
 - e.g. Google and the European Parliament!