

Commitment Decisions in EU Competition Law: When is Article 9 of Regulation 1/2003 Applicable?

*A Legal Analysis on the Area of Application of Article 9 of
Regulation 1/2003.*

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Abbreviations

CJEU: Court of Justice of the European Union

ECJ: European Court of Justice

EEA: European Economic Area

EFTA: European Free Trade Association

ESA: EFTA Surveillance Authority

EU: European Union

GC: General Court

SCA: Surveillance and Court Agreement

TEU: Treaty on European Union

TFEU: Treaty on the Functioning of the European Union

1 Introduction

The topic of this master's thesis is public enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) by means of commitment decisions under Article 9 of Regulation 1/2003.

The European Commission (Commission) has in the last two decades been empowered with several alternative enforcement instruments to prohibition decisions under Article 7 of Regulation 1/2003.¹ These are instruments such as the leniency programme, the cartel settlement scheme, and the commitment decision scheme. When Regulation 1/2003 entered into force May 1, 2004, the Commission initially believed that commitment decisions would be unusual and infrequent.² However, the number of decisions under Article 9 of Regulation 1/2003 turned out to be a lot higher than first expected. Leaving out decisions in cartel cases, Article 9 of Regulation 1/2003 has been and still is the dominating enforcement instrument in the Commission's enforcement of the European Union (EU) competition rules.³

The choice between a prohibition decision under Article 7 and a commitment decision under Article 9 constitutes an antitrust dilemma. On the one hand, prohibition decisions could set legal precedent, ensure effective deterrence through the imposition of a fine, and, by establishing an infringement of Articles 101 or 102, provide supporting evidence for third-party private litigants in follow-on actions for damages. On the other hand, commitment decisions could shorten the administrative procedure, adopt more efficient remedies, and thus have a quicker impact on the market. Choosing to adopt a commitment decision would to a substantial extent out rule the gains from an Article 7 procedure – and vice versa.

However, inherent in the scheme, commitment decisions are rarely challenged before the Court of the European Union (CJEU). By making a habit out of commitment decisions, the Commission moves itself farther away from the judicial branch. Because commitment decisions are not challenged before the European Court of Justice (ECJ), we might risk that a "parallel" competition policy will develop outside the scope of judicial review.⁴ From a general interest perspective: With a view to especially judicial development, legal certainty, and legal

¹ "The Commission" refers to the actions and policies of the Competition Directorate-General (DG COMP).

² Allendesalazar, Bach, Bartolini, and others (2010) p. 186.

³ See Table 1. The distinction of years shown by a blue line corresponds to the mandate of the last three Competition Commissioners. Cartel cases are subject to a different settlement scheme and are therefore excluded from the statistics.

⁴ Allendesalazar, Bach, Bartolini, and others (2010) p. 525.

predictability, a too large use of commitment decisions under Article 9 of Regulation 1/2003 could have crucial consequences.

It is therefore important to establish the scope of the area of application of Article 9 of Regulation 1/2003. Hence, the research question in this thesis is: When is Article 9 of Regulation 1/2003 applicable?

In order to answer the research question of whether one can establish a legal rule on the area of application of Article 9 of Regulation 1/2003, this thesis will address the following questions:

- i) How does the key characteristics of Article 9 of Regulation 1/2003 define the scope of its area of application?
- ii) How does the last sentence in Recital 13 in the preamble to Regulation 1/2003 limit Article 9's area of application?
- iii) With an emphasis on judicial development, legal certainty, and legal predictability: Should Article 9 of Regulation 1/2003 be modified?

This thesis is structured as follows.

Chapter 2 argues why it is adequate to analyse the commitment decision scheme on the basis of EU law. Further, it gives account for the available sources of law and the methodical challenges to the following analysis. Together with a brief overview of Articles 7 and 9 of Regulation 1/2003, chapter 3 provides an overview of Regulation 1/2003 and its predecessor Regulation 17. Furthermore, it presents updated statistics on the use of the two procedures.

In order to answer the research question, I have organised the following analysis into two chapters. Through a comparison of Articles 7 and 9, chapter 4 gives account for the key characteristics of Article 9 and asks whether these characteristics influence Article 9's applicability. Chapter 5 analyses Recital 13 last sentence in the preamble to Regulation 1/2003 and asks whether it imposes any limitations to the area of application of Article 9.

The discussions in chapter 4 and 5 form the basis for the discussions in chapter 6, which asks whether Article 9 of Regulation 1/2003 needs modifications.

Finally, chapter 7 presents an overall conclusion on the research question.

2 Sources of law and legal method

This master's thesis conducts a legal analysis of Article 9 of Regulation 1/2003.⁵ It does not concern the legal basis for the adoption of commitment decisions in the European Economic Area (EEA)/European Free Trade Association (EFTA)⁶ or Norway. This chapter argues why it is adequate to analyse the thesis question on the basis of EU law. Moreover, it gives account for the available EU sources of law and the legal methodology applied to the following analysis.

2.1 The legal basis for the following discussions

Since the Norwegian Competition Act Section 12 (3) entered into force in 2014, the Norwegian Competition Authority has not adopted any commitment decisions. The EFTA Surveillance Authority (ESA) has adopted one commitment decision.⁷ By contrast, the Commission has adopted 44 commitment decisions since Article 9 entered into force May 1st, 2004.⁸ Among the Norwegian courts, the EFTA Court and the CJEU, only the latter has ruled on the application of Article 9 of Regulation 1/2003. It is evident that this is linked to the Commission's frequent use of the scheme. Because there is little practice on the Norwegian and the EEA/EFTA commitment decision schemes, this subchapter argues why Article 9 of Regulation 1/2003 is the adequate starting point for the following analysis.

The Norwegian Competition Act Sections 10 and 11 are equivalent provisions to the EEA Agreement Articles 53 and 54.⁹ Further, the EEA Agreement Articles 53 and 54 are equivalent provisions to Articles 101 and 102 TFEU.¹⁰

The Norwegian Competition Act of 2004 Section 12 (3) empowers the Norwegian Competition Authority to enforce the Act's Section 10 and 11 through the adoption of commitment decisions. ESA is empowered to enforce the EEA Agreement Article 53 and 54 by means of commitment decisions on the basis of the Surveillance and Court Agreement (SCA).¹¹ The

⁵ 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, pp. 1-25.

⁶ The EEA consists of the EU and the EFTA member states Norway, Iceland, and Lichtenstein. The EFTA Member State Switzerland is not party to the EEA Agreement.

⁷ Case No. 61291, Liechtensteinische Kraftwerke Anstalt and Telecom Liechtenstein AG.

⁸ See Table 1.

⁹ Act of 5 March 2004 No. 12 on competition between undertakings and control of concentrations.

¹⁰ Agreement on the European Economic Area, p. 19-20.

¹¹ Surveillance and Court Agreement Protocol 4, Part II, Section III Article 9.

respectively legal bases for commitment decisions in the EEA/EFTA and Norway are built on and largely reflect Article 9 of Regulation 1/2003. The Norwegian Competition Act Section 12 (3), taken into consideration the desire for a harmonized body of rules, is meant to largely correspond to the commitment decision provisions set out in Regulation 1/2003/SCA, Protocol 4, Part II, Article 9.¹² The practice related to both Articles is relevant to further interpretation of the Norwegian provision.¹³

2.2 Sources of law and legal method

Based on the above, the adequate starting point for examining the research questions is EU law. Thus, EU legal methodology is applied to the following research. The scope of this thesis does not allow for a thorough elaboration on EU legal methodology. Together with key characteristics of EU legal methodology, this subchapter presents the legal method applied in the following analysis.

The EU Treaties and the European Charter of Fundamental Rights are classified as primary law.¹⁴ Accordingly, Articles 101 and 102 TFEU are classified as such. Article 288 of the Treaty on European Union (TEU) establishes the legal acts called secondary law, which rank below primary law. According to Article 288 TEU, the binding acts include regulations, directives and decisions, and the non-binding acts include recommendations and opinions. Primary law does not give any guidance as to the applicability of Article 9 of Regulation 1/2003. Regulation 1/2003 is therefore the primary source of law in the following analysis. However, Regulation 1/2003 does not provide sufficient guidance to establish a legal rule on the area of application of Article 9.

EU legal methodology is functional and is characterised by a teleological approach to legal interpretation. This means that the purpose of a rule is attributed more legal weight than its wording.¹⁵ The ECJ is the superior judicial interpreter and plays a large role in the interpretation of EU legislation.¹⁶ However, inherent in the voluntary nature of commitment decisions, there are only a few judgments from the ECJ in which Article 9 of Regulation 1/2003 is interpreted.¹⁷

¹² Prop. 75 L (2012-2013) p. 21-32.

¹³ *Ibid.* p. 142.

¹⁴ Ackermann, Dohrmann, Babusiaux, and others (2017) p. 120.

¹⁵ *Ibid.* p. 256.

¹⁶ *Ibid.* p. 527.

¹⁷ C-441/07 *Alrosa*; C-547/16 *Gasorba and Others v Repsol*

In the following analysis, I look towards Recital 13 in the preamble of Regulation 1/2003, the preparatory work to Regulation 1/2003, the Commission's decisional practice, and the Commission's guidelines. These sources are neither primary nor secondary law and therefore they do not have binding legal force. Based on this, the main challenge to the following analysis is therefore the lack of binding sources of law. In the following, I will argue why these sources nevertheless are attributed legal weight in this thesis.

Recital 13 in the preamble of Regulation 1/2003 gives expression to a limitation on Article 9's area of application. In principle, it "has no binding legal force and cannot be relied on either as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording".¹⁸ Nonetheless, Recital 13 plays a central role in a teleological interpretation of Article 9 of Regulation 1/2003.¹⁹ Further, the preparatory work to Regulation 1/2003 also plays a role in purposive interpretation. In this regard, the White Paper on modernisation is the prerequisite to the proposal to implement Regulation 1/2003 and is extensively reasoned.²⁰ Where the text is unambiguous, these sources will be attributed weight in the following analysis. Conversely, where the text in the recital or the preparatory work is ambiguous, meaning that it can be interpreted differently, it will be afforded less weight.

Further, it is a matter of course that the judgments from the CJEU have greater legal force than administrative decisions made by the Commission. This is because the CJEU usually has jurisdiction to review the Commission's decisions.²¹ However, in the enforcement of Articles 101 and 102 TFEU, commitment decisions are rarely challenged before the CJEU. Because of this, judicial review of commitment decisions under Article 9 of Regulation 1/2003 is limited. The Commission's decisional practice is therefore attributed legal weight in the following analysis. Closely related to this are the Commission guidelines, i.e. notices. Such instruments have been coined *soft law* and are not legally binding. However, the vagueness of both primary and secondary provisions of EU competition law (*hard law*), leaves the Commission a considerable margin of discretion.²² The Commission's guidelines give expression to the Commission's own practice and is therefore afforded legal weight in the following analysis.

¹⁸ C-136/04 Deutsches Milch-Kontor, para. 32.

¹⁹ Ackermann, Dohrmann, Babusiaux and others (2017) p. 249.

²⁰ White Paper on modernisation.

²¹ Lomio and Spang-Hanssen (2009) p. 137-138.

²² Ackermann, Dohrmann, Babusiaux and others (2017) p. 519.

In connection with the Commission's decisional practice, some empirical data is gathered. This data is used to shed light on the Commission's practice to provide insight into when the Commission has applied Articles 7 and 9 since the introduction of Regulation 1/2003. Together with the already collected data on the Commission's decisional practice from 2000-2015²³, I have collected and assembled the data on the Commission's decisional practice from 2016-2019.²⁴ Supplements to the data from 2005-2015 has been added where such have been missing. Furthermore, I have analysed the Commission's decisions from 2005-2019 to produce an overview of the procedural steps in the different decisions. Lastly, I have analysed and produced an overview of the Commission's decisions in different industrial sectors per year.

The data provides important background information for answering the research question. The empirical data is contained in "Tables and charts" at the end of this paper.

²³ Wils (2015) pp. 7-8.

²⁴ The data is updated till May 7, 2019.

3 Regulation 1/2003 – overview and statistics

This chapter provides an overview of Regulation 1/2003 and its predecessor Regulation 17, and a brief introduction to Articles 7 and 9. Further, the statistics on the application of Articles 7 and 9 of Regulation 1/2003 are accounted for. The purpose of this chapter is to introduce the current enforcement system and how it has been applied in practice.

3.1 The modernisation reform

Prior to May 1st, 2004, the legislative basis for enforcement of Articles 101 and 102 TFEU were contained in Regulation 17.²⁵ Under Regulation 17, the Commission had the sole power to grant an individual exemption under Article 101 (3).²⁶ Under this authorisation system, undertakings had to notify their practices described in Article 101 (1) in order to apply for an individual exemption under Article 101 (3). Hence, Regulation 17 contained an *ex ante* control mechanism, meaning that the Commission assessed the undertaking's conduct beforehand.²⁷ This resulted in undertakings systematically notifying their practices.²⁸ In 1967, the Commission was faced with 37 450 cases that had accumulated since Regulation 17's entry into force.²⁹

Under Regulation 17, the Commission did close some of its investigations on the condition of obligations/commitments in several ways. Firstly, the Commission granted "negative clearance" under Article 2 of Regulation 17 if the Commission, based on the facts in the case, certified that there were no grounds for action. Article 2 did not explicitly open up for this practice, but it is clear that several cases were closed by the means of such "negative clearance".³⁰ Secondly, in order to speed up the processing of applications for an individual exemption under Article (3), the Commission settled its investigations through an informal "comfort letter".³¹ These letters informed undertakings that the notified agreement either did

²⁵ EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty

²⁶ Jones and Sufrin (2016) p. 886.

²⁷ White Paper on modernisation, point 24, p. 12

²⁸ Ibid.

²⁹ Ibid. point 25, p. 10.

³⁰ Wils (2015) p. 11.

³¹ White Paper on modernisation, point, 34, p. 15.

not meet the conditions for Article 101 (1) (negative clearance letter) or that it qualified for exemption (exemption letter).³² This became a practice in the early 70's and the Commission issued 150-200 "comfort letters" each year.³³ Lastly, it could grant a formal individual exemption decision with attached obligations under Article 101 (3). According to Article 15 (2) (b) of Regulation 17, the Commission could only impose a fine where the undertaking breached the obligations in the latter. Hence, the cases that were closed by means of negative clearance or "comfort letters" could not be effectively enforced through the threat of a fine.

The inefficiencies in Regulation 17 led to the White Paper on modernisation, which was the prerequisite for proposing Regulation 1/2003.³⁴ Regulation 1/2003 was implemented because the Commission saw the need to make enforcement of the competition rules more efficient. The Commission needed to "refocus its activities on the most serious infringements".³⁵

Regulation 1/2003 replaced the centralised notification system in Regulation 17 with a directly applicable exemption system under Article 101 (3). This meant that undertakings themselves had to assess whether their conduct fulfilled the requirements for an individual exemption under Article 101 (3). As part of Regulation 1/2003, Article 9 empowered the Commission to make commitments binding on *legal* grounds on the basis of a new type of formal decision named "commitment decision". With Article 9, the legal gap, in which the Commission could not effectively enforce compliance with obligations, was largely closed.

3.2 Article 7 and Article 9 of Regulation 1/2003

Chapter III of Regulation 1/2003 is the legal basis for the Commission's decisions in antitrust cases. Where the Commission finds that an undertaking has infringed the competition rules, it can adopt a formal prohibition decision under Article 7 of Regulation 1/2003. A prohibition decision "may" be combined with the imposition of a fine under Article 23 (2) (a). The Commission has, in fact, adopted a prohibition decision in combination with the imposition of a fine under Article 23 (2) (a) in 82 % of its prohibition decisions.³⁶

A commitment decision under Article 9 is a formal decision in which the undertakings concerned offer commitments which are made binding by the Commission's acceptance. To

³² White Paper on modernisation, 34, p. 15.

³³ Ibid. point 34, p. 15.

³⁴ White Paper on modernisation.

³⁵ Ibid. point 13, p. 5

³⁶ See Table 1.

increase transparency, the Commission is required to market test the offered commitments through publishing a concise summary of the case and the main content of the commitments, cf. Article 27 (4). Interested third parties may then submit their observations.

3.3 Statistics on decisions

In this subchapter, statistics are used to illustrate the Commission's practice on adopting Article 7 and Article 9 decisions. Table 1 shows the Article 7/Article 9 ratio between 2005-2019.³⁷ The period 2005-2009 corresponds to the mandate of Neelie Kroes, the period 2010-2014 corresponds to the mandate of Joaquín Almunia, and the period 2015-2019 corresponds to the mandate of Margrete Vestager.

The decisions from 2005-2009 show a ratio of 33 % prohibition decisions to 67 % commitment decisions. In the period 2010-2014, 35 % of the decisions were prohibition decisions, while 65 % were commitment decisions. The last period, 2015-2019, show a drastic decrease in commitment decisions with a ratio of 63 % prohibition decisions to 37 % commitment decisions. This means that during the mandate of Margrete Vestager we see a full reverse in the use of commitment decisions. Overall, for the years 2005-2019, there have been 43 % prohibition decisions to 57 % commitment decisions.

In connection with the *Google Search (shopping)* case³⁸, Commissioner Vestager stated, “It’s very important not to make a habit out of settlements”. She further stated, “They are much more quick and much more smooth and everyone can move on, but still you need occasion to develop [case law] and only our judges and going to court can do that”.³⁹ Accordingly, there has in fact been a decrease in the use of Article 9 in the period corresponding to the mandate of Vestager. In the last three years, 14 out of 19 decisions (74%) have been prohibition decisions.⁴⁰ Vestager's period as Commissioner Competition ends in 2019. Time will tell if these statistics signal a new trend.

³⁷ See Table 1.

³⁸ Case AT.39740 – Google Search (Shopping).

³⁹ Oliver and Barker (2015, March 8) (Original bracket.)

⁴⁰ See Table 1.

4 Key characteristics of the Article 9 procedure

The previous chapter established that the commitment decision procedure is more frequently used than the Article 7 procedure. In order to answer the research question, this chapter clarifies the commitment decision procedure. Three key characteristics of Article 9 are analysed: the non-establishment of an infringement, the initiative to the Article 9 procedure, and the proportionality of binding commitments. Article 7 of Regulation 1/2003 serves as a point of reference to demonstrate the differences between the two procedures.

Article 9 (1) of Regulation 1/2003 states:

Commitment decision

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

4.1 The non-establishment of an infringement

The first characteristic of Article 9 is that a commitment decision, contrary to Article 7, does not establish an infringement of Articles 101 or 102. Article 9 states that the decision "shall conclude that there are no longer grounds for action by the Commission". The second sentence of Recital 13 in Regulation 1/2003 supports this by stating that the case is to be closed, "without concluding whether or not there has been or still is an infringement".

4.1.1 The imposition of a fine

This characteristic impacts the Commission's powers to impose a fine on the undertaking concerned. Article 23 (2) (a) of Regulation 1/2003 empowers the Commission to enforce a prohibition decision by imposing a fine where an undertaking "infringes" Articles 101 or 102. Because the Commission does not conclude whether or not there has been an infringement of

the competition rules in a commitment decision, they consequently cannot impose a fine on the undertaking under Article 23 (2) (a). Recital 13 last sentence might give expression to the same idea by stating, "Commitment decisions are not appropriate when the Commission intends to impose a fine". Recital 13 last sentence is further discussed in chapter 5.

According to Article 23 (2) (c), to ensure that commitments are complied with, the Commission may impose a fine on an undertaking if it breaches the binding commitments. The enforcement of commitment decisions thus lies in the threat of a fine for breaching the commitments. The Commission has only imposed a fine for breaching binding commitments in the Microsoft (tying) case.⁴¹ If the Commission imposes a fine on an undertaking under Article 23 (2) (c), the Commission is only required to put forward evidence of the breach of the commitments. It is therefore an effective enforcement instrument for the Commission.

4.2 Initiating the Article 9 procedure

The second characteristic of Article 9 is that the initiative to the Article 9 procedure is different from the Article 7 procedure. Briefly, under Article 7, the Commission opens proceedings and issues a Statement of Objections before it finally adopts a prohibition decision. Therefore, the Commission is the sole initiator to both the Article 7 procedure and the prohibition decision.

Under Article 9, the undertaking concerned is not obliged to offer commitments, and the Commission is not obliged to accept any commitments. This raises the question of who the initiator to the Article 9 procedure is.

4.2.1 Is the Article 9 procedure a derail from the Article 7 procedure?

The linguistics of Article 9 of Regulation 1/2003 imply that the Commission is required to pursue an Article 7 procedure before adopting a commitment decision under Article 9. This is based on the text in Article 9 which states that "Where the Commission intends to adopt a decision *requiring that an infringement is brought to an end*", it may accept the offered commitments and make them binding upon the undertaking concerned. This is supported by the same terminology found in Article 7, which states, "Where the Commission [...] finds [...]"

⁴¹ AT.39530 Microsoft (Tying) 06/03/2013

an *infringement* [...], it may by decision *require* the undertakings [...] concerned to *bring such infringement to an end*".⁴²

Likewise, Recital 13 first sentence in the preamble to Regulation 1/2003 states, "where, *in the course of proceedings which might lead to an agreement or practice being prohibited*, undertakings offer the Commission commitments such as to meet its concerns, the Commission should be able to adopt decisions which make those commitments binding on the undertaking concerned".⁴³

This understanding is additionally supported by the explanatory memorandum to the Commission's proposal to Regulation 1/2003 which states that Article 9 "empower[s] the Commission to adopt decisions accepting commitments offered by undertakings *in the course of proceedings in which* the Commission *intends* to adopt a decision *ordering termination* of an alleged infringement".⁴⁴

Moreover, the Commission notice on best practices supports this understanding by stating, "The Commission or the undertaking(s) concerned may decide at any moment during the commitment procedure to discontinue their discussions. The Commission can then normally *continue* formal proceedings pursuant to Article 7 of Regulation."⁴⁵ The word "continue" is understood to be something starts again after stopping for a period of time.

Based on Article 9 itself, Recital 13, the preparatory work and Commission guidelines, one might argue that the undertaking concerned is the initiator to an Article 9 procedure. The preliminary answer to the question concerning initiation of the Article 9 procedure is therefore that the Commission would initially have to pursue a prohibition decision, and that the undertaking's action of offering commitments would trigger a shift of procedure. Therefore, one may argue that the Article 9 procedure is a derail from the Article 7 procedure.

4.2.2 The "preliminary assessment" criterion

According to Article 9, the undertaking concerned has to offer commitments "to meet the concerns expressed to them by the Commission in its *preliminary assessment*".⁴⁶ The content,

⁴² My emphasis.

⁴³ Recital 13 first sentence in the preamble to Regulation 1/2003 (my emphasis),

⁴⁴ Proposal for Regulation 1/2003 (my emphasis).

⁴⁵ Commission notice on best practices, point 125 (my emphasis).

⁴⁶ My emphasis.

length, and level of specificity of a "preliminary assessment" is neither defined in Regulation 1/2003 nor any other secondary legislation.⁴⁷

The original draft proposal to Regulation 1/2003 did not contain the word "preliminary assessment" in the text in Article 9. In a Report from the Presidency in the European Council (EC) dated May 21, 2002, one of the delegation's position on the text in Article 9 was that "[The Italian delegation] prefers a reference to a document by the Commission incorporating a preliminary assessment of the business conduct under examination".⁴⁸ The term "preliminary assessment" was added to the draft on September 9, 2002, and the remark by the Italian delegation is in this document removed.⁴⁹ This indicates that the "preliminary assessment" criterion was added based on the remark of the Italian delegation. However, there has been no mentioning of the term elsewhere in the preparatory work. Without any further reasoning, it is not possible to establish the legislature's intentions for adding this term to the text in Article 9.

The Commission is required to issue a Statement of Objections in the Article 7 procedure. This follows from Article 7 (4) of Regulation 1/2003 and Article 10 (1) in Regulation 773/2004.⁵⁰ The issuing of a Statement of Objections is an important procedural step and "sets out the preliminary position of the Commission on the alleged infringements of Articles 101 and/or 102."⁵¹ A Statement of Objections may serve as a "preliminary assessment".⁵² Uncertainty relates to whether the Commission may issue another, less formal document *instead* of a Statement of Objections.

One might argue that the term "preliminary assessment" indicates that the Commission is required to issue a Statement of Objections. This was also the initial view when Regulation 1/2003 was adopted.⁵³ This corresponds with the understanding that the Commission initially needs to pursue a prohibition decision, and that Article 9 is a derail from the Article 7 procedure. If the Commission issues a "preliminary assessment", which is not a Statement of Objections, it implies that the Commission initially intends to pursue the commitment procedure under Article 9.⁵⁴ This would conflict with the system in Regulation 1/2003.

⁴⁷ Georgiev (2007) p. 1019.

⁴⁸ Report from the Presidency, Doc No. ST 8383 2002 INIT (2002) note 36, p. 27. In the relevant document, "IRL" is Ireland. Therefore, "I" is Italy.

⁴⁹ Report from the Competition Working Party, Doc. No. ST 11791 2002 INIT (2002), p. 21.

⁵⁰ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty.

⁵¹ Commission notice on best practices, point 82, p. 21.

⁵² Wils (2006) p. 11

⁵³ Temple Lang (2003) pp. 1-2.

⁵⁴ Schweitzer (2008) p. 9.

Moreover, requiring a Statement of Objections would safeguard the interests of the undertakings concerned.⁵⁵ This is because in a Statement of Objections, the Commission must articulate a theory of harm, and set forth evidence that supports it, giving the parties a chance to respond.⁵⁶ According to the Commission guidelines, a Statement of Objections' purpose "...is to inform the parties concerned of the objections raised against them with a view to enabling them to exercise their rights of defence".⁵⁷ The Article 9 "preliminary assessment" criterion seems to largely serve the same purpose.⁵⁸ A Statement of Objections does not give expression to a final conclusion on whether or not an undertaking has infringed Articles 101 or 102. It is a preliminary conclusion which "does not prejudge the final outcome of the procedure".⁵⁹ Based on this, if a Statement of Objections did prejudge the outcome of the case, requiring a Statement of Objections in the Article 9 procedure would contradict the overall system that a commitment decision does not establish an infringement of the competition rules. However, because it does not prejudge the outcome of the case, requiring a Statement of Objections would not conflict with the characteristic of Article 9.

By contrast, the original proposed text to Article 9 was "...such as to meet the Commission's *objections*".⁶⁰ This could indicate that a Statement of Objection was a requirement. The Commission later changed the text to "...the Commission's *concerns*", as the wording is today. This indicates that the legislature's intention was not to make the issuing of a Statement of Objections a criterion under Article 9.

Furthermore, Article 2 of Regulation 773/2004 states that the Commission may initiate proceedings with a view to adopt a decision pursuant to Chapter III of Regulation 1/2003 at any point in time, "but no later than the date on which it issued a preliminary assessment as referred to in Article 9 (1) [...] *or* a statement of objections".⁶¹ It is therefore clear that Regulation 773/2004 makes a distinction between a preliminary assessment and a Statement of Objections. Without providing any further definition of the term, Article 2 of Regulation 773/2004 merely states that there is a difference between these two "documents". It is nevertheless not clear what this difference consists of.

⁵⁵ Schweitzer (2008) p. 9.

⁵⁶ Cooke (2006) p. 5.

⁵⁷ Commission notice on best practices, para. 82.

⁵⁸ Cooke (2006) p. 5.

⁵⁹ MEMO/07/314.

⁶⁰ Note from General Secretariat of the Council, Doc. No. ST 5158 2001 INIT, p. 13 (my emphasis).

⁶¹ Regulation 733/2004.

The Commission's view is that it can first open proceedings and then have a State of Play meeting with the undertaking(s) concerned.⁶² According to the Commission, it would during a State of Play meeting consider whether the undertaking(s) show(s) willingness to discuss commitments and thereafter send the undertaking(s) a preliminary assessment.⁶³ The Commission's view is that "Once the Commission is convinced of the undertakings' genuine willingness to propose commitments which will effectively address the competition concerns, a Preliminary Assessment will be issued".⁶⁴ Therefore, the description of the case as given in the State of Play meeting is, in practice, the main basis for the undertaking concerned to decide whether to offer commitments or not.⁶⁵

This practice allows the Commission and the undertaking(s) to negotiate commitments outside of the procedure that Regulation 1/2003 Article 9 seems to require. In the *Coca-Cola* case⁶⁶ the proceedings were formally opened on September 29, 2004. The Commission issued its preliminary assessment October 15 the same year, and Coca-Cola submitted its commitments on October 19 – only four days later. Some argue that the commitments in the *Coca-Cola* case were drafted before the preliminary assessment was issued.⁶⁷ A "preliminary assessment" is meant to have an equivalent function to the Statement of Objections under Article 7, in which it should be a significant check on the Commission when it discusses commitments with the undertaking.⁶⁸ In order to have this function, the preliminary assessment must precede the negotiations on commitments.⁶⁹ The fact that the Commission issued a preliminary assessment only four days before the commitments were offered in the *Coca-Cola* case indicates that the Commission saw this criterion as a mere formality in this case.⁷⁰

In all of the cases that have been closed by means of a commitment decision, the Commission issued a Statement of Objections in 40 percent of them.⁷¹ Contrary, the Commission issued a "preliminary assessment" in 60 percent of its commitment decisions.⁷² The lengths of the preliminary assessment varies from around ten to seventy pages, which is about one-tenth of

⁶² A "State of Play meeting" is voluntary and can contribute to the quality and efficiency of the decision-making process and to ensure transparency and communication between the Directorate-General for Competition and the parties, notably to inform them of the status of the proceedings at key points in the procedure, see the Commission notice on best practices para. 61.

⁶³ European Commission (2013) p. 8. (roadmap)

⁶⁴ Commission notice on best practices (2011) para 121.

⁶⁵ Blanco, Jörgens, Sauer, and others (2013) p. 579.

⁶⁶ Case COMP/A.39.116/B2 – Coca-Cola

⁶⁷ See Sweitzer (2008) p. 9; Georgiev (2007) p. 1019; Rab, Monnoyeur, and Sukhtankar (2010) p. 173.

⁶⁸ Schweitzer (2008), note 55, p. 10.

⁶⁹ Ibid.

⁷⁰ Cooke (2006) p. 6.

⁷¹ See Table 3

⁷² See Table 3.

the length of a Statement of Objections.⁷³ The average length of commitment decisions is 21 pages, while the average length of prohibition decisions is 160 pages.⁷⁴ In *Rambus*⁷⁵, the commitment decision has 17 pages in which 4 of them are dedicated to the "practices raising concerns". In *Intel*⁷⁶, the prohibition decision has 518 pages in which 225 pages are dedicated to the analysis of the abuse of dominance.⁷⁷ Thus, the "preliminary assessment" criterion opens up for an easy way to bypass the complexity of articulating a theory of harm that would be subject for judicial review and the risk that the decision would be challenged before the CJEU.⁷⁸

However, issuing a less formal and shorter document as a "preliminary assessment" corresponds with the objectives of Article 9 set out in *Alrosa*.⁷⁹ In *Alrosa*, the ECJ stated that "Article 7 aims to put an end to the infringement that has been found to exist and Article 9 aims to address the Commission's concerns following its preliminary assessment".⁸⁰ The ECJ further stated:

This is a new mechanism [...] which is intended to ensure that the competition rules [...] are applied *effectively*, by means of the adoption of decisions making commitments [...] binding in order to provide a *more rapid solution* to the competition problems identified by the Commission, instead of proceeding by making a formal finding of an infringement. More particularly, Article 9 of the regulation is *based on considerations of procedural economy*, and enables undertakings to participate fully in the procedure, by putting forward the solutions which appear to them to be the most appropriate and capable of addressing the Commission's concerns.⁸¹

Because of the clearly formulated objectives of Article 9 in *Alrosa*, requiring a Statement of Objections in an Article 9 procedure would not be appropriate from a procedural economic perspective. As illustrated in the *Rambus* and *Intel* cases, it is evident that issuing a Statement of Objections requires more resources than issuing a preliminary assessment.

⁷³ Blanco, Jörgens, Sauer, and others (2013) p. 580.

⁷⁴ Mariniello, Mario (2014) p. 7. referred to in Jenny (2015) p. 734.

⁷⁵ Case COMP/38.636 – Rambus.

⁷⁶ Case COMP/C-3 /37.990 – Intel.

⁷⁷ Mariniello, Mario (2014), note 7, p. 3. referred to in Jenny (2015) p. 734.

⁷⁸ Jenny (2015) p. 734

⁷⁹ C-441/07 *Alrosa*.

⁸⁰ *Ibid.* para. 46.

⁸¹ *Ibid.* para. 35 (my emphasis).

4.2.3 Partial conclusion

The unambiguous text in Article 9 itself, Recital 13 first sentence, the preparatory work and the Commission guidelines imply that the Commission initially has to pursue an Article 7 procedure. Because a preliminary assessment, which is not a Statement of Objections, is not sufficient in the Article 7 procedure, the Commission's purpose of issuing a preliminary assessment would be to initiate discussions concerning commitments under Article 9. It is difficult to see that the Commission's practice on issuing a preliminary assessment reconciles with the overall system in Regulation 1/2003.

By contrast, based on the distinction made between the two documents in Regulation 773/2004 and the clearly formulated efficiency objectives in *Alrosa*, one cannot interpret Article 9 to require a Statement of Objections. This understanding prevails because the efficiency objectives of Article 9 are clearly formulated. Therefore, these objectives afforded greater legal weight than the linguistic and system-oriented interpretation of Regulation 1/2003. However, there is no legal basis for the Commission to negotiate commitments *before* issuing a preliminary assessment. The bottom-line criterion is therefore that the "preliminary assessment" has to precede the negotiation on commitments.

On the basis of the above, and in similarity to the initiative under the Article 7 procedure, the Commission may be both the initiator to the Article 9 procedure and the final commitment decision. This depends on whether the Commission issues a "preliminary assessment" or a Statement of Objections.

4.3 The proportionality of binding commitments

The third characteristic of Article 9 is that, contrary to Article 7, it does not explicitly mention the principle of proportionality. The Commission's discretion to which commitments it can accept would influence the area of application of Article 9 of Regulation 1/2003. Therefore, this subchapter raises the question of whether there are any limitations as to which commitments the Commission can make binding.

4.3.1 The principle of proportionality under Articles 7 and 9

The Article 7 procedure empowers the Commission to impose remedies on undertakings which they have found to have breached the competition rules. Article 7 makes a distinction between

two types of remedies: behavioural and structural remedies. The first involves a change of behaviour and the latter involves a change to the structure of an undertaking i.e. the divestiture of assets.⁸² The principle of proportionality is explicitly mentioned in Article 7. Under Article 7, the Commission always has to choose behavioural remedies over structural remedies if they are sufficiently effective. The Commission has only imposed structural remedies in the *ARA foreclosure* case⁸³, which constitutes 3 % of all prohibition decisions after 2005.⁸⁴ Hence, one can say that structural remedies are very rare in decisions under Article 7.

Contrary, Article 9 mentions neither behavioural or structural remedies/commitments nor the principle of proportionality. However, it is clear that the Commission in practice accepts both types of commitments under Article 9.⁸⁵ These differences raise the question of whether or not the Commission can *accept* farther-reaching remedies under Article 9 than what it can *impose* on an undertaking under Article 7. Further, do the same limitations to structural remedies under Article 7 apply to Article 9?

4.3.2 Alrosa v. Commission

Alrosa is the very first judgment on commitment decisions under Article 9 of Regulation 1/2003.⁸⁶ Before discussing the judgment, it is appropriate to provide an overview of the facts of the case.

In 2006, De Beers was the largest diamond mining company in the world.⁸⁷ De Beers' sales encompassed rough diamonds acquired from the Russian state-owned entity Alrosa, which was the second largest diamond producer on the worldwide market at the time.⁸⁸ Under an agreement between the two undertakings, De Beers were to purchase substantial amounts of rough diamonds from Alrosa during a period of five years. Alrosa would essentially sell the entire production of rough diamonds, which was meant for export, to De Beers.⁸⁹ De Beers and Alrosa both notified the agreement and applied for negative clearance or, if this failed, an individual exemption under Regulation 17.⁹⁰ The Commission concluded that such exemptions

⁸² MEMO, 8.3.2013

⁸³ Case AT.39759 – ARA foreclosure

⁸⁴ See Table 1.

⁸⁵ See Table 3.

⁸⁶ C-441/07 P *Alrosa*

⁸⁷ Case COMP/B-2/38.381 – De Beers, point 3, p. 3.

⁸⁸ *Ibid.* point 7, p. 3.

⁸⁹ Schweitzer (2008) p. 14.

⁹⁰ Case COMP/B-2/38.381 – De Beers, point 11, p. 4.

were not available and issued a Statement of Objections on January 14, 2003.⁹¹ When Regulation 1/2003 entered into force May 1, 2004, De Beers and Alrosa offered joint commitments under Article 9. These commitments were market tested, and negative comments by third-parties resulted in the Commission asking De Beers and Alrosa to offer new commitments.⁹²

The Commission requested both undertakings to submit new joint commitments which were to lead to a complete cessation of their trading relationship from 2009.⁹³ Only De Beers offered such commitments and the Commission made them binding by adopted an Article 9 decision.⁹⁴ Alrosa appealed to the CJEU for annulment. It claimed that the Commission had exceeded its powers by ordering complete cessation of the trading relationship and prohibiting future contracts for the sale or purchase of rough diamonds between Alrosa and De Beers for an indefinite period of time. Alrosa argued that the commitments went beyond what was appropriate and necessary to meet the Commission's concerns under what is today Article 102 TFEU.⁹⁵

The General Court's (GC) judgment⁹⁶ found that the principle of proportionality applied to Article 9 in the same way as it applies to prohibition decisions under Article 7.⁹⁷ Further, the General Court found that the commitment which prohibited future trading relations between De Beers and Alrosa for an indefinite period of time was disproportionate to the alleged infringement of Article 102.

The Commission appealed the judgment to the ECJ, which annulled the judgment from the General Court in its entirety. The ECJ starts by stating that "The *specific characteristics* of the mechanisms provided for in Articles 7 and 9 [...] and the *means of action available* under each of those provisions *are different*, which means that the obligation on the Commission to ensure that the principle of proportionality is observed has *a different extent and content*, depending on whether it is considered in relation to the former or the latter article".⁹⁸ Based on these differences, the ECJ stated that Articles 7 and 9 "pursue different objectives"⁹⁹ and that "there is therefore no reason why the measure which could possibly be imposed in the context of

⁹¹ Ibid. point 12, p. 4.

⁹² Schweitzer (2008) p. 14-15.

⁹³ Schweitzer (2008) p. 14-15.

⁹⁴ Ibid. p. 15.

⁹⁵ Ibid. p. 15.

⁹⁶ T-170/06 *Alrosa*

⁹⁷ Ibid. para 92 and 95 referred to in Schweitzer (2008) p. 15.

⁹⁸ C-441/07 P *Alrosa*, para. 38.

⁹⁹ Ibid. para 46.

Article 7 [...] should have to serve as a reference for the purpose of assessing the extent of the commitments accepted under Article 9 [...], or why anything going beyond that measure should automatically be regarded as disproportionate".¹⁰⁰

Further, the ECJ stated that the application of the principle of proportionality by the Commission in Article 9 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".¹⁰¹ Accordingly, the Commission is not required to seek out less onerous commitments or more moderate solutions than the commitments offered to it.¹⁰² The Commission only needs to assess whether or not the offered commitment address the Commission's concerns and whether or not the undertaking has offered less onerous commitments. Judicial review of this assessment "...relates *solely* to whether the Commission's assessment is *manifestly incorrect*".¹⁰³

If the undertaking concerned offer commitments which go beyond what the Commission could have imposed on it, the ECJ's reasoning is that the undertaking concerned "...*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..."¹⁰⁴ Based on this, elements of contract law is inherent in commitment decisions. The ECJ continues to state, "...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*".¹⁰⁵ Thus, farther-reaching commitments under Article 9 are counterweighed by the undertaking's avoidance of the establishment of an infringement and a possible fine.

Lastly, the ECJ stated, "It follows from Article 9 (1) of Regulation No 1/2003 that the Commission has a wide discretion to make a proposed commitment binding or to reject it."¹⁰⁶ Because *Alrosa* affords the Commission a considerable level of discretion to reject or accept commitments, one might argue that the balance of power between the Commission and the undertaking is askew.

¹⁰⁰ C-441/07 P *Alrosa*, para 47.

¹⁰¹ C-441/07 P *Alrosa*, para. 41 (my emphasis).

¹⁰² Jenny (2015) p. 754.

¹⁰³ Ibid. para. 42 (my emphasis).

¹⁰⁴ C-441/07 P *Alrosa*, para. 48 (my emphasis).

¹⁰⁵ Ibid para 48 (my emphasis).

¹⁰⁶ Ibid. para 94.

Some argue that the Commission's large use of commitment decisions are due to the "overly formalistic" approach to Article 9 in *Alrosa*.¹⁰⁷ Further, some argue that *Alrosa* allowed the Commission to enjoy a level of discretion in commitment decisions regarding structural remedies, causing the Commission to "move from the objective of restoring competition to a wider objective of creating competition conditions by restructuring markets."¹⁰⁸ To illustrate the different strength of the principle of proportionality in the two procedures, structural remedies have only been imposed in one Article 7 decision¹⁰⁹ while having been accepted five times in Article 9 decisions in the energy sector.¹¹⁰ This will be further addressed in chapter 5.2.2.

According to *Alrosa*, if the Commission investigates a breach of Articles 101 and 102, "... the Commission has a wide discretion to make proposed commitments binding or to reject it".¹¹¹ One might argue that making commitments binding or rejecting them is another way of choosing between a commitment decision and a prohibition decision. This is because an alleged infringement of Articles 101 and 102 should initially be serious enough for the Commission to pursue a prohibition decision. It is not plausible that the Commission would reject the case in total because it rejects commitments. Thus, rejecting commitments would in theory mean that the Commission "continues"¹¹² to pursue an Article 7 decision. Based on this, one might argue that *Alrosa* affords the Commission the same level of discretion to its choice between pursuing an Article 9 or an Article 7 procedure.

4.3.3 Partial conclusion

The *Alrosa* judgment answers the question of whether the Commission can accept farther-reaching remedies under Article 9 than what it can impose on the undertaking under Article 7 affirmatively. *Alrosa* answered the question of whether the same limitations to structural remedies under Article 7 apply to Article 9 negatively. The Commission's wide discretion to reject or accept commitment is transferred to its discretion to choose the Article 7 or 9 procedure.

¹⁰⁷ Jenny (2015) p. 709.

¹⁰⁸ Ibid. p. 702.

¹⁰⁹ Case AT.39759 – ARA foreclosure

¹¹⁰ See Table 3

¹¹¹ Ibid.

¹¹² Commission notice on best practices (2011) point 125.

4.4 Concluding remarks

There are fundamental inconsistencies within Regulation 1/2003. The text in Article 9 and Recital 13 first sentence read together with the preparatory work and the Commission guidelines, imply that the Article 9 procedure is a derail from an Article 7 procedure. Such an understanding would imply that the Commission cannot pursue a commitment decision from the opening of a procedure and that it consequently is required to issue a Statement of Objections. However, together with the distinction between a preliminary assessment and a Statement of Objections in Regulation 773/2004, the efficiency objectives of Article 9 set forth in *Alrosa* are the decisive element in this assessment. The Commission's practice on issuing shorter, less formal documents as preliminary assessments is therefore in line with current law.

The Commission's wide discretion to accept or reject commitments in *Alrosa* also applies to the Commission's choice between a commitment decision procedure and a prohibition decision procedure. The only clear limitation to Article 9's area of application is the fact that the Commission cannot impose a fine under Article 23 (2) (a) in combination with a commitment decision. Recital 13 last sentence gives expression to the same principle. But, as will be demonstrated in the next chapter, Recital 13 last sentence can be interpreted in different ways.

5 Recital 13's impact on the area of application of Article 9

On the basis of the discussions in chapter 4, one might say that the Commission has a wide discretion in pursuing an Article 7 or an Article 9 procedure. However, in order to complete the analysis, this chapter discusses which limitations the last sentence of Recital 13 impose on the area of application of Article 9.

5.1 Recital 13 – merely stating the evident?

Recital 13 last sentence in the preamble to Regulation 1/2003 states, "Commitment decisions are not appropriate in cases where the Commission intends to impose a fine".

On the one hand, Recital 13 can be interpreted to merely state that a final commitment decision cannot be combined with the imposition of a fine.¹¹³ This is based on the view that the commitment decision procedure is "...not a mechanism suitable for plea bargaining".¹¹⁴ Recalling to chapter 4.1, this is because, according to Article 23 (2) (a), a fine can only be imposed if the Commission finds that there has been an infringement of Articles 101 and 102 TFEU. Given that fines can only be imposed in combination with an Article 7 decision, the Commission cannot make commitments binding if it wishes to impose a fine. One might argue that since the Commission needs to have an initial intent to adopt an Article 7 decision, the last sentence of Recital 13 merely states that the possibility to impose fines is excluded once a commitment decision is adopted.

The last sentence of Recital 13 of Regulation 1/2003 was added to the draft of Regulation 1/2003 on September 9, 2002. In the preparatory work to Regulation 1/2003, it is stated that "the possibility for the Commission to adopt commitment decisions has been limited to cases in which it does not intend to impose a fine. This is however logical given that the regulation

¹¹³ Allendesalazar, Bach, Bartolini, and others (2010) p. 525, 596; Blanco, Jörgens, Sauer, and others (2013) note 21, p. 577.

¹¹⁴ Allendesalazar, Bach, Bartolini, and others (2010) p. 186.

does not provide for a possibility to settle on the payment of an amount of money".¹¹⁵ The legislature's intentions therefore support the understanding that Recital 13 states that a commitment decision cannot be combined with a fine under Article 23 (2) (c).

5.2 The Commission's intention to impose a fine

On the other hand, Recital 13 last sentence could "indicate that article 9 proceedings are entered into at a stage where the Commission has already made up its minds about whether or not the infringement warrants the imposition of a fine".¹¹⁶ What distinguishes this view from the above is that the Commission has not yet adopted a decision. According to the linguistics of Recital 13 last sentence, the intention to impose a fine is within the Commission's discretion. To establish whether Recital 13 limits the area of application of Article 9, this subchapter examines the Commission's decisional practice.

5.2.1 Hardcore cartels

Taking into account Recital 13 last sentence of Regulation 1/2003, the Commission states in its guidelines that commitment decisions are not appropriate in cases "where the Commission considers that the *nature* of the infringement *calls for* the imposition of a fine. Consequently, the Commission does not apply the Article 9 procedure to secret cartels..."¹¹⁷ Earlier, the Commission used the word "hardcore cartels" instead of "secret cartels".¹¹⁸ Nothing indicates that these terms have a different meaning. The term "hardcore cartels" refers to i.e. price fixing, market sharing, bid rigging or production or sales quotas.¹¹⁹

According to this viewpoint, the decisive element is whether the Commission considers that the "nature" of the infringement calls for the imposition of a fine. On a question on whether participation in hardcore cartels is *per se* illegal, the Commission answered, "As a matter of

¹¹⁵ Council of the European Union, Report of the Competition Working Party of 8 November 2002 in Interinstitutional File 2000/0243(CNS) referred to in Blanco, Jörgens, Sauer, and others (2013) note 31, p. 577. NB. I have not succeeded in finding this quote in the referred Report or in other preparatory documents files under Interinstitutional File 2000/0243(CNS). I have contacted the editor of the book by e-mail asking for further elaboration on where to find the referred quote. However, the editor of the book did not succeed in finding the quote. He believed the quote was from an earlier version of the document referred to in the book. I requested additional documentation from the EU Council, but the documents I was sent did not contain the referred quote either.

¹¹⁶ Wils (2006) p. 11.

¹¹⁷ Commission notice on best practices, para 166 (my emphasis).

¹¹⁸ MEMO/04/217

¹¹⁹ International Competition Network (2015) point 2.B.

practice, any agreement which fixes prices, limits its output, shares markets, customers or sources of supply or involves other cartel behavior such as bid-rigging will be regarded as a *per se* restriction of competition within the meaning of Article 101(1) TFEU. As these are restrictions "by object" it is not necessary to prove the anti-competitive effects of the cartel".¹²⁰

Hence, one might argue that cartels are explicitly excluded from the Commission's application of Article 9 because their conduct is a *per se*/restriction by "object" infringement, which opts for a fine. Restriction of competition by "object" is a term only used in Article 101 (1) TFEU. Article 102 TFEU does not hold the same criteria. This raises a question of whether this means that an undertaking's abuse of dominant position can never be *per se* illegal, and thus should never be excluded from the application of Article 9.

Historically, the EU Courts and the Commission tended to apply *per se* rules for some types of abuses. The law on loyalty rebates is an example of this.¹²¹ In *Intel*, the ECJ cited *Hoffmann-La Roche*¹²², in which the ECJ formulated a rule on exclusivity dealing and loyalty rebates in 102 TFEU cases in *per se* terms.¹²³ This rule was followed in several other cases on rebates.¹²⁴ Nonetheless, the ECJ added, "However, that case-law must be further clarified in the case where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, producing the alleged foreclosure effects".¹²⁵ The ECJ's qualification seems to mean that the undertaking's conduct can be abusive only where the conduct can be shown to be capable of having anti-competitive effects.¹²⁶ Based on this, the answer to the above-asked question is that there is no *per se* illegality under Article 102 TFEU.¹²⁷ However, one might argue that if *per se* illegality existed under Article 102 TFEU, these types of abuses also would be excluded from the Article 9 of Regulation 1/2003's area of application because their "nature" calls for a fine.

¹²⁰ International Competition Network (2015) point 2.D.

¹²¹ Whish and Bailey (2018). p. 205.

¹²² Case 85/76 *Hoffman La-Roche*, para 89.

¹²³ Whish and Bailey (2018) p. 205.

¹²⁴ See i.e. T-203/01 *Michelin v. Commission* EU:T:2003:250, para 56; T-218/99 *British Airways plc v Commission* EU:T:2003:343, upheld on appeal to the ECJ. Referred to in Whish and Bailey (2018) p. 205.

¹²⁵ Case C-431/14 P *Intel*, para 138.

¹²⁶ Whish and Bailey (2018) p. 206.

¹²⁷ *Ibid.* p. 207

5.2.2 Are other infringements not appropriate for a commitment decision?

In five of the Commission's prohibition decisions, the undertaking concerned initially offered commitments, which the Commission later rejected.¹²⁸ This raises the question of whether other infringements are inappropriate for an Article 9 decision. It is therefore of interest to examine the Commission's reasons for rejecting them.

In the *International Skating Union's Eligibility* case, the Commission's rejected commitments because "the Commission considered [them] as insufficient to solve the identified competition concerns in a timely and effective manner".¹²⁹ In *Slovak Telekom*, "The commitments were considered insufficient to resolve the concerns raised by the Commission".¹³⁰ In *CISAC*, the Commission market tested the commitments and more than 80 observations were submitted. Based on negative replies from the market test, the Commission held that "It must therefore be concluded that the proposed commitments would not give an appropriate answer to the competition concerns raised in the Statement of Objections".¹³¹ Lastly, in *Google Search (Shopping)*, the Commission received 19 complaints to the its initial position that the offered commitments could address the competition concerns set out in the preliminary assessment. Based on this, "...the Commission considered that it was not in a position to adopt a decision under Article 9..."¹³² The *Google Search (Shopping)* and *CISAC* cases are further discussed in respectively chapter 5.3.2 and 5.3.3.

Lastly, the *Telekomunikacja Polska*¹³³ case stands out. In *Telekomunikacja Polska*, Telekomunikacja Polska (TP) was the only Polish telecommunications operator that had a nation-wide fixed telephone network. The Commission held that TP "...consciously planned and engaged in practices aimed at hindering AOs from efficiently accessing the incumbent's network and using its wholesale broadband products".¹³⁴ TP offered commitments in April 2010.¹³⁵ During the State of Play meetings, "...TP was informed that commitments would not be an appropriate way of concluding the case".¹³⁶ In this regard, the Commission referred to recital 13 last sentence of Regulation 1/2003 in a note without further reasoning its rejection.

¹²⁸ See Table 2.

¹²⁹ Case AT.40208 – International Skating Union's Eligibility, point 19, p. 8.

¹³⁰ Case AT.39523 – Slovak Telekom, point 18, p. 19.

¹³¹ Case COMP/C2/38.689 – CISAC, point 72, p. 23.

¹³² Case AT.39740 – Google Search (Shopping), point 73, p. 18.

¹³³ Case COMP/39.525 – Telekomunikacja Polska

¹³⁴ Ibid. point 5, p. 7 (my emphasis.)

¹³⁵ Ibid. point 12, p. 8.

¹³⁶ Ibid. point 12, p. 8

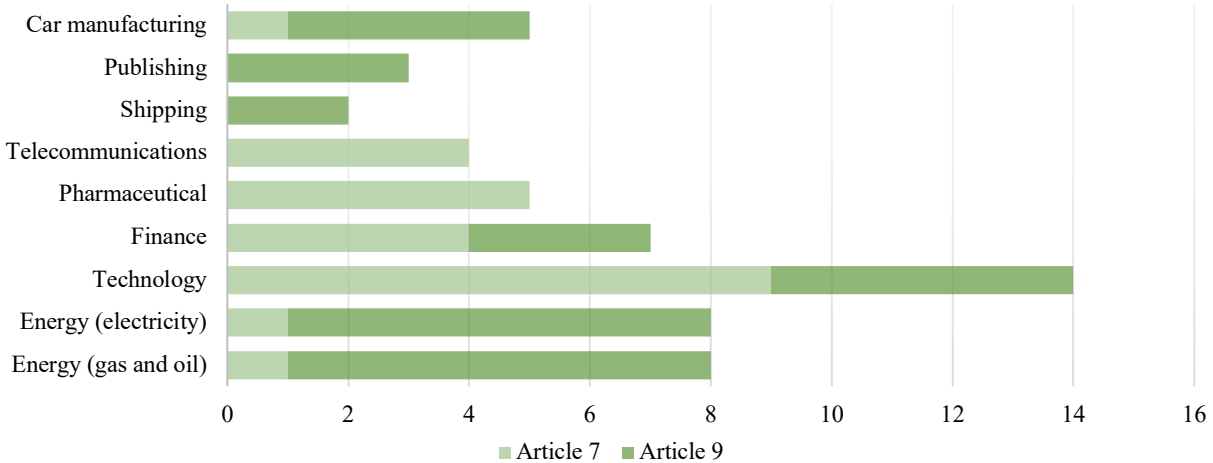
Consciously planning and engaging in practices aimed at hindering other undertakings from entering the market is a serious behaviour.

Based on the above, one might argue that other serious breaches of the competition rules are excluded from the application of Article 9.¹³⁷ This is because the Commission directly referred to the last sentence of Recital 13 when rejecting the commitments in *Telekomunikacja Polska*. Nevertheless, it is not certain. In the extension of this, one might argue that if a market test or third-party complaints reveal that a case is not proper for a commitment decision after all, the infringement in question might have been too serious for an Article 9 decision and should have been fined. These specific cases do however not suffice to establish that certain infringements, other than hardcore cartels, are excluded from the Article 9 procedure.

5.2.3 Are commitment decisions particularly suitable in certain industrial sectors?

If we reverse the above-discussed question, this subchapter discusses whether some infringements are particularly *suitable* for a commitment decision. It is of interest to see whether certain sectors are more prone to commitment decisions than others. The statistics below show the Commission's decisions in the most prevalent sectors. Because of the scope of this thesis, the following discussion will only concern the energy and technology sector.

Chart 1: Decisions by sector¹³⁸



¹³⁷ Dunne (2014) pp. 402-403.

¹³⁸ The data is analysed and assembled by the author of this master's thesis.

Concerning the energy (gas/oil and electricity) sector, the EU Council initiated the adoption of two Directives in 1990 that were to establish common rules for gas and electricity.¹³⁹ In 2003, a second reform established a new set of common rules for this sector.¹⁴⁰ After the Commission conducted a sectoral inquiry into the European gas and electricity sectors under Article 17 of Regulation 1/2003 in June 2005, the Commission concluded that "Despite the liberalization of the internal energy market, barriers to free competition remain."¹⁴¹

In the wake of the sector inquiry, the Commission adopted four commitment decisions in the gas and oil sector from 2006 till 2010.¹⁴² In 2009, the Council and the European Parliament adopted new legislative measures.¹⁴³ After this, in 2010, the Commission adopted four more commitment decisions in this sector – two in the gas and oil sector and two in the electricity sector.¹⁴⁴

In the electricity sector, the Commission issued a preliminary assessment in five out of seven cases.¹⁴⁵ In the oil and gas sector, the Commission issued a preliminary assessment in four out of seven cases.¹⁴⁶ Based on this, the Commission issued a preliminary assessment in a total of 64 % of the cases in the energy sector. Because we have already established that the Commission is, in practice, the initiator of the Article 9 procedure when issuing a preliminary assessment, these statistics imply that the Commission considered the alleged infringements in these industrial sectors to be appropriate for a commitment decision.

Further, five of the commitment decisions in the energy sector made structural commitments binding.¹⁴⁷ And in four of these five cases, the Commission issued a preliminary assessment.¹⁴⁸ This might imply that the Commission applied Article 9 as an instrument to make farther-reaching commitments binding instead of imposing remedies under Article 7, which would be subject to a stricter proportionality test.¹⁴⁹ Criticism is directed towards Article 9 of Regulation

¹³⁹ Council Directive 90/377/EEC, OJ [1990] L 185/16 and Council Directive 90/377/EEC, OJ [1990] L 185/16, referred to in Whish and Bailey (2018) pp. 1020-1021

¹⁴⁰ Whish and Bailey (2018) p. 1021.

¹⁴¹ COM (2006) 851 final, referred to in Whish and Bailey (2018) p. 1021.

¹⁴² See Chart 2.

¹⁴³ Whish and Bailey (2018) p. 1021.

¹⁴⁴ See Chart 2.

¹⁴⁵ See Table 4.

¹⁴⁶ Ibid.

¹⁴⁷ See Table 4.

¹⁴⁸ Ibid.

¹⁴⁹ C/441-07 Alrosa.

1/2003 for being legal ground for restructuring markets and that it, as such, can be used as a regulatory instrument.¹⁵⁰ Based on the statistics, one might argue that the liberalisation of the energy sector is a continuous project for the Commission, and that the Commission considers cases in the energy sector as particularly suitable for commitment decisions because it is a more flexible instrument.

Moving on to the technology sector, one might expect this sector to be prone to commitment decisions. This is because the technology sector is a fast-moving market and a commitment decision could end the competition concerns faster. The Commission's competition brief gives expression to a similar view. It states, "In contrast, an Article 9 decision is more appropriate when the primary target is not punishment for past behaviour, but adjusting future behaviour. This makes Article 9 decisions a good option for fast-moving markets, where the speed of enforcement is crucial for the effectiveness of the commitments. Of course, if the companies concerned are not ready to offer appropriate commitments to the Commission, Article 7 may be the only option available to ensure competition rules are complied with."¹⁵¹

By contrast, Chart 1 above shows that nine out of 14 decisions in the technology sector have been closed by means of a prohibition decision.¹⁵² If we look at the timeline, an interesting development is that prohibition decisions in the technology sector have increased massively in the last three years.¹⁵³ One might argue that the reason that the Commission adopts more prohibition decisions in the technology sector is because of the increased focus on technology and digitalization the past years. Further, as the Commission stated, the reason for the increase in prohibition decisions in the technology sector might be due to the undertakings concerned not offering commitments.¹⁵⁴ However, these statistics imply that commitment decisions will not be particularly suitable in the technology sector. Time will tell whether this is correct or not.

These statistics is used to shed light on the Commission's practice to provide insight into when the Commission has applied Articles 7 and 9. One might argue that the characteristics of different industry sectors joint with the Commission's practice in these sectors, make certain sectors more suitable for Article 9 decisions. According to the statistics, the energy sector, which previously was the preserve of state-owned monopolies and has later been

¹⁵⁰ Hjelmeng (2011) p. 67 (non-official translation by the author of this book).

¹⁵¹ Competition policy brief (2014) p. 4

¹⁵² See Chart 1.

¹⁵³ See Chart 3.

¹⁵⁴ Competition policy brief (2014) p. 4

demonopolized and liberalized through Directives, appears to be particularly prone to commitment decisions. One might argue that this also applies to other sectors that have been monopolized and later liberalized. Further, an increased awareness to the issues relating to technology might have resulted in the increase of Article 7 decisions in this sector.

5.3 Related procedural questions

If Recital 13 last sentence is to be interpreted to mean that a commitment decision is not appropriate when the Commission has made up its mind about whether to impose a fine or not beforehand, three procedural questions relating to such an understanding arise.

Firstly, is a Statement of Objections binding upon the Commission in the way that it cannot adopt a commitment decision later? Secondly and reversed, does a preliminary assessment exclude the Commission from imposing a fine under Article 23 (2) (a) in a later prohibition decision? Lastly, can the Commission fine an undertaking after a failed market test under Article 27 (4)? These questions will be addressed in said order.

5.3.1 From Statement of Objections to a commitment decision

In the Commission notice on best practices it is stated, "The Statement of Objections will clearly indicate whether the Commission intends to impose fines on the undertakings, should the objections be upheld..."¹⁵⁵ One might argue that the Commission has "intended" to impose a fine when it issued its Statement of Objections, and that the Commission has "intended" to impose a fine where this is notified in the Statement of Objections.¹⁵⁶ Nevertheless, it is not possible to assess the Commission's practice on this matter as these documents are not public.¹⁵⁷ However, it was established in chapter 4.2.2 that a Statement of Objections can serve as a preliminary assessment. Based on this, a commitment decision could 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".¹⁵⁸

¹⁵⁵ Commission notice on best practices, point 84, p. 21.

¹⁵⁶ Hjelmeng (2011) p. 18 (non-official translation by the author of this book).

¹⁵⁷ I contacted the Directorate-General for Competition in the EU Commission and requested access to the Statement of Objections which were issued in all commitment decisions. This request was rejected on the basis of professional secrecy, and that a Statement of Objections is only a preparatory step in the antitrust procedure, and that its contents is only provisional in nature.

¹⁵⁸ Temple Lang (2003) p. 2

This interpretation is in line with the overall view that an Article 9 decision is a derail from the Article 7 procedure. Therefore, the first question must be answered negatively. The Commission is not bound by an initial Statement of Objections to pursue an Article 7 decision.

5.3.2 From a preliminary assessment to a prohibition decision combined with a fine

Reversing the discussion above, the next question is whether a preliminary assessment excludes the Commission from imposing a fine under Article 23 (2) (a) in a later prohibition decision.

We have already established that because a "preliminary assessment" only is a requirement under Article 9, the Commission is in fact the initiator to the Article 9 procedure. Because a fine cannot be imposed together with a commitment decision, a preliminary assessment would imply that the Commission initially does not intend to impose a fine. The Commission has stated, "Ultimately, the choice between Article 7 and Article 9 depends on the objectives pursued: deterrence, punishment and precedent value on the one hand, efficient and swift solving of competition concerns on the other".¹⁵⁹ One might argue that if the Commission initially issues a preliminary assessment but chooses to finally adopt a prohibition decision because of i.e. precedent value, it would be inappropriate to impose a fine on the undertaking concerned. This is because the preliminary assessment should not have been issued if the Commission intended to fine the firms.¹⁶⁰

This issue is of current interest. Although an extraordinary case, the *Google Search (Shopping)* case is an example of a similar situation.¹⁶¹ It is the only case in which the Commission has issued a preliminary assessment before "reverting" to the Article 7 procedure and adopted a prohibition decision combined with a fine.¹⁶²

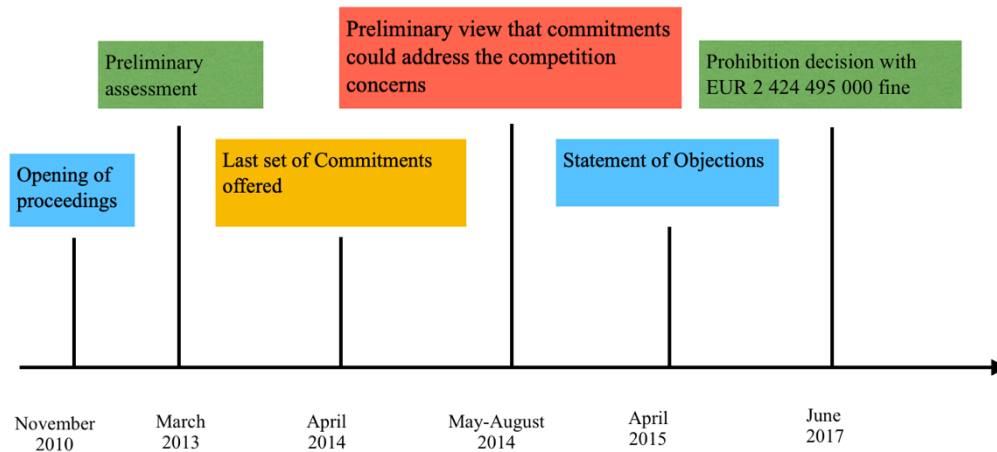
¹⁵⁹ Competition policy brief (2014) p. 4.

¹⁶⁰ Jenny (2015) p. 768.

¹⁶¹ Case AT.39740 – Google Search (Shopping).

¹⁶² See Table 3.

The timeline below illustrates the proceedings in the case.¹⁶³



In the *Google Search (Shopping)* case, several complaints from other companies, to both the Commission and National Competition Authorities (NCAs), starting in 2009, led the Commission to open proceedings against Google on November 2010. After having received 13 complaints from third-parties against Google between December 2010 and January 2013¹⁶⁴, the Commission adopted a preliminary assessment addressed to Google on March 13, 2013. Even though "Google did not agree with the legal analysis in the Preliminary Assessment and contested the assertion that any of the business practices described in it infringe Articles 102", it nevertheless offered commitments to the Commission.¹⁶⁵ The first set of commitments were offered on April 3, 2013. After offering the last set of commitments in April 2014, the Commission received five additional complaints against Google.¹⁶⁶ The Commission sent letters to all complainants rejecting their complaints, which "...outlined the Commission's preliminary view that the third set of commitments offered by Google [...] could address the [...] concerns [...] identified in the Preliminary Assessment".¹⁶⁷

In September 2014, after 19 complainants submitted written observations in response to these rejection letters, "...the Commission considered that it was not in a position to adopt a decision

¹⁶³ The timelines is assembled by the author of this master's thesis.

¹⁶⁴ Case AT.39740 – Google Search (Shopping) point 44, 45, 46, 47, 49, 50, 53, 54, 56, 57, 58, 60, 61.

¹⁶⁵ Ibid. point 65.

¹⁶⁶ Ibid. point 66, 67, 68, 69, 70.

¹⁶⁷ Ibid. point 71.

under Article 9".¹⁶⁸ After additional complaints, the Commission "reverted" to the Article 7 procedure by issuing a Statement of Objections in regard of one of Google practices in April 2015.¹⁶⁹ The Commission adopted a prohibition decision combined with a € 2.42 billion fine in June 2017 – almost seven years after the Commission opened proceedings against Google.¹⁷⁰ This is the second largest fine ever imposed by the Commission – the largest being the € 4.34 billion fine imposed on Google in the *Google Android* case.¹⁷¹

Google claimed that the Commission could not impose a fine because the Commission had "...considered adopting a decision under Article 9".¹⁷² Google has appealed the prohibition decision to the CJEU. In its application for appeal, brought on September 11, 2017, Google claimed, among other things, that the decision errs in imposing a fine and that "... a fine was not warranted because the Commission [...] *selected the case for commitments*...".¹⁷³

The *Google Search (Shopping)* case illustrates the procedural issues relating to the Commission's understanding of Recital 13 last sentence. However, based on the Commission's practice in this one case, one cannot interpret Recital 13 last sentence to impose a restriction on the Commission in which it could not impose a fine after initially issuing a preliminary assessment. Such an interpretation would to some extent limit the "wide discretion" to reject or accept commitment afforded to the it in *Alrosa*.¹⁷⁴ In the extension of this, it would limit the area of application of Article 9. If the Commission's discretion was limited once a preliminary assessment was issued, an Article 7 decision would not be as effective. Currently, the Commission may therefore impose a fine even though it initially issued a preliminary assessment. The issue is nevertheless of current interest, and the appeal to the CJEU might be an important opportunity to further clarify the area of application of Article 9.

5.3.3 Adopting a commitment decision after a failed market test

According to Article 27 (4), the Commission is required to market test commitments if the Commission views them as capable of addressing its competition concerns.¹⁷⁵ Similarly to the previous question, this raises the question of whether the Commission can impose a fine on an

¹⁶⁸ Case AT.39740 – Google Search (Shopping) point 73.

¹⁶⁹ Ibid. point 76. One of Google's other practices led to the AT.40411 *Google Search (AdSense)* case, which was closed by means of a prohibition decision combined with a €1.49 billion fine in March 2019.

¹⁷⁰ Ibid. point 754.

¹⁷¹ Case AT.40099 – *Google Android*

¹⁷² Case AT.39740 – Google Search (Shopping), point 730.

¹⁷³ Case T-612/17 *Google and Alphabet* (case in progress) (my emphasis).

¹⁷⁴ C-441/07 *Alrosa*.

¹⁷⁵ Dunne (2014) p. 403.

undertaking in a situation where it initially issued a preliminary assessment before reverting to the Article 7 procedure after having received interested third-parties' view on the commitments.

In the *CISAC Agreement* case, CISAC and 18 of its members offered commitments in March 2017.¹⁷⁶ The commitments were market tested according to Article 27 (4) of Regulation 1/2003, and more than 80 observations were submitted.¹⁷⁷ In its prohibition decision, the Commission stated, "...broadcasters, content providers and certain collective societies, generally considered that the proposed commitments would not be effective [...] Additionally, certain EEA CISAC members who had offered the proposed commitments took the opportunity of the market test to criticize them. It must *therefore* be concluded that the proposed commitments would not give an appropriate answer to the competition concerns raised in the Statement of Objections".¹⁷⁸

CISAC was not fined for its breach of Article 101 TFEU. Because CISAC was not fined by the Commission, one might argue that the imposition of a fine is not appropriate if commitments are market tested and the market test shows that the commitments do not answer to the competition concerns. However, the Commission does not discuss the imposition of a fine in its decision. Therefore, the Commission's practice does not give expression to such an understanding.

5.4 Concluding remarks

Recital 13 last sentence has been interpreted to give expression to two different limitations. Whether it merely states that a commitment decision cannot be combined with a fine, or that a commitment decision is precluded once the Commission has shown its intent to impose a fine, is uncertain. It is therefore unclear whether Recital 13 last sentence imposes any limitations on the area of application and what those limitations potentially are. Because Recital 13 last sentence is ambiguous, its legal weight is limited. The Commission's decisional practice and its references to Recital 13 last sentence, which gives expression to the second interpretation, set forth the current legal status on the area of application of Article 9. Further, because the decisional practice does not clarify the details of this limitation more closely, the Commission guidelines are afforded decisive weight. On the basis of the Commission guidelines, the only

¹⁷⁶ COMP/C2/38.698 – CISAC

¹⁷⁷ Ibid. point 71, p. 23

¹⁷⁸ Ibid. point 72, p. 23 (my emphasis).

clear limitation to the area of application of Article 9 is therefore that hardcore/secret cartels are excluded from the Article 9 procedure.

This chapter has further established that the Commission can still adopt a commitment decision after issuing a Statement of Objections, and that, currently, the Commission can adopt a prohibition decision in combination with a fine in a situation where it initially issued a preliminary assessment. Further, a failed market test does not preclude the Commission from imposing a fine in combination with a prohibition decision either.

The discussions in chapter four and five establish that the scope of the area of application of Article 9 of Regulation 1/2003 is wide. Further, the analysis above has not established any limitations to Article 9's applicability except the exclusion of hardcore cartels and the fact that a final commitment decision cannot be combined with a fine.

6 Article 9 of Regulation 1/2003 under scrutiny

With considerations to particularly judicial development, legal certainty, and legal predictability, this chapter discusses the above-established area of application of Article 9 of Regulation 1/2003 with a *de lege ferenda* approach. Instead of aiming critique towards the judgment in *Alrosa* for affording the Commission a too wide discretion to the adoption of commitment decisions, this thesis' approach is to discuss whether the legislation needs to be modified.

6.1 Judicial development, legal certainty, and legal predictability

Judicial development is fundamentally necessary in any field of law. Commitment decisions under Article 9 of Regulation 1/2003 might make judicial development of the EU competition rules more sensitive for judicial stagnation. This is based on the fact that commitment decisions are rarely challenged before the CJEU. Judicial review is therefore largely limited. Because of restricted judicial review, Article 9 of Regulation 1/2003 itself is not judicially developed or clarified at a satisfactory level.

A potential risk of adopting commitment decisions is that the judicial development of especially Article 102 TFEU could be slowed down or stagnated. This is particularly true for the continuously digitalised markets which give rise to both new anti-competitive conduct and anti-trust issues. From society's perspective, judicial development is important for effective enforcement of the competition rules. If Article 102 TFEU is not sufficiently developed, the Commission might struggle to enforce Articles 101 and 102 TFEU, which could harm competition and consumers in the long run.

From the undertakings' perspective, judicial development and a clear set of rules is important for legal certainty. Legal certainty is a fundamental principle in EU law, and in *Salomie and Oltean*, the ECJ stated, “As the Court has held on numerous occasions, it follows, inter alia, that EU legislation must be certain and its application foreseeable by those who are subject to

it”.¹⁷⁹ Based on the above, one might argue that on this matter, considerations to judicial development should prevail over efficiency considerations.

By choosing to adopt commitment decisions in novel, complex cases, new antitrust issues may not be clarified for the future. With lack of legal certainty and legal predictability, undertakings might find it challenging to consider whether or not their conduct constitutes a breach of, particularly, Article 102 TFEU. A potential consequence of this might be that the undertaking concerned offers commitments although its conduct on the market actually does not breach Articles 101 or 102 TFEU. As a result of this, other undertakings might refrain from the behaviour in question, which might lead to a restraint on competition. Furthermore, undertakings could, in principle, end up being too vigilant. A consequence of this could be lack of innovation, which again could harm consumers in the long run.

With a view to the above-said potential consequences, a suitable modification of Article 9 of Regulation 1/2003 could be that commitment decisions should be explicitly excluded in novel, complex cases. By contrast, commitment decisions stand out to be particularly appropriate in straightforward cases in which the law is clear. This is because in such cases, considerations to judicial development, legal certainty and legal predictability do not apply in an equal manner. It is in this regard positive that we see a noticeable increase of prohibition decisions in the technology sector.¹⁸⁰ In the extension of this, the length and detail of the commitment decisions would help disclose whether the case is too novel or complex for it to be appropriate for an Article 9 decision. It would be appropriate to require the Commission to, in its commitment decision, "...set out in abstract terms, but in detail, which legal theories of harms its pursuing as a major premise, what legal precedent supports these theories of harms and how the remedies chosen relate to these theories of harm – why they are deemed adequate, necessary and proportionate".¹⁸¹ In a situation "Where the Commission is not able to support the stated theories of harm with precedent, this indicates that a novel legal issue is involved, and the Commission should refrain from using the commitment procedure altogether".¹⁸² This would also increase transparency, which could ensure legal predictability and legal certainty for other undertakings and for third-party private litigants in follow-on actions for damages.

¹⁷⁹ Case C-183/14 *Salomie and Oltean* para. 31

¹⁸⁰ See Graph 1 and 2

¹⁸¹ *Wagner Von-Papp* (2012) p. 968.

¹⁸² *Ibid.*

Based on this, one could argue that the Commission should be required to adopt a prohibition decision in novel, complex cases. This way, the undertaking concerned might have larger incentive to challenge the decision before the CJEU, which could set legal precedent on the matter in question. This would ensure legal certainty for undertakings in the future in line with the ECJ's statement in *Salomie and Oltean*.

6.2 The "preliminary assessment" criterion

Based on the foregoing chapters, the term "preliminary assessment" is the source to several of the procedural questions that have been discussed in this thesis. One might argue that the Commission's practice on issuing shorter, less formal letters as an alternative to a Statement of Objections is not satisfying. Further, one may ask whether the commitment decision scheme is entirely voluntary if the preliminary assessment does not inform the undertaking concerned of the objections raised against them in enough detail. Through the threat of a fine, practically inherent in a prohibition decision, one might risk that undertakings concerned offer commitments although they do not agree with the Commission, or if they do not have all the information needed to make an informed decision to offer commitments. This could distort the fundament in commitment decisions under Article 9, which is that the offering of commitments is voluntary. Recalling to chapter 5.3.2, an example of this risk in practice is the prohibition decision in the *Google Search (Shopping)* case, the decision stated, "*Google did not agree with the legal analysis in the Preliminary Assessment and contested the assertion that any of the business practices described in it infringe Articles 102...*".¹⁸³ Google nevertheless offered commitments to the Commission.¹⁸⁴

To ensure legal certainty, a "preliminary assessment" should be more detailed and provide the undertaking with more specific information. If not identical to a Statement of Objections, an increased detailing level would ensure that the undertaking offers commitments on a completely voluntary basis. Considering the current difference in length and detail in a Statement of Objections and a preliminary assessment, one might argue that the Commission has set the standard too low for the "preliminary assessment" criterion. Based on the current detailing in "preliminary assessments", one may risk that the Commission's competition concerns are not

¹⁸³ Case AT.39740 – Google Search (Shopping), point 65

¹⁸⁴ Ibid. point 65

justified. Therefore, the standard for a preliminary assessment should be closer to the length and detail of a Statement of Objections than what it is in practice today.

6.3 The limitation in Recital 13

It is not certain whether Recital 13 limits the area of application of Article 9 of Regulation 1/2003. The current law is based on the Commission guidelines. However, this thesis has discussed whether other infringements than hardcore cartels are excluded from the Article 9 procedure. The Commission's decisional practice implies that it is reluctant to adopt a commitment decision in other serious cases, but it has not been possible to further establish which types of cases the Commission will exclude from the Article 9 procedure.

The Commission has rejected commitments in serious cases that are not hardcore/secret cartel cases without enough reasoning as to why the commitments were rejected. Based on the *Telekomunikacja Polska* case, one might argue that this implies that other infringements than hardcore/secret cartels are not appropriate for a commitment decision. As such, according to the current law, which only explicitly excludes hardcore/secret cartels, there is a risk of abusing Article 9 as a "short-cut" for frail evidence or as a regulatory instrument, even in serious breaches of the EU competition rules. To increase transparency and legal predictability, one could therefore argue that Regulation 1/2003 should be more well-defined as to which cases are appropriate/inappropriate for the Article 9 procedure. An alternative to this is that the Commission adopts self-binding guideline. These should make it clear which cases are appropriate for a commitment decision and set out factors or criteria that the Commission considers when deciding whether to accept commitments or not. Such a measure has already been adopted in countries like Italy, Greece, and Spain.¹⁸⁵ The Commission's Notice on best practices has increased transparency on some level, but further specification is necessary.

Currently, whether these potential consequences could become a reality or not seems to largely depend on the Commission's self-constraint, rather than on the control by the CJEU.

¹⁸⁵ OECD DAF/COMP/M (2016) 1/ANN3/FINAL, p. 5, 11

7 Final remarks

To answer the research question of when Article 9 of Regulation 1/2003 is applicable, several aspects of the commitment decision scheme have been discussed in the foregoing chapters.

Article 9 of Regulation 1/2003 does not prescribe when the Commission should choose a prohibition decision or a commitment decision. Article 9 only requires that the undertaking concerned offers commitments that meet the Commission's concerns expressed in its "preliminary assessment". A preliminary assessment may be shorter and less formal than a Statement of Objections, but negotiations on commitments cannot precede the issuing of a preliminary assessment. It is unclear whether this criterion imposes any other restrictions upon the Commission. Based on the analysis above, the Commission has a wide discretion to choose between the Article 7 or the Article 9 procedure.

The scope of the area of application of Article 9 of Regulation 1/2003 is limited by the fact that the Commission cannot impose a fine in combination with its commitment decision. Further, it is not clear whether Recital 13 last sentence imposes any limitations on the area of application and what those limitations potentially could be. The current law is nevertheless that the Commission's guidelines, which refer to Recital 13, limit Article 9's area of application by excluding hardcore/secret cartels from its application.

This thesis illustrates that several essential questions concerning Article 9 of Regulation 1/2003 are either open or should be discussed further. This particularly concerns the procedural issues relating to the Commission's understanding of the term "preliminary assessment" in Article 9 and its direct conflict with the overall system in Regulation 1/2003. Furthermore, inherent in the voluntariness of the scheme, a commitment decision is rarely challenged before the CJEU either by the undertaking concerned itself or by third-parties. The Commission's application of Article 9 is therefore, to an extensive extent, outside the scope of judicial review. Based on this, the large use of Article 9 of Regulation 1/2003 could have a negative impact on judicial development of the EU competition rules. Such an impact would consequently decrease legal certainty and legal predictability. Based on the above, judicial development of Article 102 TFEU is in the danger zone of stagnation. A question to reflect on: If commitment decisions did not exist, would the legal details of Article 102 have been developed further than what they are today?

Based on the analysis in the previous chapters, one might argue that Article 9 of Regulation 1/2003 should be modified. Further clarification of the commitment decision scheme is vital for legal certainty, progressive competition, and for preventing abuse of power. In this regard, to increase transparency, the standard for "preliminary assessment[s]" should be set at a more advanced level.

Furthermore, the law on commitment decisions should be more well-defined as to which cases are appropriate/not appropriate for the Article 9 procedure. In the extension of this, novel, complex cases should be excluded from the commitment decision procedure. As such, to detect novel cases and increase transparency, the Commission should be required to state, in its commitment decision, its theory of harm, which legal precedent supports this theory, and why the binding commitments are sufficient to help the competition concerns.

If Regulation 1/2003 is not modified, only the CJEU can clarify the scheme. Because commitment decisions are rarely challenged before the CJEU, this is not an ideal solution. Nevertheless, the *Google and Alphabet* case in progress, if appealed to the European Court of Justice, might contribute to a better understanding of the procedure under Article 9 of Regulation 1/2003.¹⁸⁶

¹⁸⁶ Case T-612/17 *Google and Alphabet* (case in progress)

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Tables and charts

Table 1: Decisions between 2005-2019

Year	Non-cartel prohibition decisions *without a fine under Article 23 (2) (a)	Commitment decisions	Total
2005	2 (Peugeot, Astra Zeneca)	2 (German Football League - DFB, Coca-Cola)	4
2006	1 (Tomra)	4 (Premier League, Repsol, De Beers, Cannes Agreement)	5
2007	4 (Mastercard*, Morgan Stanley/Visa, Groupement des cartes bancaires*, Telefónica)	5 (Distrigaz, DaimlerChrysler, Fiat, Toyota, General Motors)	9
2008	1 (CISAC*)	2 (E.ON-electricity, German electricity balancing market)	3
2009	1 (Intel)	5 (Rambus, GDF – gas foreclosure, RWE – gas foreclosure, Ship classification, Microsoft-tying)	6
Total 2005-2009	9 (33 %)	18 (67 %)	27
2010	1 (French pharmacies - ONP)	5 + ½ (ENI, E.ON- gas foreclosure, Swedish interconnectors, EDF, BA/AA/IB, ½ Visa MIF)	6 + ½
2011	1 (Telekomunikacja Polska)	2 (Standard & Poor's, IBM – maintenance services)	3
2012	0	5 (Rio Tinto Alcan, Siemens/Areva, Reuters, E-books – Penguin, E-books – “The four publishers” and Apple)	5

2013	3 (Lundbeck, Fentanyl, Telefonica/Portugal Telecom)	3 (Continental/United/Lufthansa/Air Canada, Deutsche Bahn, CEZ)	6
2014	4 (OPCOM, Motorola GPRS*, Perindopril-Servier, Slovak Telekom)	1 + ½ (Samsung UMTS, ½ Visa MIF)	5 + ½
Total 2010-2014 in numbers	9 (35 %)	17 (65 %)	26
2015	0	2 (BEH Electricity, Skyteam)	2
2016	1 ARA foreclosure* (strucural remedy)	2 (Container shipping, CDS – Information Market)	3
2017	3 (Google Shopping, Baltic rail, International Skating Union's Eligibility*)	1 (E-books Amazon)	4
2018	8 (Qualcomm, Guess, Google Android, BEH gas, Asus – vertical restraints, Denon & Marantz - vertical restraints, Philips - vertical restraints, Pioneer - vertical restraints)	2 (Gazprom, DE/DK Interconnector)	10
2019	3 (Mastercard II, Google Search Adsense, Nike)	2 (Cross-border access to Pay-tv, Mastercard/Visa)	5
Total 2015-2019	15 (63 %)	9 (37%)	24
Total 2005-2019	33 (43 %) (6 without a fine – 18 %)	44 (57 %)	77

Table 2: Procedural steps in prohibition decisions

Case	S.O.	“Preliminary Assessment”	The undertaking offered commitments (red = no, green = yes)
ARA foreclosure			
Astra Zeneca			
Asus			
Baltic Rail			
BEH gas			Decision not published
CISAC			
Denon & Marantz			
Fentanyl			
French Pharmacies	N/A		
Google (Android)			
Google (Shopping)			
Google Search (Adsense)			
Groupement des cartes bancaires			
Guess			
Intel			
International Skating Unions’ Eligibility			
Lundbeck			
Mastercard I			
Mastercard II			
Morgan Stanley/Visa			
Motorola GPRS			
Nike	Decision not published		Decision not published
OPCOM			
Perindopril (Servier)			
Phillips			

Pioneer			
Qualcomm			
Slovak Telekom			
Telefonica			
Telefonica/Portugal Telecom			
Telekommunikacja Polska			
Tomra			
Peugeot			
Total	30	1	5

Table 3: Procedural steps in commitment decisions

Case	Statement of Objections	"preliminary assessment"
German Football League – DFB		
Repsol		
Coca Cola		
Premier League		
De Beers		
Cannes Agreement		
Distrigaz		
DaimlerChrysler		
Fiat		
Toyota		
General Motors		
E.ON - electricity		
German electricity balancing market		
Rambus		
GDF – gas foreclosure		
RWE – gas foreclosure		
Ship classification		
Microsoft (tying)		
ENI		
E.ON gas		
Swedish Interconnectors		
EDF		
BA/AA/IB		
Visa MIF		
Standard and Poor's		
IBM – maintenance services		

Rio Tinto Alcan		
Siemens/Areva		
Reuters		
E-books Penguin		
E-books the Four Publishers + Apple		
Continental/United/Lufthansa/Air Canada		
Deutsche Bahn		
CEZ		
Samsung		
BEH electricity		
Skyteam		
Container shipping		
CDS – information market		
E-books (Amazon)		
Gazprom		
DE/DK Interconnector		
Cross-border access to Pay-tv		
Mastercard/Visa		
Total: 44	With Statement of Objection: 17 (39 %)	With "preliminary assessment": 27 (61 %)

Table 4: Commitment decisions in the energy sector¹⁸⁷

Year	Gas and Oil	Structural commitments	Preliminary assessment	Electricity	Structural commitments	Preliminary assessment
2006	1 Repsol					
2007	1 Distrigaz					
2008				2 E.ON Electricity,		
				German electricity balancing market		
2009	2 GDF – foreclosure					
	RWE- foreclosure					
2010	2 ENI			2 Swedish Interconnector		
	E.ON gas			EDF		
2011						
2012						
2013				1 CEZ		
2014						
2015				1 BEH electricity		
2016						
2017						
2018	1 Gazprom			1 DE/DK Interconnector		
Total	7	2	4	7	3	5

¹⁸⁷ Data on structural commitments from Hjelmeng (2011) p. 51; Gerard (2013) p. 20; Schweitzer, (2008) p. 9; Dunne (2014) p. 408.

Chart 1: Decisions by sector

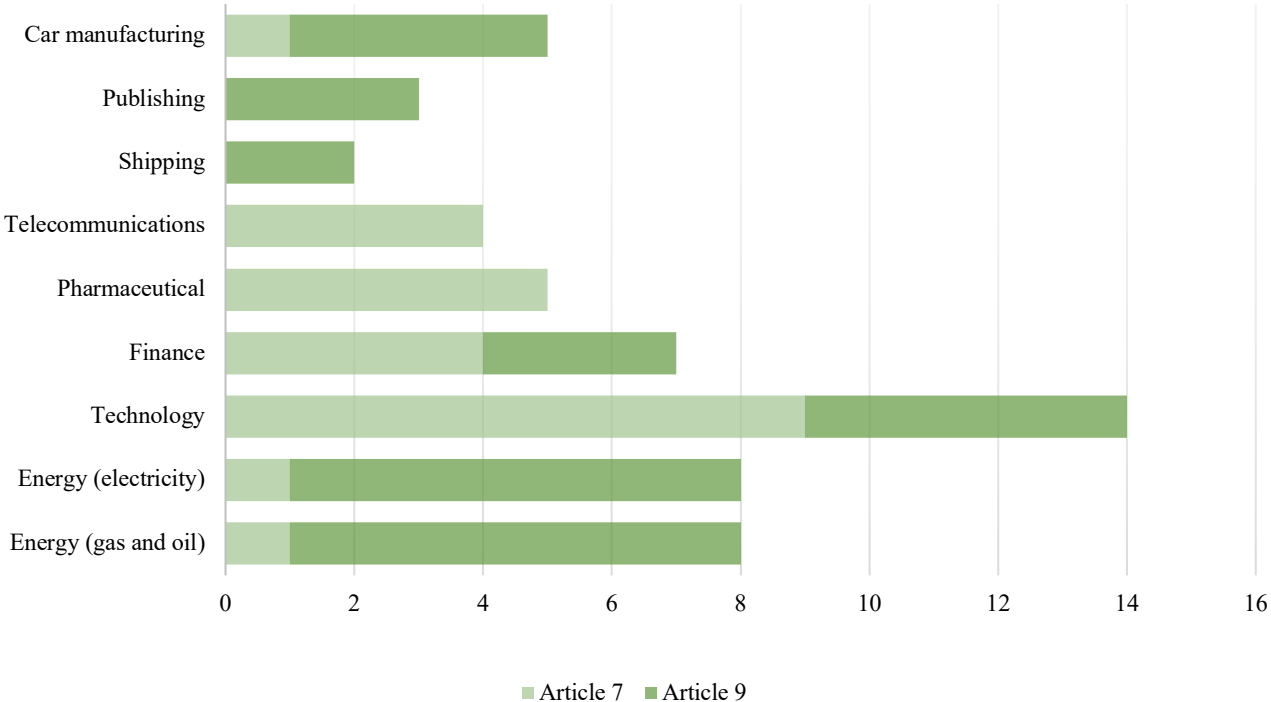


Chart 2: Commitment decisions by sector per year

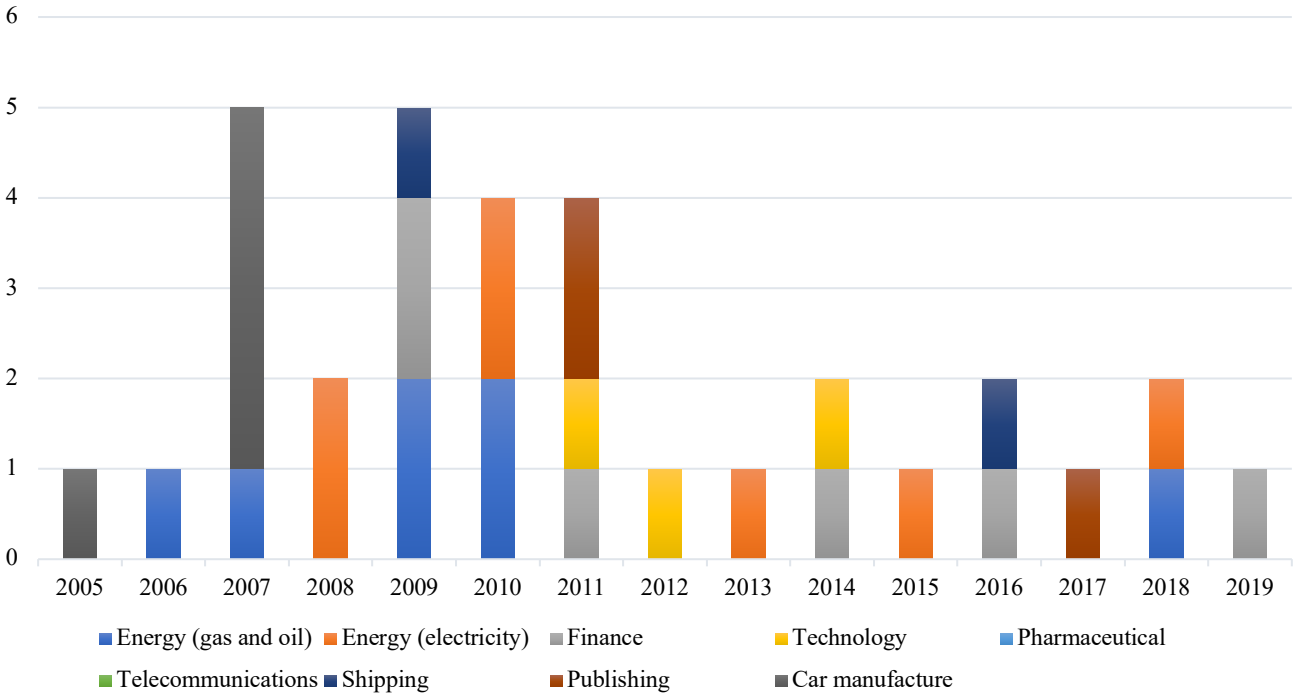


Chart 3: Prohibition decisions by sector per year

