Commitment Decisions in EU Competition Enforcement: Policy Effectiveness v. the Formal Rule of Law

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Abstract

Marking the fifteenth anniversary of the entry into force of Regulation 1/2003, 2019 offers a vantage point from which to analyse the rise of commitment decisions as the primary enforcement mechanism for non-cartel competition law investigations at EU level. Commitment decisions, the closure of competition cases with a package of remedial obligations in response to Commission concerns, have an undeniable administrative appeal. They afford the Commission the absolute discretion to counteract any form of market conduct, whether beyond the pre-existing scope of the law deduced by the EU Courts from Articles 101 and 102 TFEU, or below exacting thresholds for prohibition of legally controversial business practices. Furthermore, the Commission can secure any remedial outcome, even if disproportionate or seemingly disconnected from its competitive concerns, to thereby redraw markets according to its idealized vision. In this regard, commitment decisions allow the Commission to achieve its policy goals with utmost effectiveness. Nevertheless, this article argues that such a method of market intervention represents a significant divergence from realizing the ideal of the formal rule of law in EU competition enforcement: normative certainty for businesses, facilitated by the equal application of generalized legal norms, which are subject to close oversight by courts. This offers an aspirational legal form of considerable political and economic value. Using commitment decisions to enforce EU competition policy via ad hoc, subject-specific decision-making, conditional upon unforeseeable remedial obligations, is of systemic detriment to the legal comprehensibility of not just future Commission decision-making, but the entire edifice of norms deduced from the Treaties by the EU Courts in this field. A rather relaxed approach to judicially reviewing the remedial proportionality of commitment decisions has partly contributed to this issue. However it is suggested that the EU Courts are largely unable to remedy the problems of novel theories or harm or subject-specific determinations, delivering upon their important residual role envisaged by the rule of law ideal, because of a factor mostly beyond their control: the lack of commitment decisions brought before them for review. To that end, the article concludes by recommending the automatic review of commitment decisions by the Courts. This would hopefully foster a more balanced reconciliation of effective policy achievement by the Commission and realization of the formal rule of law ideal in contemporary EU competition enforcement.

1. Introduction

The 1st May 2019 marked fifteen years since the entry into force of Regulation 1/2003.[1] Informally referred to as the "Modernization Regulation", it fundamentally altered the division of labour for EU competition law enforcement between the European Commission and Member State decision-makers (national competition authorities, courts) that had existed since the 1960s.[2] Among its numerous procedural alterations, Article 9 of Regulation 1/2003 gave the Commission a power to close investigations with a commitment decision, whereby businesses submit remedial packages addressing its preliminary competition concerns.[3] This allows for the avoidance of a fully-substantiated finding of illegality and a fine, the typical outcome of a prohibition decision.[4] Since their first use in 2005,[5] commitment decisions have become the Commission's mechanism of choice for concluding non-cartel investigations pursuant to Articles 101 and 102 TFEU.[6] This has continued in earnest in recent years, with landmark commitment decisions recently agreed in *Amazon, Gazprom,* and *Pay-TV*.[7]

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[1] Regulation 1/2003, O.J. 2003, L 1/1.

[2] Regulation 17/62, J.O 1962, P 13/204.

[3] Art 9., Reg. 1/2003.

[4] Art 7., ibid..

[5] *Joint Selling of the Media Rights to the German Bundesliga* (COMP/C-2/37.214).

[6] For statistics: Wils, "Ten Years of Commitment Decisions under Article 9 of Regulation 1/2003: Too Much of a Good Thing?", (2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2617580>, (last visited 30 October 2019); Geradin

It is clear that even prior to Regulation 1/2003, the Commission routinely sought to secure remedial commitments from businesses rather than proceeding to a full decision.[8] Pre-2004, it often granted formal Article 101(3) TFEU exemption decisions in response to notified agreements subject to conditions.[9] There are also notable instances of abuse of dominance investigations pursuant to Article 102 TFEU concluding with an "undertaking" from a business that it would change its commercial behaviour.[10] These were undoubtedly powerful enforcement tools.[11] The introduction of commitment decisions as part of the procedural modernization of EU enforcement was in certain ways an improvement over the negotiated outcomes of old. In terms of transparency, Article 9 now provides a clear legal basis for their adoption for Article 102 TFEU, and they are subjected to market testing through provisional publication in the Official Journal.[12] With regard to compliance, there is now a formal procedure for sanctioning breaches of commitments undertaken.[13]

While acknowledging such precedents, since Regulation 1/2003 the Commission has demonstrated a clear preference for concluding non-cartel investigations with Article 9 commitment decisions rather than Article 7 prohibitions. The typical justification offered by the Commission for their frequency is procedural economy: that the concession of defence rights allows for the swift securing of competitive conditions on the investigated market, more quickly bringing the problematic conduct to an end.[14] This is said to make commitment decisions particularly appealing in technology markets.[15] It could also be suggested that the relative mildness of the conduct subjected to this procedure justifies its use, simultaneously conserving Commission resources to pursue the most heinous behaviour with fully-substantiated prohibition decisions, primarily cartels.[16] But none of these explanations are especially convincing. There is little to suggest that commitment decisions are on average much faster to conclude,[17] nor optimally suited to technology markets.[18] Furthermore, the legal innocuousness of their subject-matter is challenged by examples of commitment decisions

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and Mattioli, "The Transactionalization of EU Competition Law: A Positive Development?", 8 JECLAP (2017), 634-643; Ibáñez Colomo, *The Shaping of EU Competition Law,* (CUP, 2018), pp. 289.

[7] *E-book MFNS and Related Matters* (AT.40153) (hereafter "*Amazon*"); *Upstream Gas Supplies in Central and Eastern Europe* (AT.39816) (hereafter "*Gazprom*"); *Cross-Border Access to Pay-TV* (AT.40023) (hereafter "*Pay-TV*") (commitment decisions with Paramount on 26 July 2016 and other undertakings concerned on 7 March 2019).

[8] Van Bael, "The Antitrust Settlement Practice of the EC Commission", 23(1) CML Rev. (1986), 61-90; Waelbroeck, "New Forms of Settlement of Antitrust Cases and Procedural Safeguards: Is Regulation 17 Falling into Abeyance?", 11(4) EL Rev. (1986), 268-280.

[9] E.g. *Optical Fibres* (IV/30.320), 1986 O.J. L 236/30; *UIP* (IV/30.566), 1989 O.J. L 226/25.

[10] E.g. "Averting the Danger of an Abuse of Dominant Position: The IBM Case", 17(7/8) *Bulletin of the European Communities* (1984), 7; *Twenty-Seventh Report on Competition Policy 1997* (Brussels, 1998), pp. 26-27 (*La Poste/SWIFT* and *Digital),* pp. 144-148 (*IRI/Nielsen*).

[11] Conditional exemption decisions were used in the 1990s vis-à-vis network operators to pre-empt EU legislation on telecommunications liberalization: Larouche, *Competition Law and Regulation in European Telecommunications,* (Hart, 2000); Cave and Crowther, "Pre-Emptive Competition Policy Meets Regulatory Anti-Trust", 26(9) ECLR (2005), 481-490.

[12] Art. 27(4), Regulation 1/2003.

[13] Art 23(2)(c), ibid., as used in *Microsoft (Tying)* (AT.39530) to levy a €561 million fine. For criticism: Aleixo, "An Inaugural Fine: Microsoft's Failure to Comply with Commitments (case COMP/39530)", 34(9) ECLR (2013), 466-479. Although exemption decisions could previously be revoked, censuring non-compliance with Article 102 undertakings required the initiation of formal infringement proceedings.

[14] E.g. COM(2009)206, "Report on the Functioning of Regulation 1/2003", 5; SPEECH/13/768, "The Google Antitrust Case: What is at Stake?" (commitments "solve competition concerns more quickly and concretely, with an immediate impact on the market"); COM(2014)453, "Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives", 7.

[15] E.g. SPEECH/12/372, "Statement of VP Almunia on the Google antitrust investigation' (on "fast moving markets" particularly benefitting from commitments); Commission Report 2014, ibid..

[16] As seemingly envisaged by Recital 13, Reg. 1/2003. See SEC(2009)574, "Report on the Functioning of Regulation 1/2003", 33.

[17] For calculations questioning their speed: Lugard and Möllmann, "The European Commission's Practice Under Article 9 Regulation 1/2003: A Commitment a Day Keeps the Court Away?", (2013) *CPI Antitrust Chronicle*; Mariniello, "Commitments or Prohibition? The EU Antitrust Dilemma", 2014/01 *Bruegel Policy Brief* (2014). The most rapid commitment decisions have been preceded by informal discussions, e.g. *DE/DK Interconnector* (AT.40461) (around 6 months from initiation to conclusion).

[18] Lugard and Möllmann, ibid. (tech commitments among the slowest); Mariniello, ibid. 5 (24% of commitments involved technology versus 61% of prohibition decisions).

concerning conduct akin to a hub-and-spoke cartel and exchanging information on future price increases.[19]

Reflecting upon over a decade of enforcement since Regulation 1/2003, this article offers an alternative justification for the Commission's procedural preference. Commitment decisions represent the most powerful tool conceivable for the realization of the Commission's policy goals with maximum effectiveness. Such efficacy results from commitment decisions constituting the enforcement of competition policy through pure, unrestrained administrative discretion. It will be demonstrated (section 2) that the Commission is able to secure changes to *any* type of business conduct, even if stretching the pre-existing normative scope of Articles 101 and 102 TFEU (*beyond* the law), or without reaching exacting legal thresholds deduced by the Courts for condemnation (*below* the law). The appealing policy effectiveness of commitment decisions also relates to their outcomes (section 3). The Commission is able to negotiate *any* remedial package with investigated firms, even if the outcomes are entirely unrelated to the initial competitive concerns. In essence, commitment decisions afford the discretion for the Commission to sanction any conduct it dislikes and redraw markets according to its idealized vision with maximum effectiveness.

But having acknowledged the efficacious pursuit of often laudable policy *ends*, the main purpose of this article is to explore the problematic consequences of this *means* of market intervention. In short, the prioritization of effective policy goals through unbridled administrative discretion represents a rejection of the formal rule of law ideal in EU competition enforcement. While others have previously raised analogous concerns about commitment decisions,[20] this article builds upon their important insights by squarely adopting legal theory as a lens through which to more extensively scrutinize the implications of this manner of competition enforcement, while also incorporating analysis of the many decisions adopted since their earlier writing. A theoretical interlude (section 4) sketches the political and economic value of aspiring towards generalized and equally-applicable legal norms, comprehensible to businesses and scrutinized by courts, justifying its inclusion amongst the foundational values of the EU.[21] This will lay the groundwork for an extensive articulation of the negative implications of the significant contemporary divergence from realizing the formal rule of law (section 5). It will be explained how each appealing element of commitment decisions for the Commission (e.g. novel theories of harm, ad hoc legal exceptions, inconsistent and disconnected remedies) have come together to systematically degrade the legal certainty and universality of every pre-existing norm of EU competition law.

To be clear, despite the problematic consequences of this form of enforcement, it is actually to be expected: administrative authorities understandably endeavour – perhaps are expected to endeavour - to realize their policy goals as effectively as possible. So long as external review mechanisms can generalize the specific and concretize the unclear within individual administrative decisions, the value of the formal rule of law may nevertheless be approximated. Indeed, that is the institutional architecture seemingly mandated by the EU Treaties for competition policy, where the Commission takes the discretionary decisional lead in enforcing Articles 101 and 102 TFEU, and the Courts occasionally review their legality. To that end, the final part of this article will explore the culpability of EU Courts in the systemic degradation in the rule of law occasioned by the rise of commitment decisions (section 6). Contrary to other accounts, it will be suggested that judicial fault is not clear cut here. On the one hand, certain rulings do indicate a level of deference. But on the other hand, there are significant obstacles largely outside of the Courts' control which necessarily limit the quantity of commitment decisions subjected to judicial review. It will be suggested that perhaps the only effective solution to combat the serious consequences of the current use of commitment decisions, thereby better realizing the values of the formal rule of law ideal, is to *force* the Courts into

[19] *E-Books* (AT.39847) and *Container Shipping* (AT.39850) respectively. See Jenny, "Worst Decision of the EU Court of Justice: The *Alrosa* Judgment in Context and the Future of Commitment Decisions", 38 *Fordham International Law Journal* (2015), 701-770, 724-725, 736-737. For a rare example of the Commission refusing to accept commitments owing to the severity of the alleged abuse: *Telekomunikacja Polska* (COMP/39.525).

[20] E.g. Wagner-Von Papp, "Best and Even Better Practices in Commitment Procedures after *Alrosa*: The Dangers of Abandoning the "Struggle for Competition Law"", 49 CML Rev. (2012), 929-970; Dunne, "Commitment Decisions in EU Competition Law", 10(2) *Journal of Competition Law & Economics* (2014), 399-444.

[21] Art. 2 TEU.

a supervisory role for commitment decisions. This would however represent a fundamental shift in administrative-judicial relations in the field of EU competition law.

2. Appeal I: The Effectiveness of Competition Enforcement without Competition Law

A competition decision can be broken down into three ingredients. First, the law, the normative obligations determining the legality of conduct by firms, as authoritatively deduced by the ECJ from Articles 101 and 102 TFEU.[22] Second, the facts, the matrix of events established by the Commission to have occurred. Third, bridging the gap between the first and second, the legal characterization of the factual circumstances as satisfying the norms determining legality or illegality.

The effectiveness with which commitment decisions permit the Commission to successfully pursue its policy objectives concerns all three elements. Article 9 affords the discretion to investigate business conduct in a manner untouched by the pre-existing law developed by the ECJ. It can enforce competition policy *beyond the law* through advancing novel theories of harm (2.1) and *below the law*, without meeting deliberately high legal hurdles for condemning certain forms of conduct (2.2). Commitment decisions permit market interventions on an ad hoc basis against specific companies as and when the Commission sees fit, regardless of the legal originality or strength of its concerns. This is undoubtedly an effective means to achieve its policy aims, freed from the administrative rigidity and restraint of applying pre-existing legal norms to the ordinary evidential standard. To this end, the Commission's discretion has achieved a great deal of good. Nevertheless, adopting the form of competition enforcement without competition law is not without its costs.

2.1. Enforcement Beyond the Law

Through commitment decisions the Commission has the discretion to target *any* business conduct, regardless of whether it has been previously been deemed illegal by the EU Courts.[23] It can thereby effectively secure changes to subject-specific behaviour as thought necessary. Numerous examples could be offered of enforcement activity beyond the scope of pre-existing competition law.

One such instance is *patent ambush*. In *Rambus* the Commission suggested that dishonesty in standard-setting procedures could be an abuse of dominance contrary to Article 102 TFEU. Patent holder Rambus was alleged to have "engaged in intentional deceptive conduct" by keeping secret the inclusion of its IP in the international standard for DRAM chips, aiming to subsequently charge considerable royalties for producers locked into the standard.[24] The Commission's goal of ensuring confidence in international standard-setting processes is commendable.[25] That being accepted, the conduct scrutinized in *Rambus* bears no relation to pre-existing EU competition law.[26]

Although there has yet to be an authoritative ruling on their legality, the Commission has also been able to secure remedies in response to the contractual use of *most favoured nation (MFN) clauses* through Article 9 decisions. In *E-Books* it raised concerns about five publishers separately negotiating agency contracts with Apple that all included various MFNs.[27] The specific breach of Article 101 TFEU alleged was that they had jointly converted the sale of e-books from a wholesale to an agency model through introducing similar MFN clauses. The Commission suspected that the intention was to raise retail prices above those hitherto offered by Amazon, which had used the wholesale model to offer substantial discounts on e-books, thereby under-cutting direct sales of physical books by the publishers. The facts of *E-Books* were shuffled around in the recent *Amazon*

[22] Art. 19 TEU.
[23] Cengiz, "Judicial Review and the Rule of Law in the EU Competition Law Regime after *Alrosa*", 7(1) *European Competition Journal* (2011), 127-153, 137; Hjelmeng, "Competition Law Remedies: Striving for Coherence or Finding New Ways?", 50(4) CML Rev. (2013), 1007-1037, 1012; Svetiev, "Settling or Learning: Commitment Decisions as a Competition Enforcement Paradigm", 33(1) YEL (2014), 466-500, 470.
[24] *Rambus* (COMP/38.636), recital 27.
[25] Moullet, "How Should Undertakings Approach Commitment Proposal in Antitrust Proceedings?", 34(2) ECLR (2013), 86-100, 87.
[26] Lianos, "The Principle of Effectiveness, Competition Law Remedies and the Limits of Adjudication", 3/2014 *CLES Research Paper Series* (2014), 24; Dunne, *Competition Law and Economic Regulation: Making and Managing Markets*, (CUP, 2015), pp. 110.
[27] *E-Books.*

commitments, where its own imposition of MFNs on publishers were thought to potentially breach Article 102 TFEU.[28] The sincere motivation of the Commission in both was to tackle the artificial raising of consumer prices, a bread-and-butter concern of competition enforcement. *Amazon* is also one of the most robustly articulated commitment decisions to date, covering the potential anticompetitive consequences of MFNs in great detail. The Commission's effective realization of its goal in these decisions was in no way prejudiced by the lack of clear, analogous legal precedents.

Despite ultimately ending in failure, the Commission's initial recourse to Article 9 for investigating *preferential treatment of related services* in *Google Search (Shopping*) further demonstrates the potential effectiveness of its discretion to counter commercial behaviour beyond pre-existing legal prohibition. The theory of harm proposed from the beginning – displaying Google's related shopping search results in response to generic search requests more favourably than competing shopping services – was always clearly driven by a desire to forestall potential market foreclosure in the very specific context of Google's search engine domination.[29] So too were the increasingly demanding remedial packages thrashed-out over multiple years to address this "preferential" or "favourable treatment".[30] But at no point did the Commission indicate how the investigated practice related to the legal norms deduced by the ECJ from Article 102 TFEU.[31] The implication seems to have been that the positive ends of more competitive online search markets would legitimate any novel theory of harm. Indeed, the feast of economic analysis and famine of legal precedent that eventually emerged as the formal prohibition decision may be similarly motivated.[32] Still, that this outcome was almost achieved through a commitment decision – novel theory of harm, ambitious remedies and all – is a testament to the policy effectiveness of this procedure, allowing the Commission to pursue its ends unencumbered by the scope of pre-existing competition law.

As a final example of the efficacy of enforcement through commitment decisions in this manner, the Commission has frequently targeted *capacity hoarding* and *strategic underinvestment* in the energy sector.[33] These investigations concern owners of infrastructure bottlenecks such as transmission networks, pipes, or terminals for importation. Capacity hoarding is where a vertically-integrated bottleneck operator reserves for its upstream or downstream business a substantial portion of the infrastructure's transmission volume for a long period.[34] The Commission's commitment decisions have found this to result from explicit contractual terms, vagueness as to spare capacity, poor congestion management, or simply failing to ease third party access.[35] Sometimes these practices have blended into what it has called strategic underinvestment, where the bottleneck owner neglects to increase capacity that would facilitate upstream or downstream market entry. For example, *Gaz de France* concerned two import capacity terminals: for one, it criticized a failure to take seriously external offers to co-finance expansion; for the other, it censured the lack of investment in additional capacity that the Commission deemed "sufficiently profitable".[36] Commitment decisions have been a very effective method for addressing its view that vertically-integrated infrastructure owners necessarily have distorted incentives against capacity expansion to protect their upstream or downstream profits. It has essentially been able to secure "investment obligations" in capacity to foster increased market entry.[37] Given the unpredictable impact upon business incentives to invest and

[28] *Amazon*.
[29] IP/10/1624, "Commission probes allegations of antitrust violations by Google".
[30] SPEECH/12/372, "Statement of VP Almunia on the Google antitrust investigation".
[31] See Nazzini, "Google and the (Ever-Stretching) Boundaries of Article 102 TFUE", 6(5) JECLAP (2015), 301-314, 307-308; Akman, "The Theory of Abuse in *Google Search*: A Positive and Normative Assessment under EU Competition Law", (2017) *Journal of Law, Technology & Policy*, 301-374.
[32] *Google Search (Shopping)* (AT.39740).
[33] Terminology adopted in SWD(2014)230/02, "Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives", 32.
[34] E.g. *RWE Gas Foreclosure* (COMP/39.402); *Gaz de France* (COMP/39.316); *ENI* (COMP/39.315); *E.ON Gas* (COMP/39.317); *CEZ, a.s.* (AT.39727). cf Scholz and Purps, "The Application of EC Competition Law in the Energy Sector", 2(1) JECLAP (2011), 62-77, 73-74 (long-term entry booking is normal and promotes security of supply).
[35] E.g. *RWE*, recitals 26-27.
[36] *Gaz de France*, recital 39. Similarly in *ENI* the Commission criticized the firm for knowing that many requests went unmet but still failing to consider expansion or canvass opinions on co-financing it.
[37] Scholz and Purps, "The Application of EC Competition Law in the Energy Sector", 1(1) JECLAP (2010), 37-51, 48.

innovate, it is possible to disagree with the desirability of this end.[38] What cannot be doubted is that commitment decisions are an efficacious means for the Commission to realize its goals in the energy sector, despite "capacity hoarding" or "strategic underinvestment" bearing little relation to authoritative legal obligations deduced by the ECJ from the Treaties.[39]

In short, commitment decisions have proven to be a powerful enforcement tool for wherever the Commission has reason to be believe that harm is being caused to markets, but where there has been no previous finding of illegality for the alleged theory of harm. Freed from the scope of the pre-existing law of Articles 101 and 102 TFEU, its discretionary interventions can be directed towards realizing its policy goals for particular markets and against specific firms as it deems necessary.

2.2. Enforcement Below the Law

The effectiveness of commitment decisions as a tool for competition enforcement does not end at permitting interventions beyond the scope of the law. Article 9 only requires the identification of a "possible" infringement of EU competition law, rather than a demonstration of an "actual" violation.[40] The Commission therefore has discretion as to the legal characterization of instant facts as meeting criteria for condemnation. As a result, it can intervene against conduct possibly *below* authoritative thresholds deduced by the EU Courts for a formal finding of illegality. Although (unsurprisingly) adamant that it does not use this discretion to close weak cases,[41] its reasoning is often much more terse than in a fully-substantiated prohibition decision.[42] Of course, commitment decisions are intended to offer a mechanism for cooperative case closure without the same level of evidential exactitude. Still, succinct explanations differ from questions as to whether the Commission is actually exercising its discretion to pursue conduct falling far short of deliberately narrow judicial requirements for finding illegality.[43] As with commitment decisions reaching beyond the law, these examples of enforcement below the law reinforce the effectiveness of this discretion for the Commission to realize its various policy goals, often securing admirable results.

A first illustration concerns the establishment of a position of *collective dominance* for the purposes of Article 102 TFEU. In a period of considerable embarrassment for the Commission,[44] the General Court in *Airtours* stressed that the legal pre-requisites for finding concerted abuses of dominance were strict,[45] ruling in the instant decision that the characterization of the UK market for short-haul package holidays as such did not meet the strict legal standard.[46] The high hurdles for successfully substantiating collective dominance essentially restrained the Commission's ability to effectively intervene in oligopolistic markets. But as demonstrated by *German Electricity*, commitment decisions offer the Commission the enforcement discretion to avoid meeting such legal hurdles.[47] E.ON was alleged to have engaged in the serious practice of output limitation, but its dominance was dubious owing to a relatively low market share. Instead, the Commission suggested that E.ON may have engaged in an individual abuse of a collective dominant position. In the safe

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[38] See Scholz and Purps, ibid. (on cementing dominant bottlenecks by disincentivizing rivals from finding competing distribution methods); Merlino and Faella, "Strategic Underinvestment as an Abuse of Dominance under EU Competition Rules", 36(4) World Comp. (2013), 513-539, 536 (on inhibiting infrastructure creation).

[39] Scholz and Purps, ibid.; Talus, "Just What is the Scope of the Essential Facilities Doctrine in the Energy Sector?: Third Party Access-Friendly Interpretation in the EU v. Contractual Freedom in the US", 48(5) CML Rev. (2011), 1571-1597; Hjelming, *supra* note 23, 1012; Merlino and Faella, ibid., 516-519; Dunne, "Commitment Decisions in EU Competition Law", 10(2) *Journal of Competition Law & Economics* (2014), 399-444, 421; Lianos, *supra* note 26, 24; Geradin and Mattioli, *supra* note 6, 640-642.

[40] "To Commit or not to Commit?: Deciding Between Prohibition and Commitments", (2014) *Competition Policy Brief* .

[41] ibid.; MEMO/13/139, "Commitment decisions – frequently asked questions".

[42] Geradin and Mattioli, *supra* note 6, 635.

[43] As alleged by Sadowska, "Energy Liberalization in an Antitrust Straitjacket: A Plant Too Far?", 34(4) World Comp. (2011), 449-476, 451 ("far more perfunctory", "weak" allegations); Cengiz, *supra* note 23, 137; Mariniello, *supra* note 17, 7; Jenny, *supra* note 19, 734; Witt, *The More Economic Approach to EU Antitrust Law*, (Hart, 2016), pp. 149-150 ("conceptually hazy").

[44] See Witt, ibid., pp. 27-32.

[45] T-342/99, *Airtours v. Commission*, EU:T:2002:146, para. 62.

[46] Ibid., para. 294 (lacking "cogent evidence", "vitiated by a series of errors of assessment").

[47] *German Electricity Wholesale Market* (COMP/39.388) and *German Electricity Balancing Market* (COMP/39.389) (hereafter "*German Electricity*").

context of a commitment decision, the Commission was able to justify its characterization of there being collective dominance in a few hundred words without reference to the stringent legal elements of *Airtours.* Undoubtedly this was an effective means for it to remedy anticompetitive behaviour in this particular instance to the benefit of German energy customers. Nevertheless, whether Article 9 was used to avoid the rigorous demonstration of collective dominance through a fully-substantiated prohibition decision is not without question.

Establishing *excessive pricing* as an abuse contrary to Article 102 TFEU is also legally difficult, though has still been found by the Commission in a number of commitment decisions. The formative *United Brands* case established the test for excessive pricing to be bearing "no reasonable relation to the economic value of the product supplied", either in comparison to competitive benchmarks or in itself.[48] The haziness of this test has hampered condemnation of high prices by the Commission through fully-substantiated prohibition decisions for decades.[49] Yet the discretionary evaluative latitude of commitment decisions avoids such evidential issues. For example in *Standard and Poor's*, the Commission was confident in tersely concluding that prices "significantly exceed the costs incurred" so as to amount to an abuse of dominance, despite the usual contestability of such claims.[50] Following the recent reengagement of the ECJ with this issue,[51] the *Gazprom* commitment decision is slightly more rigorous, adopting competitive benchmarks for gas in Germany and the Netherlands to gauge the excessiveness of prices in Central and Eastern Europe, finding average differences of 22-44% (though reduced to 9-24% on another metric).[52] Still, the evaluation that these variations meet the *United Brands* test is reached in little over a page. Exorbitantly high prices are an exercise of market power of clear consumer detriment, and the Commission's determination to prevent exploitation is an understandable end of competition policy.[53] Despite the difficulty of persuasively characterizing prices as excessive, commitments offer the decision-making discretion to reach such a conclusion with greater ease than at any time before Regulation 1/2003.

A third example of the appealing enforcement effectiveness of the Commission's latitude as to the legal evaluation of facts in commitment decisions concerns the law on *refusals to grant access to physical property*. In *Bronner*, the ECJ was confronted with whether refusing access for a small periodical to a national distribution system should be found abusive, contrary to Article 102 TFEU.[54] Following Advocate General Jacobs' cautious warning that overeager conclusions of illegality in such circumstances could severely undermine investment incentives,[55] the ECJ make it abundantly clear that such a finding should only be reached in the most limited circumstances: where the requesting party would be eliminated; access was "indispensable" to continue operating; that there were no actual or potential substitutes.[56] That alternatives were "less advantageous" would not suffice.[57] Such strictness in condemning refusals to grant access to physical infrastructure has been praised by commentators.[58] While explicit and constructive refusals have occasionally been the subject of Article 7 prohibition decisions, their characterization as meeting the demanding *Bronner* legal threshold[59]

[48] C-27/76, *United Brands and United Brands Continental v. Commission,* EU:C:1978:22, para. 250.
[49] Dunne, *supra* note 39, 422.
[50] *Standard and Poor's* (COMP/39.592), recital 37. See Dunne, ibid., 424 ("patently neglects" to meet the legal test).
[51] C-177/16, *Autortiesību un Komunicēšanās Konsultāciju Aģentūra/Latvijas Autoru Apvienība v. Konkurences Padome*, EU:C:2017:689.
[52] *Gazprom*, recitals 69-74.
[53] Enforcement against excessive pricing has returned to prominence under Commissioner Vestager: "Protecting Consumers from Exploitation", speech available at <https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/protecting-consumers-exploitation_en> (last visited 30 October 2019); IP/17/1323 "Commission opens formal investigation into Aspen Pharma's pricing practices for cancer medicines" (AT.40394).
[54] C-7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint,* EU:C:1998:569.
[55] Opinion of A.G. Jacobs, EU:C:1998:264, paras. 56-58.
[56] C-7/97, *Bronner*, para. 41.
[57] Ibid., para. 43.
[58] E.g. Capobianco, "The Essential Facility Doctrine: Similarities and Differences between the American and the European Approach", 26(6) EL Rev. (2001), 548-564, 558-560; Mavroidis and Neven, "*Bronner* Kebab: Beyond Refusal to Deal and Duty to Cooperate" in Ehlermann and Atanasiu (Eds.), *European Competition Law Annual 2003: What is an Abuse of a Dominant Position?,* (Hart, 2006), pp. 362.
[59] As reformulated in "Guidance on the Commission's enforcement priorities in applying Art. 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings", O.J. 2009, C 45/7, recitals 81-90.

invariably requires long and detailed appraisal by the Commission.[60] This has not been the case for the use of this concept when conducting enforcement activity through commitment decisions. The Commission has been up-front that it regularly finds constructive refusals to grant access to energy infrastructure.[61] This is despite academic scepticism as to whether the terminals, networks, and pipes under scrutiny actually *are* indispensable and necessary to operate.[62] Notwithstanding such doubts, the Commission's characterization of the refusal as potentially amounting to an abuse is relatively scant in commitment decisions, bordering on assertion.[63] The four recitals in *E.ON Gas* and *ENI*,[64] two recitals in *Gaz de France*,[65] and single recital in *RWE*[66] on whether the facilities questioned were actually essential, suggest that through commitment decisions the Commission has the discretion to reach conduct potentially below the exacting requirements stipulated by the ECJ in *Bronner*. The opportunity to dispense with rigorous legal appraisal of the instant facts has, however, permitted it to effectively pursue its policy goals in energy markets.

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Commitment decisions have proven to be a powerful tool of competition enforcement for the Commission to realize its ends with utmost efficacy. In permitting market interventions beyond the scope of pre-existing law or, where difficult evaluative thresholds exist, below judicially-determined legal strictures, it has the discretion to target *any* market conduct it deems problematic. This is competition enforcement without competition law, and it is undoubtedly very effective for realizing the Commission's often commendable goals.

3. Appeal II: The Effectiveness of Unrestrained Remedies

The decision-making discretion to persuade companies to merely *cease* any market conduct where the Commission has competitive concerns, even if beyond or below pre-existing legal prohibition, would in itself be a valuable enforcement tool. But the effectiveness with which the Commission can reach its ends through commitment decisions goes far beyond such remedial restraint. Instead, it also enjoys the discretion to accept all manner of outcomes to close the investigation.[67] Commitment decisions have been a site of extensive experimentation in competition remedies, prompting claims that the appeal of far-reaching outcomes are responsible for their prevalence.[68] The attraction to competition decision-makers is unsurprising. Through commitment decisions the Commission essentially has the discretion to entirely redraw targeted markets according to its idealized vision, whether informed by efficiency, market entry, European integration, or anything else.

Although free to impose behavioural and structural solutions in prohibition decisions, the text of Article 7 of Regulation 1/2003 only permits remedies that are "proportionate to the infringement committed" and necessary to bring it "effectively to an end".[69] Fines are the "baseline" remedy beyond cease-and-desist orders,[70] even where recidivism is a key concern.[71] The Commission has

[60] E.g. *Telekomunikacja Polska* (COMP/39.525), recitals 695-884; *Slovak Telekom* (AT.39523), recitals 355-821; *ARA Foreclosure* (AT.39759), recitals 74-115 (more truncated as an unusual hybrid voluntary settlement).
[61] Working Document cited *supra* note 33, 31-32. E.g. *RWE, Gaz de France, E.ON Gas, ENI.*
[62] For discussion: Scholz and Purps, *supra* note 34, 74-75; Talus, *supra* note 39, 1588-1590; Merlino and Faella, *supra* note 39, 531.
[63] As claimed by: Ibáñez Colomo, "On the Application of Competition Law as Regulation: Elements for a Theory", 29(1) YEL (2010), 261-306, 298; Merlino and Faella, ibid.; Dunne, *supra* note 39, 424.
[64] *E.ON Gas*, recitals 32-35; *ENI*, recitals 39-42.
[65] *Gaz de France*, recitals 26-27.
[66] *RWE*, recital 22.
[67] On remedial discretion, see Lianos, "Competition Law Remedies: In Search of a Theory", 3/2011 *CLES Working Paper Series* (2011).
[68] E.g. Gerard, "Negotiated Remedies in the Modernization Era: The Limits of Effectiveness", available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2395414> (last visited 30 October 2019), 5 (commitment decisions are "entirely driven by the nature and scope of remedies").
[69] See also Regulation 1/2003, recital 12, on structural remedies only being available where there is no equally effective behavioural change or where they would be less of a burden.
[70] Working Document cited *supra* note 33, 56.
[71] For an overview of competition remedies: Ritter, "How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements?", 7(9) JECLAP (2016), 587-598.

never imposed a structural remedy through a prohibition decision.[72] Such remedial restraint has produced rare judicial engagement with this subject.[73] The main exception is the General Court's annulment of the imposition of a monitoring trustee in *Microsoft* owing to illegal delegation of enforcement powers and disproportionality.[74] The Court was clear in stressing that the Commission "does not have unlimited discretion when formulating remedies" in prohibition decisions.[75]

In contrast, the text of Article 9 of Regulation 1/2003 states that the Commission can accept any remedies that "meet the concerns" it has expressed, a lower threshold for justifying more radical outcomes. Many have suggested that commitment decisions have thus been used to secure remedies that would be overturned by the EU Courts if part of a prohibition decision.[76]

Early extensions beyond the strictures of Article 7 prohibition decisions were relatively modest. Although the *Coca-Cola* commitment decision only expressed concerns about contractual practices with distributors in four countries, the final remedial package covered all EU member states where it was dominant.[77] Similarly, when comparing the *Premier League* commitment decision on joint-selling of football broadcasting rights with the almost identical exemption decision in *Champions League*, the former included a bonus remedial obligation to prevent a single buyer from acquiring all of the packages.[78]

It has since become clear that commitment decisions are a very effective tool for the Commission to pursue its policy goals through designing creative remedies. For instance, *Microsoft (Tying)* evidences an apparent desire to assist smaller competitors of the technology giant through pro-active obligations.[79] As with the (in)famous investigation into Windows Media Player,[80] the follow-up commitment decision was directed at the pre-installation of Internet Explorer on the Windows operating system as a possible abuse of dominance.[81] Rather than simply requiring the two products to be decoupled, the Commission secured a pledge from Microsoft to offer a consumer ballot screen offering a range of browsers from which to choose, thereby giving its rivals unprecedented visibility.[82] Similarly extensive remedies to assist small technology firms were also sought in the abandoned *Google Search (Shopping)* commitment negotiations. Over four years the Commission and Google's rivals attempted to reconceptualize how the search engine displayed its related shopping service and those of others, scrutinizing package after package to get the "icing on the cake" and finally the "cherry on top".[83] Commissioner Almunia considered the final set to be "far-reaching" concessions to "restore a level playing-field" in online search.[84] Although failing to convince his successor, the extent of the radical remedies to which Google was willing to commit nevertheless demonstrates the effectiveness with which the Commission can pursue its enforcement goals.

Without doubt, the most vivid examples of the Commission's remedial discretion are commitment decisions in the energy sector. This is an area of activity where it has a very particular vision which it wishes to replicate as closely as possible. Since the 1990s, it has spearheaded various EU legislative packages endeavouring to liberalize domestic markets, foster entry to challenge

[72] It tried in *Continental Can Company* (IV.26811) through the decision was overturned by the ECJ on the unrelated issue of market definition: C-6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission*, EU:C:1973:2. In *ARA Foreclosure*, the investigated undertaking voluntarily offered divestiture.
[73] See Ritter, *supra* note 71.
[74] T-201/04, *Microsoft v. Commission*, EU:T:2007:289, paras. 1251-1279.
[75] Ibid., para. 1276.
[76] Especially in the energy sector: Rab and Sukhtankar, "Alternative Competition Law Enforcement in Energy: The Application of Commitments under Article 9 Regulation 1/2003 in the Energy Sector", 17(6) *Utilities Law Review* (2008), 199-201; Ibáñez Colomo, *supra* note 63, 300; Scholz and Purps, *supra* note 37, 51; Wagner-Von Papp, *supra* note 20, 960.
[77] *Coca-Cola* (COMP/A.39.116/B2).
[78] *Joint selling of the Commercial Rights of the UEFA Champions League* (COMP/C.2-37.398); *Joint Selling of Media Rights to the FA Premier League* (COMP/C-2/38.173). See Ibáñez Colomo, *supra* note 63, 289-290.
[79] On the risk of commitment decisions facilitating an inefficient bias against concentration: Ibáñez Colomo, ibid., 281-282; Hjelming, *supra* note 23, 1018-1019.
[80] *Microsoft* (COMP/C-3/37.792); T-201/04, *Microsoft*.
[81] *Microsoft (Tying)* (COMP/C-3/39.530).
[82] For commentary: Ibáñez Colomo, *supra* note 63, 294; Rab, Monnoyeur, and Sukhtankar, "Commitments in EU Competition Cases: Article 9 of Regulation 1/2003, its application and the challenges ahead", 1(3) JECLAP (2010), 171-188; Aleixo, *supra* note 13, 474-475.
[83] Leyden and Dolmans, "The Google Commitments: Now with a Cherry on Top", 5(5) JECLAP (2014), 253-255.
[84] SPEECH/14/93, "Statement on the Google investigation".

vertically-integrated former incumbents, and introduce a borderless European energy market.[85] Its 2007 report found a number of outstanding inadequacies,[86] though its insistence that the appropriate solution was regulation rather than competition enforcement was short-lived.[87] Commitment decisions have given the Commission ample discretion to effectively restructure energy markets through creative and radical remedies. As examples of the remedial latitude afforded by this investigatory procedure are too numerous to all be considered in detail, priority is given to the most dramatic.

In *Swedish Interconnectors* the electricity transmission system operator had managed congested internal bottlenecks at peak times by restricting exports to Denmark, thereby discriminatorily raising prices for Danish customers.[88] Plainly animated by the goal of market integration,[89] the remedies concluded in the commitment decision fundamentally reorganized the Swedish electricity system.[90] Despite the existence of less drastic solutions,[91] and regulatory ambivalence as to the chosen option for congestion management,[92] the Commission used its discretion to realize its ideal outcome. It similarly reconstructed the Bulgarian energy market in *BEH Electricity*.[93] Commitments were effectively used to create a new power exchange for electricity, animated by noble intentions of facilitating anonymous sales, increasing liquidity, improving transparency, and promoting cross-border integration.

The efficacy of the Commission's remedial discretion through this procedural route can also be gleaned where the final commitments bear little relation to the conduct deemed problematic.[94] In *German Electricity Wholesale*, allegations of production withdrawal raising prices for downstream retailers were closed with the divestiture of generation capacity to a third party, a remedy clearly intended to force new entry.[95] Similarly in *CEZ*, the Commission was concerned with long-term capacity booking into the transmission network by the former electricity monopolist, potentially reducing entry and expansion by rivals.[96] But despite this specific impetus, and contrary to remedies in earlier analogous investigations,[97] CEZ also agreed to divest generation capacity. In the recent *Gazprom* decision too, allegations of partitioning national markets to charge excessive prices were actually met with an innovative scheme for rearranging the delivery of gas from Central Europe to the Baltic states (and vice versa), thereby overcoming the lack of physical interconnectors for cross-border energy movement.[98] In this way the Commission's remedial discretion is very effective for achieving its goals, permitting decision-making outcomes that even have - at best – a tenuous connection to the potential competitive concerns.

So potent are the remedies which may be secured through commitment decisions that the Commission is even able to secure those explicitly rejected as mandatory in regulation, essentially side-stepping obstructive intermediaries to its ends: Member States in the EU legislative process.[99] In

[85] For overviews: Cameron, "The Internal Market in Energy: Harnessing the New Regulatory Regime", 30(5) EL Rev. (2005), 631-648; Rab and Sukhtankar, *supra* note 76.
[86] COM(2006)851final, "Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors" (e.g. high concentration, vertical integration, barriers to entry, lack of price transparency).
[87] Ibid., 9.
[88] *Swedish Interconnectors* (COMP/39.351). Similar conduct was recently investigated in the *DE/DK Interconnector* (AT.40461) commitment decision, though involved restricting the *importation* of cheaper electricity into Germany.
[89] Sadowska and Willems, "Power Markets Shaped by Antitrust", 9(1) *European Competition Journal* (2013), 131-173, 143-144.
[90] Splitting Sweden into two bidding zones with their own electricity prices, deliberately leading to higher tariffs for some southern customers but hopefully signalling the need for investment.
[91] For discussion of counter-trading, the preferred option of the Swedish operator: Sadowska and Willems, *supra* note 89, 153-154.
[92] Ibid., 161-162, 170 (accepting cross-border restrictions).
[93] *BEH Electricity* (AT.39767).
[94] See Lianos, *supra* note 67, 28.
[95] (COMP/39.388). For doubts above the suitability of this remedy: Scholz and Purps, *supra* note 37, 51.
[96] (AT.39727).
[97] *Gaz de France* (COMP/39.316) and *E.ON Gas* (COMP/39.317) also concerned long-term capacity booking into gas transmission networks. In contrast, the remedies agreed were for the sale of some contracted capacity and limits to the overall percentage reserved.
[98] (AT.39816)
[99] See: Hancher and de Hauteclocque, "Manufacturing the EU Energy Markets: The Current Dynamics of Regulatory Practice", 11(3) *Competition and Regulation in Network Industries* (2010), 307-334, 329-330; Sadowska and Willems, *supra* note 89, 142; Dunne, *supra* note 39, 435; Geradin and Mattioli, *supra* note 6, 641-642.

German Electricity Balancing, *RWE*, and *ENI*, various bottleneck infrastructures (transmission networks, cross-border pipes) were divested by vertically-integrated energy companies who could have used their control to the disadvantage of upstream and downstream rivals.[100] This outcome reflected the Commission's belief that the *only* suitable remedy to remove the allegedly inherent risk of distorted management incentives was ownership unbundling:[101] operation by an independent firm singularly driven by the commercial motivation to efficiently running the bottleneck, invest in expansion, and stimulate upstream/downstream entry.[102] But making ownership unbundling compulsory was *rejected* by Member States in the Third Energy Package, instead leaving open a variety of options.[103] Notwithstanding concerns for the legitimacy of the EU legislative process and the separation of powers,[104] the attractive efficacy of commitment decisions are clear: in this instance their broad remedial discretion permitted the Commission to pursue its ends of restricting regulatory choices through one-to-one discussions with infrastructure owners.[105]

Given the remedial latitude afforded by commitment decisions, their appeal for conducting and concluding competition investigations is surely irresistible to the Commission. Commentators are correct to equate this manner of enforcement with regulation;[106] the Commission can, in theory, reach *any* outcome (divestiture, redrawing Member State markets, forced entry, aiding competitors, anything else) even where they appear unrelated to the initial competitive concern.[107] When combined with the discretion to investigate market conduct beyond and beneath the law – useful even if simply resulting in cessation – the Commission arguably has the most powerful tool conceivable for pursuing its various policy ends with utmost effectiveness. These decision have in many instances done a great deal of good for European consumers. Nevertheless, the realization of such ends through absolute discretion is antithetical to the formal rule of law ideal and not without consequences.

4. Theoretical Interlude: The Political and Economic Value of the Formal Rule of Law

Despite recent Commission claims to the contrary,[108] it has been recognized for centuries that the rule of law is an inherently contestable concept, which perhaps accounts for its longevity in Western legal philosophy.[109] To avoid its use as a meaningless slogan,[110] it is necessary to be very specific about the particular conceptualization of the ideal adopted from the extensive catalogue of formulations.

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[100] (COMP/39.388); (COMP/39.402); (COMP/39.315).

[101] As evidenced in the speeches of Commissioner Kroes in the lead up to the Third Energy Package, e.g. SPEECH/06/541 "The Need for a renewed European Energy Policy"; SPEECH/07/175 "Improving Europe's energy markets through more competition"; SPEECH/07/574 "Improving competition in European energy markets through effective unbundling"; SPEECH/08/106 "Structural Reforms to the Energy Market".

[102] For academic support: Pollitt, "The Arguments for and against Ownership Unbundling of Energy Transmission Networks", 36 Energy Policy (2006), 704-713; Von Rosenberg, "Unbundling through the Back Door… the Case of Network Divestiture as a Remedy in the Energy Sector", 30(5) ECLR (2009), 237-254, 241-242; Moselle and Black, "Vertical Separation as an Appropriate Remedy", 2(1) JECLAP (2011), 84-90.

[103] Directive 2009/73/EC Concerning Common Rules for the Internal Market in Natural Gas, O.J. 2009, L 211/94;
Directive 2009/72/EC Concerning Common Rules for the Internal Market in Electricity, O.J. 2009, L 211/55. For an overview: Johnston and Block, *EU Energy Law*, (OUP, 2012), pp. 37-39.

[104] See Forrester, "Creating New Rules or Closing Easy Cases? Policy Consequences for Public Enforcement of Settlements under Article 9 of Regulation 1/2003", in Ehlermann and Marquis (Eds.), *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law*, (Hart, 2010), pp. 65; Cengiz, *supra* note 23, 136.

[105] For comment: Piergiovanni, "Competition and Regulation in the Energy Sector in Europe in the Post-Sector Inquiry Era", 5(2) *Competition Law International* (2010); Johnston and Block, *supra* note 103, pp. 71-72; Dunne, *supra* note 39, 430.

[106] E.g. Forrester, *supra* note 104, pp. 659; Schweitzer, "Commitment Decisions under Article 9 of Regulation 1/2003: The Developing EC Practice and Case Law," in Ehlermann and Marquis, *supra* note 104, pp. 559; Moullet, *supra* note 25, 86; Sadowska and Willems, *supra* note 89, 142; Dunne, *supra* note 39, 430; Jenny, *supra* note 19, 702.

[107] It has sometimes been claimed that the discretion in commitment decisions to expand the theory of harm allows the Commission to gain broader remedies (e.g. Sadowska, *supra* note 43, 451-453; Gerard, *supra* note 68, 13-14; Lianos, *supra* note 26, 11-12). The analysis in this section challenges such suggestions: as *any* conduct and *any* remedy can result from a commitment decision, there is no need for the Commission to connect the two halves at all.

[108] COM(2019) 343 final, "Strengthening the Rule of Law Within the Union: A Blueprint for Action", 1 ("well-defined in its core meaning.").

[109] See generally: Hutchinson and Monahan, "Democracy and the Rule of Law' in (Eds.) *The Rule of Law: Ideal or Ideology*, (Carswell, 1987), pp. 99; Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?", 21(2) *Law and Philosophy* (2002), 137-164, 140-141; Tamanaha, *On the Rule of Law: History, Politics, Theory*, (CUP, 2004); Loughlin, *Foundations of Public Law*, (OUP, 2010), pp. 312-313; European Commission for Democracy through Law (Venice Commission), 'Report on the Rule of Law' CDL-AD(2011)003rev.

The critique of competition enforcement through commitment decisions offered in the next section adopts a *formal* understanding of the rule of law, based upon the similar accounts of Hayek, Fuller, and Raz, plus the critiques of Unger, Nonet and Selznick.[111] It also closely aligns with the articulations offered by the Venice Commission advising the Council of Europe, and by a Commission report on strengthening the rule of law within the Union.[112] As an ambition for the form of legal obligations and their enforcement, to accept the desirability of its realization is to demand more than the mere constitutional "legality" of normative acts. As understood here, it is to aspire to a legal system of normative obligations which approximate principles (i) and (ii), within an institutional framework providing (iii):

(i) *Normative comprehensibility:* legal subjects are able to comprehend their obligations and rights. This is facilitated by the many more specific formal characteristics often posited: publicity, prospectivity, clarity, consistency, constancy, possibility, and so on.

(ii) *Generalized norms of equal application:* in terms of their substantive scope, laws are generalized (abstracted, universalized) away from particular individuals and circumstances that may fall within their ambit. With regard to their enforcement,[113] all similar instances coming within their reach should be treated equally, consistent with past and future decision-making. The formal antithesis of this is ad hoc, subject-specific determinations of legality.

(iii) *Independent review:* individuals subjected to a normative determination have an independent mechanism for checking the legal validity of this power and, if decision-making is premised on realizing certain societal goals (e.g. promoting "competition"), for reviewing substantive compliance of decisions with this condition of power-conferral. This is usually entrusted to courts.

Each aspect of this conceptualization of the formal rule of law has been acknowledged to be of considerable virtue throughout centuries of scholarship. In political liberalism,[114] comprehensible norms are seen to respect the rationality of legal subjects and facilitate the freedom to plan their affairs.[115] They also allow for the legitimate allocation of responsibility and punishment for knowing transgressions of norms that could have been understood in advance.[116] Therefore where a decision (administrative or judicial) is necessary to resolve a contentious legal issue or extend normative prohibition, the affected parties who could not rationally change their behaviour to avoid illegality ought not to be punished. Aspiring to common action through generalized and equally-applied norms is further considered an additional limitation upon state action, reaching beyond more recognized devices of liberal constitutionalism.[117] Such a restrictive form facilitates normative comprehensibility by marginalizing discretionary decision-making on an ad hoc basis,[118] simultaneously guarding against the risk of discriminatory legal treatment.[119]

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[110] Loughlin, ibid..

[111] Hayek, *The Road to Serfdom*, (Routledge, 2001); Hayek, *Law, Legislation and Liberty,* (Routledge 2013); Fuller, *The Morality of Law*, rev. ed. (Yale University Press, 1969), pp 33-39; Raz, *The Authority of Law: Essays on Law and Morality*, Clarendon Press, 2011), pp. 214-218; Unger, *Law in Modern Society: Toward a Criticism of Social Theory,* (Free Press, 1977), pp. 52-54, 176-177; Nonet and Selznick, *Law & Society in Transition: Toward Responsive Law* (Transaction Publishers, 2001), pp. 53-54.

[112] Venice Commission, *supra* note 109, 10; "Strengthening the Rule of Law", *supra* note 108, 3.

[113] On the close relationship between generalized norms and equal enforcement: Radin, "Reconsidering the Rule of Law", 69(4) *Boston University Law Review* (1989), 781-819, 785.

[114] Marxists criticize this account, seeing de jure normative generality and formal equality as smokescreens for de facto inequality in everyday life. See Collins, *Marxism and Law*, (OUP, 1982).

[115] E.g. Locke, *Second Treatise of Government and a Letter Concerning Toleration,* (OUP, 2016), pp. 13, 70; Montesquieu, "The Spirit of the Laws" in *The Complete Works of M de Montesquieu Volume I* (T Evans, 1777), pp. 198; Hayek, *Serfdom*, *supra* note 111, pp. 75-76; Hayek, *Law*, *supra* note 111, pp. 102-103; Raz, *supra* note 111, pp. 214; Rawls, *A Theory of Justice: Revised Edition,* (Harvard University Press, 1999), pp. 208-210.

[116] Hayek, *The Constitution of Liberty*, (Routledge 2006), pp. 181; Rawls, ibid., pp. 212; Epstein, *Skepticism and Freedom: A Modern Case for Classical Liberalism,* (University of Chicago Press, 2003), pp. 140

[117] E.g. limited competence conferral, protection for constitutional rights, the separation of powers.

[118] See Kant, "The Metaphysics of Morals" in Gregor (ed.) *Immanuel Kant: Practical Philosophy*, (CUP, 1996), pp. 450-456; Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (Liberty Fund, 1982), pp. 110; Hayek, *Serfdom*,

Both aspirational principles (i) and (ii) of the formal rule of law also find justifications in various branches of economics, a complementary line of reasoning which is especially important in the field of competition policy. New institutional economics conceptualizes laws as informational regularities relied upon by actors with bounded rationality, to thereby more efficiently coordinate their spontaneous ordering through the price mechanism.[120] The effectiveness of laws as institutions which simplify decision-making is undermined if their content is not comprehensible to its users.[121] Normative stability is further weakened by legal determinations through ad hoc, discretionary interventions, recommending instead a generalized scope for laws.[122] Given the importance of the legal system for the functioning of markets, public choice theory highlights that private actors may lobby legislators and decision-makers to act to their *individual* benefit (e.g. closing market entry, restricting imports, protective regulation).[123] The related field of constitutional economics suggests as a solution the obligation to formulate and apply *generalized* laws, as opposed to the broad administrative discretion to offer subject-specific privileges.[124]

It is important to stress the *aspirational* nature of the formal rule of law; complete comprehensibility and absolute generality of norms are incapable of perfect realization.[125] Rather than binary compliance with the ideal, to approximate the formal rule of law is to progress along a sliding scale of legal forms, from "less" to "more" comprehensible and generalized norms. This is why principle (iii), independent review by courts, is a necessary institutional complement.[126] Of course, the rule of law means little if there is no mechanism for ensuring congruence between norms and lived experience, especially when leading to punishment.[127] But more important in terms of its delivery, the opportunity for review allows courts to prospectively formulate clearer, more generalized legal norms in response to individual administrative determinations that may,[128] for instance, apply vague standards, exercise unstructured discretion, or make context-specific determinations of legality.[129] Through this institutional fall-back, the political and economic virtues of the formal rule of law are more likely to be realized over time.

The conceptualization adopted here is not substantive;[130] a "rule-book" rather than a "rights"-based approach.[131] Realizing the formal rule of law does not mean that laws are just, democratic,[132] or,

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supra note 111, pp. 61-62; Hayek, *Constitution*, *supra* note 116, pp. 20, 131-135; Unger, *supra* note 111, pp. 69-70; Habermas, *Between Facts and Norms*, (Rehg Trans.)(Polity Press, 1996), pp. 82-83.

[119] Locke, *supra* note 115, pp. 99-100; Dicey, ibid., pp. 111; Hayek, *Constitution*, ibid., pp. 135-136, 184; Raz, *supra* note 111, pp. 219; Unger, ibid., pp. 70, 177; Rawls, *supra* note 115, pp. 209; Epstein, *Design for Liberty: Private Property, Pubic Administration, and the Rule of Law*, (Harvard University Press, 2011), pp. 20, 25-26, 123.

[120] See generally Schotter, *The Economic Theory of Social Institutions*, (CUP, 1981); North, *Institutions, Institutional Change and Economic Performance*, (CUP, 1990); Kasper and Streit, *Institutional Economics: Social Order and Public Policy*, (Edward Elgar, 1998); Mantzavinos, *Individuals, Institutions, and Markets*, (CUP, 2001).

[121] Kasper and Streit, ibid., pp. 96, 122-123, 127, 137, 165-168. For pre-emptive ideas: Hayek, *Constitution*, *supra* note 116, pp. 140-141, 183

[122] Hayek, *Constitution*, ibid., pp. 195; Hayek, *Law*, *supra* note 111, pp. 40, 49.

[123] Stigler, "The Theory of Economic Regulation", 2(1) *Bell Journal of Economic and Management Science* (1971), 3-21, 3-4; Samuels, "Interrelations between Legal and Economic Processes", 14(2) *Journal of Law & Economics* (1971), 435-450, at 443-444; Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities*, (Yale University Press, 1982), pp. 43-47, 59-65; Kasper and Streit, *supra* note 120, pp. 247-248, 324-326. Similarly Hayek, *Law*, ibid., pp. 287, 347, 352-356, 435-436.

[124] See Brennan and Buchanan, *The Reason of Rules: Constitutional Political Economy*, (CUP, 1985), pp. 29; Vanberg, *Rules and Choice in Economics*, (Routledge, 1994); Kasper and Streit, ibid., pp. 316, 335; Mantzavinos, *supra* note 120, pp. 244-245. Similarly Hayek, *Law*, ibid., pp. 359, 439, 463.

[125] Hayek, *Constitution*, *supra* note 116, pp. 181; Raz, *supra* note 111, pp. 222.

[126] Acknowledged by Raz, ibid., pp. 216-218; Unger, *supra* note 111, pp. 177; Nonet and Selznick, *supra* note 111, pp. 54; Habermas, *supra* note 118, pp. 134, 173; Rawls, *supra* note 115, pp. 209-210; Waldron, "The Concept and the Rule of Law", 43(1) *Georgia Law Review* (2008), 1-62; Loughlin, *supra* note 109, pp. 335.

[127] On the principle of *nulla poena sine lege:* Montesquieu, *supra* note 115, pp. 197; Dicey, *supra* note 118, pp. lv; Hayek, *Constitution*, *supra* note 116, pp. 173-174, 181, 185; Tamanaha, *supra* note 109, pp. 34-35.

[128] But not necessarily. An administrative decision-maker could independently attempt to construct generalized, comprehensible norms, but the courts are still an important institutional safeguard. This approach is similar to Shapiro, *The Supreme Court and Administrative Agencies*, (Free Press, 1968).

[129] Hayek, *Constitution*, *supra* note 116, pp. 187; Hayek, *Law*, *supra* note 111, pp. 82, 90, 95-96, 113, 191; Habermas, *supra* note 118, pp. 144.

[130] See Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework", (1997) *Public Law*, 467-487.

more pertinently in this context, economically-informed. But rather than a failing, the deliberate minimalism of this conceptualization of the rule of law isolates the desirable consequences of the purely formal characteristics themselves, without their being lost in broader visions of political theory and constitutional design.[133]

As briefly recounted, the formal rule of law is an aspiration of considerable political and economic value. This substantial justificatory background is often absent from less theoretical analyses of "the rule of law" and commitment decisions, or competition literature more generally.[134] The perennial problem is that such political and economic goods are achieved through requiring laws to take a form that is restrained, rigid, and subject to independent review. Understandably, these are not characteristics which instantly appeal to administrative authorities whose commitment is to pursue societal good/s with utmost efficacy. Approximating the formal rule of law marginalizes determinations of legality through ad hoc, subject-specific, unstructured discretion, which decision-makers may consider the most effective means to realize their ends. A trade-off therefore exists between the *effective pursuit of societal goals* – ends - and *approximation of the formal rule of law* – means. The Commission's contemporary use of commitment decisions for enforcing EU competition law illustrates the strongest possible emphasis upon the former and severest consequent degradation of the latter. This is not coherent with the vision of a Union founded upon the rule of law.[135]

5. Problematic Means: Implications of the Form of Commitment Decisions

Sections 2 and 3 argued that commitment decisions offer an undeniably appealing procedure for the Commission to enforce competition law. The discretion they provide allows it to censure *any* business conduct, whether beyond or below pre-existing legal obligations, and conclude with *any* remedial package. But using commitment decisions so readily represents the maximal prioritization of pursuing the Commission's ends with utmost effectiveness through administrative discretion. As a consequence of the ends/means trade-off discussed above, it also evidences a lack of concern for the formulation and equal application of generalized competition law norms that are comprehensible to businesses. In essence, it is a case study in the implications of failing to realize the formal rule of law.

The Commission's unbounded discretion to secure changes against any business conduct systematically undermines the normative comprehensibility of EU competition enforcement for all firms. By successfully mounting investigations beyond the pre-existing scope of the law with novel theories of harm or below judicially-determined thresholds for characterizing certain types of conduct as illegal, businesses have no reasonably guaranteed zone of legality. In both instances, the authoritative legal norms deduced by the EU Courts from Articles 101 and 102 TFEU fail to prospectively demarcate the boundary between permission and prohibition as they have no restraining influence upon the Commission's Article 9 discretion. This is not simply a case of concentric normative circles, with the scope of conduct caught by commitment decisions being somewhat broader at the edge than the Courts' jurisprudence. *All* business behaviour beyond or below the pre-existing ambit of EU competition law can potentially be questioned and lead to remedial change. With unlimited decision-making discretion, official recommendations that companies will be fine if they simply "stay on the right side of the law at all times" ring hollow.[136] Firms can act within the confines of authoritative competition law and still be the subject of this type of enforcement. The Commission's calculation of the benefits of adopting *individual* commitment decisions – pursuit of its ends with utmost effectiveness as it deems necessary – fails to take into account the costs of

[131] Following the terminology of Dworkin, *A Matter of Principle*, (OUP, 1985), pp. 11-13. This prima facie contrasts with references to human rights protection in the Venice Commission and EU Commission reports (*supra* note 112). Yet on closer inspection, the discussion of rights in the former is only concerned with fair and effective judicial procedure (at 12-13), while the latter does not include rights themselves as part of the "key principles" of the rule of law (at 3).
[132] As emphasized in Habermas, *supra* note 118.
[133] Raz, *supra* note 111, pp. 211.
[134] E.g. the important works included *supra* note 20.
[135] Art. 2 TEU; C-294/83, *Parti écologiste "Les Verts" v. European Parliament,* EU:C:1986:166, para. 23.
[136] SPEECH/13/210, "Remedies, commitments and settlements in antitrust" (Commissioner Almunia).

interventions that undermine *systemic* aspirations towards normative comprehensibility for *all* firms.[137]

Perhaps this picture of normative anarchy from the perspective of the formal rule of law is too stark. Although with a largely negative intent, some have speculated that commitment decisions might themselves come to offer guidance to businesses, crystallizing into a "shadow jurisprudence".[138] Cognition of permissible and prohibited might still be possible, but firms would just have to look to how the Commission has exercised its discretion in commitment decisions, rather than the case law. The Staff Working Paper 2009 suggested that this was the Commission's own reading of its early record.[139]

Putting to one side inconsistent Commission admissions that only prohibition decisions offered legal certainty to other firms,[140] there are two reasons for scepticism that commitment decisions could ossify into a series of reasonably comprehensible norms. These caveats further emphasize the implications of prioritizing the form of discretionary decision-making over approximating the rule of law ideal.

The first cause for caution relates to the nature of the EU legal order as laid out in the Treaties. No matter how many commitment decisions are concluded or how consistently like investigations are treated alike, the unavoidable truth of the EU's legal architecture is that they can never be taken as authoritative determinations of competition law. Although the Commission has competence to investigate suspected violations of Articles 101 and 102 TFEU,[141] it is the sole preserve of the ECJ to authoritatively interpret those provisions and deduce the obligations incumbent upon businesses. Despite their frequency and remedial outcomes, without the ECJ's seal of approval normative indications from commitment decisions are necessarily more precarious points of reference against which to orientate business decision-making. The Commission's discretion to intervene against potentially anticompetitive behaviour may conclude the individual investigation, but cannot reliably inform other firms as to the legality of the practice for all.

When it comes to enforcement *beyond* judicially-determined laws, inconsistency between the silence of the case law and discretionary decision-making on unprecedented practices means that the latter exist within a normative void, their legality never authoritatively settled. At the same time, the jurisprudence of the Courts, the only valid elucidations of competition obligations upon market actors, becomes stale, failing to evolve alongside constantly innovating business practices. If, for instance, patent ambush is a live concern with the rising importance of intellectual property in international standards,[142] the authoritative norms of EU competition law contain a gap that matters to markets, yet cannot be decisively addressed through the commitments procedure alone.[143]

With regard to investigating conduct *below* the law, the Commission's discretion is directly undermining the normative assurance offered to businesses by high legal thresholds for intervention. Such substantial legal hurdles were deliberately formulated by the EU Courts to restrain the Commission's ability to reach particular conclusion, thereby reflecting the controversy of, e.g., collective dominance, administrative price regulation, or threatening investment incentives through over-eagerly characterizing refusals to grant access to physical infrastructure as abusive. Although not impossible legal options, businesses could previously take solace in their limitation to truly exceptional circumstances, restraining Commission decision-making. Nevertheless, the unbounded discretion afforded by commitment decisions has allowed it to sidestep such limitations, transforming once rare legal findings into now rather routine elements of enforcement, thereby undermining their reassuring clarity for businesses.

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[137] As similarly suggested by Schweitzer, *supra* note 106, pp. 57; Wagner-Von Papp, *supra* note 20, 964; Botteman and Patsa, "Towards a more Sustainable use of Commitment Decisions in Article 102 TFEU cases", 1(2) *Journal of Antitrust Enforcement* (2013), 347-374, 363.

[138] Marquis, "Introduction" in Ehlermann and Marquis, *supra* note 104, pp. lxxiv. See also: Forrester, *supra* note 104, pp. 638; Wagner-Von Papp, ibid., 931; Gerard, *supra* note 68, 24; Jenny, *supra* note 19, 723. For administrative decision-making independently approximating the formal rule of law, see *supra* note 128.

[139] Working Paper cited *supra* note 16, 35 (commitments "serve as a model for addressing similar situations" and certain decisions offer "sufficient orientation").

[140] E.g. Working Paper, ibid., 29; Working Document cited *supra* note 33, 55.

[141] Art. 105 TFEU.

[142] As per *Rambus*.

[143] Unless the commitment decision comes before the Courts (see section 6).

In this way, authoritative, judicially-determined norms and unauthoritative commitment decisions reaching beyond and below such laws exist in parallel. Their inconsistent scope for permission and prohibition has degraded the normative comprehensibly afforded to firms by the former, without providing any additional clarity to the demarcation of legality through the latter.

The second reason for scepticism that the frequent use of commitment decisions could eventually crystallize into a guiding body of norms goes to the connection between principles (i) and (ii) of the formal rule of law sketched above. The comprehensibility of legal obligations is affected by the extent to which they are formulated as generalized, equally-applicable norms.[144] Of course, discretionary, subject-specific decisions addressed to a particular firm makes their *individual* obligations under Articles 101 and 102 TFEU clear. Yet normative comprehensibility is only improved for *all* legal subjects if the specific instance can be generalized to indicate a foreseeable pattern of future competition enforcement. With many commitment decisions, it is simply not possible to engage in this crucial step of extrapolation as they are so tied to their specific context, leading to a substantial degree of uncertainty for businesses. Furthermore, there are indications that the Commission doesn't actually *want* to generalize its individual findings, preferring instead to maintain its unbounded discretion going forward.

Considering the previous examples of enforcement *beyond* the law, it appears that the Commission often uses commitment decisions to create exceptional findings of possible illegality at the level of particular industries or even individual businesses. This raises questions of equal treatment before the law and makes it difficult for different sectors or firms to comprehend whether comparable obligations apply to them. What, for example, are other businesses to glean from the Commission's distaste for: competitors all including MFN clauses in their agency agreements with the intent of forcing a wholesaler to switch model and thus stop undercutting prices for products not subject to the agreement;[145] or of owners of infrastructure bottlenecks reserving substantial access and protecting their upstream/downstream business by failing to invest in capacity expansion or accepting offers/inviting responses from competitors to co-finance increases?[146] Article 7 prohibition decisions are certainly not entirely free of such staccato enforcement.[147] Nevertheless, over the decades the EU Courts have developed a broad body of generalized legal presumptions: absolute territorial protection is presumed to breach Article 101,[148] while a dominant firm pricing below average variable cost will likely fall foul of Article 102 TFEU.[149] Conversely, open exclusive licences[150] or common terms in franchising agreements[151] have been deemed to fall outside the scope of the Article 101(1) prohibition. Between the two extreme positions, there also exist multi-stage tests that have been fashioned in an abstracted form – on when refusals to grant access are abusive,[152] or where selective distribution agreements are legal -[153] thereby granting certainty to *all* businesses (albeit to a lesser extent than outright presumptions). In contrast to ad hoc findings of novel illegality, the clarity of these developed norms for all derives from their generalizations which structure and thereby restrain future Commission decision-making. How much more uncertain would EU competition law have been over the decades without such abstracted norms?[154] But this, again, goes to their effectiveness as an enforcement tool. The Commission may wish to tackle a certain novel practice but *not* for its findings to be more broadly applied owing to, for instance, its widespread burden on businesses (e.g. "strategic underinvestment" as a theory of harm).[155] The potential for unequal, subject- or industry-specific normative acts through the unbounded discretion of commitment decisions thus amplifies their appeal for the Commission to realize its ends. Still, market intervention through individualized

[144] See *supra* note 118.
[145] *E-Books*.
[146] *Gaz de France, RWE, ENI.*
[147] E.g. what can other businesses glean from non-indispensable but still very important services directing users to their related search services more favourably than those of competitors, as *per Google Search (Shopping)*?
[148] Joined Cases 56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission,* EU:C:1966:41.
[149] C-62/86, *AKZO Chemie BV v. Commission,* EU:C:1991:286.
[150] C-258/78, *L.C. Nungesser KG and Kurt Eisele v. Commission,* EU:C:1982:211.
[151] C-161/84, *Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgallis*, EU:C:1986:41.
[152] C-7/97, *Bronner.*
[153] C-26/76, *Metro SB-Großmärkte GmbH & Co. KG v. Commission*, EU:C:1977:167.
[154] Similarly: Forrester, *supra* note 104, pp. 647-648.
[155] As explored by Botteman and Patsa, *supra* note 137, 363; Hjelming, *supra* note 23, 1029; Dunne, *supra* note 39, 439.

appraisals of legality, contrary to the generalized norms envisaged by the rule of law, is a means of enforcement deleterious to realizing normative comprehensibility for businesses.

The discretion for commitment decisions to reach conduct falling *below* high thresholds for illegality on a subject-specific basis also undermines systemic certainty. Where generalized norms of legality and illegality already exist, the Commission essentially uses Article 9 to create individual exceptions which fall short of authoritative thresholds for intervention deduced by the Courts. This has been particularly conspicuous in the energy sector. For example with regard to the doctrine of collective dominance, through a commitment decision the Commission can avoid the restraining influence of the stringent and *generalized* normative hurdles established in *Airtours*, thus reaching the same conclusion regardless in the *individual* circumstances of *German Electricity* via assertions and banal reflections on the structural characteristics of the particular market.[156] The Commission has been open about using such decisions to create exceptions to the generalized, reasonably comprehensible elements of the *Bronner* test for abusive refusals of access. Rather than novel theories of harm, it has characterized capacity hoarding and strategic underinvestment as "sector specific" manifestations of constructive refusals to supply,[157] though without having to rigorously meet the high thresholds for intervention set by the ECJ. So are these "sector specific" exceptions only applicable to energy companies? Other industries with bottlenecks? Or, as seems a simpler assumption, as and when the Commission sees fit in a commitment decision? By making such claims, the Commission is directly championing the use of its discretion to avoid the restraint of applying generalized, exacting tests for reaching certain legal conclusions, thereby undermining normative certainty for businesses. In short, commitment decisions facilitate deliberately discriminatory decision-making at the individual and industry level.

The lack of clarity as to the divide between legality and illegality that results from the Commission's absolute discretion in commitment decisions is also related to the far-reaching remedies negotiated. Traditional conceptualizations of the formal rule of law rarely engage with the consequences of a normative determination, focusing instead upon whether the outcome of decision-making was reasonably comprehensible, which is more likely to be the case with the application of generalized norms rather than subject-specific analysis. The concern is usually with the predictability of a finding of illegality rather than resultant punishment.[158] But commitment decisions blur the neat conceptual divide between legality and consequences; unlike the fines attached to a fully-substantiated Article 7 prohibition decision, the remedial packages agreed in an Article 9 commitment decision are better considered *conditions of legality*. And as has been seen, the Commission has the discretion to secure all manner of far-reaching changes for the closure of its investigations. It has always maintained that remedial packages are offered by businesses of their own volition without any bargaining.[159] There are good reasons to question this self-portrayal of the Commission neutrally encouraging commitments from investigated companies, eschewing messy negotiations and not applying pressure to settle.[160]

But regardless of which side of the table is suggesting the remedies, it remains the case that there is no way of knowing in advance which changes will satiate the Commission's concerns. To secure no further competition investigation going forward, companies have agreed to very severe conditions (e.g. divestiture), remedies contrary to their own national governments' wishes (e.g. ownership unbundling of German energy infrastructure), or outcomes tenuously connected to the competitive concerns the Commission initially raised.[161] But at the same time, there are occasions where the remedial discretion of commitment decisions has been utilized in a more restrained manner. In the *E-Books* and *Amazon* decisions concerning MFNs and the recently concluded *Cross-Border*

[156] See *supra* pp. 6.
[157] Working Document cited *supra* note 33, 32.
[158] Sometimes scholars invoke the rule of law when discussing remedial proportionality. As will be discussed below, proportionality is not the most pressing issue when it comes to commitment decisions.
[159] Working Paper cited *supra* note 16, 33; MEMO/13/139, "Commitment decisions – frequently asked questions".
[160] Confidentiality makes it difficult to gauge the Commission's creative input, though the General Court in *Alrosa* implied that the Commission *told* the firms what it expected them to offer (see Cengiz, *supra* note 23, 150; Jenny, *supra* note 19, 760). It has also been claimed that the choice screen in *Microsoft (Tying)* was proposed by the Commission after rejecting Microsoft's preferred remedy of decoupling: Aleixo, *supra* note 13, 476.
[161] See section 3.

Access to Pay-TV investigations regarding absolute territorial protection, the offending contractual clauses were essentially removed. It is simply unclear whether the Commission expects such moderate alterations or something more radical. What complicates this further for investigated firms is that the Commission's unbounded discretion to agree remedies also permits inconsistent outcomes. As *CEZ* demonstrates, even where commitment decisions on similar grounds have resulted in a particular type of remedy (the sale of reserved capacity),[162] the Commission still has the discretion to acquire something else instead to close the investigation (generation divestiture).[163]

The unpredictability of what will have to be offered to secure the Commission's blessing is amplified by the ad hoc, industry- or firm-specific nature of some commitment remedies. If the Commission opens proceedings for suspected product bundling against a company that doesn't produce the world's largest computer operating system, what can it learn from Microsoft pleasing the Commission with a creative consumer ballot screen?[164] What normative clarity can be derived from geographical discrimination being remedied by splitting the Swedish electricity market into two bidding zones for any business that is not a national transmission system operator?[165] Will any other firm that engages in partitioning of the single market to extract excessive prices in particular Member States be expected to reorganize the delivery of gas in Central and Eastern Europe?[166] Again, this goes to the connection between (i) generalized norms and (ii) comprehensible obligations for other firms that constitutes the formal rule of law ideal. When the remedies accepted in commitment decisions as, essentially, conditions of legality are so context-specific, they offer no indication to future firms as to what concessions they will be expected to make for the Commission to close its investigation. This is a recipe for the further proposal of disproportionate or disconnected remedies by businesses who lack a reliable comparator against which to calibrate their proposal.

Taking all of these factors together, the hope or fear of commitment decisions crystallizing into a "shadow jurisprudence", guiding businesses to a greater extent than the authoritative law deduced by the EU Courts from Articles 101 and 102 TFEU, is highly unlikely. Albeit an undeniably effective tool for realizing its policy goals, the Commission's absolute discretion in commitment decisions is entirely unstructured by any generalized norms, including EU competition law. This means of enforcement makes it very difficult for businesses to comprehend when the Commission will intervene or what remedial concessions will be necessary for it to close the investigation. The ad hoc, subject-specific, inconsistent collection of commitment decisions constitutes a rag-bag of legal novelties, shallow characterizations falling short of rigorous judicially-determined thresholds, and particularistic remedial packages that cannot meaningfully inform broader business decision-making.

As sections 2 and 3 demonstrated, the Commission's discretion to investigate *any* conduct and secure *any* remedy has permitted the enforcement of its policy ends with maximum efficacy, often with substantial benefits for European consumers. But this means of market intervention is highly problematic. In freeing competition policy from the restraining influence of the authoritative, commonly generalized norms of law deduced by the Courts for determining the legality of business conduct, normative certainty is severely undermined. Through frequent recourse to commitment decisions, the virtues occasioned by realizing the rigidity and restraint of the formal rule of law ideal are sacrificed in the trade-off with policy effectiveness.

6. Judicial Review: A Missed or Missing Opportunity?

Despite the negative systemic consequences occasioned by contemporary divergence from the rule of law, the Commission's persistence with commitment decisions for non-cartel investigations is thoroughly unsurprising. This is not just because administrative authorities can be expected to endeavour to realize as effectively as possible the various policies they believes to be in the general interest, even if via forms of enforcement antithetical to approximating the formal rule of law; if anything, one might question the convictions of an agency that *didn't* constantly strive to push boundaries by whatever means necessary, thereby effectively delivering policy "goods".

[162] *Gaz de France; E.ON Gas.*
[163] *CEZ.*
[164] *Microsoft (Tying).*
[165] *Swedish Interconnectors.*
[166] *Gazprom.*

But rather than a common temptation, the prioritization of ends through broad discretionary decision-making by the Commission in the enforcement of competition law appears to be an *expectation* of the EU Treaties. As with overseeing privileges to services of general economic interest[167] and state aid,[168] Article 105 TFEU mandates the Commission to "ensure" the application of the vague prohibitions contained within Articles 101 and 102 TFEU. When it comes to the business practices listed therein, the language of the TFEU ("in particular", "may… consist in") clearly suggests that they are merely an indicative starting-point for market intervention. In essence, the institutional architecture erected by the Treaties is one of an activist Commission prioritizing the effective realization of EU policy through using its discretion to investigate any form of conduct it deems contrary to Articles 101 and 102. Whether via the specific route of commitments or prohibition decisions, unpredictable enforcement against novel practices on an ad hoc basis seems wired into the system.

But still, the EU's emphasis upon administrative discretion is predicated upon the opportunity for judicial scrutiny of whether individual decisions "fit" with the Courts' own interpretation of the open-textured concepts of the EU Treaties. In any system emphasizing administrative enforcement, it is the possibility of judicial review that allows for the most unforeseeable, subject-specific first-instance decision-making to still result in a legal order approximating normative comprehensibility and generality, i.e. the principles of the rule of law. Courts are a vital counterbalance to staccato enforcement by authorities. Judicial review is an opportunity to rule on the whether the specific finding of legality or illegality in an individual decision should be generalized, applicable to other subjects, and thereby clarify the legal obligations incumbent upon all. Each case can prospectively formulate and update the normative obligations of EU competition law deduced from the flexible Treaty prohibitions, thus structuring future decision-making by the Commission. As context-specific decisions with unclear legal implications can nevertheless be transformed into more abstracted and comprehensible norms, courts have a sizeable impact upon the extent to which the formal rule of law is realized in enforcement regimes which prioritize administrative decision-making. This includes EU competition law.

Judicial review of commitment decisions concluded by the Commission has arguably not satisfied this role, but it may not be an oversight entirely of the Courts' making. Although the ECJ missed an opportunity to provide *some* limit to the use of commitment decisions, it is not obvious what else could actually be done to restrain the Commission's discretion, given that so few decisions are likely to appear before courts.

Whenever judicial review is raised in the context of commitment decisions, the *Alrosa* saga invariably comes to mind, culminating in what has been labelled the "Worst Decision" of the ECJ.[169] The Courts were essentially called upon to either terminate or legitimate the extreme remedial discretion seen in Article 9 commitment decisions by ruling on whether they should be held to the same proportionality requirement as Article 7 prohibition decisions.[170] The concept of proportionality is a general principle of EU law, holding that penalties and remedies ought to be suitable and the least onerous possible.[171] The alleged disproportionality of remedies has often been the perspective from which the compliance of commitment decisions with the rule of law has been questioned.[172] As mentioned previously, the General Court in *Microsoft* annulled part of the infringement decision owing to the monitoring trustee obligation,[173] stressing that the Commission "does not have unlimited discretion when formulating remedies".[174]

[167] Art. 106(3) TFEU.
[168] Art. 108 TFEU
[169] Jenny, *supra* note 19.
[170] For overviews, Kellerbauer, "Playground Instead of Playpen: the Court of Justice of the European Union's *Alrosa* Judgment on Art.9 of Regulation 1/2003", 32(1) ECLR (2011), 1-8; Messina and Ho, "Re-Establishing the Orthodoxy of Commitment Decisions under Article 9 of Regulation 1/2003: Comment on *Commission v Alrosa*", 36(5) EL Rev. (2011), 737-751; Jenny, ibid., 737-761.
[171] C-331/88, *ex parte: Fedesa*, EU:C:1990:391, para. 13; Art. 5(4) TEU; Protocol 2 TEU.
[172] Schweitzer, *supra* note 106, pp. 559; Cengiz, *supra* note 23, 149-150; Hjelming, *supra* note 23, 1009, 1012; Moullet, *supra* note 25, 86, 89.
[173] T-201/04, *Microsoft*, paras. 1251-1279.
[174] Ibid., para. 1276.

When asked in *Alrosa* whether the same limitation applied to Article 9 commitment decisions, the General Court answered in the affirmative, finding that the Commission could only secure the least onerous outcome that met its competitive concerns.[175] Celebratory commentary ensued, welcoming that the Commission was forced to "respect the rule of law" and that "quasi-regulatory solutions" in commitment decisions would end.[176] This was short-lived. The ECJ overturned the ruling on appeal and rubber-stamped the Commission's discretion through Article 9 to secure any outcome,[177] so long as it only accepted the least onerous of the *proposed* remedial packages that it considered satisfactory.[178] The Commission's analysis of remedial proportionality in commitment decisions immediately became noticeably more scant.[179]

The ECJ's ruling in *Alrosa* is a striking example of judicial deference and has understandably been subjected to widespread criticism.[180] The Court declined the opportunity to set a meaningful limit to the remedial discretion afforded to the Commission by commitment decisions. The sheer breadth of proposals that may be required for the Commission to deem market conduct safe from further investigation makes it difficult to know the scope of what should be offered. By using the concept of proportionality to hedge-in the extent of such discretion, the ECJ could have provided a greater degree of certainty for investigated companies. Furthermore, by actually establishing a direct link between the potential infringement under scrutiny and the outcomes of commitment decisions, the ECJ could have prevented those instances where commitment decisions have secured remedies seemingly disconnected from its initial competitive concerns. Instead, it chose not to take the opportunity to shift the use of commitment decisions towards the formal rule of law ideal.

A similarly deferential approach towards remedies was more recently evident in the General Court's *Morningstar* ruling,[181] a review of the *Reuters Instrument Codes* commitment decision.[182] Essentially, the challenge was that the Commission had concluded a remedial package which wasn't strong enough to address its competitive concerns, and should have included more exacting requirements to make it even easier for customers to switch real-time datafeed services.[183] The General Court rejected the claim that there had been a manifest error of assessment, finding that the package concluded was sufficient to meet initial concerns that customers should be able to *more easily* change provider; the Court agreed that the remedial package met this relative desire.[184] Its role was to look at the Commission's competition worries and the remedies, not "the demands put forward by competitors" in relation to their content.[185] To that end, it didn't matter that remedies comparatively even more favourable to competition could have been agreed,[186] or that since the decision no user had switched away from Reuters.[187] The situation following *Alrosa* and *Morningstar* is therefore that the EU Courts are reluctant to incisively weigh-in on the remedies accepted in commitment decisions, whether to question their gravity or levity, so long as they are the least intrusive suitable commitments offered by the parties.

But having noted the Courts' failure to set meaningful boundaries to the Commission's remedial discretion in commitment decisions, it is worth questioning whether more searching oversight would really solve the severe divergence from realizing the formal rule of law. This is for two reasons.

First, disproportionate commitments are only the tip of the iceberg. As argued in section 5, the problems with the means of market intervention constituting commitment decisions go beyond the

[175] T-170/06, *Alrosa Company Ltd. v. Commission,* EU:T:2007:220, paras. 92-111.
[176] Siragusa and Guerri, "Antitrust Settlements under EC Competition Law: The Point of View of Defendants" in Ehlermann and Marquis, *supra* note 104, pp. 202. See also: Schweitzer, *supra* note 106, pp. 568-569; Forrester, *supra* note 104, pp. 651.
[177] C-441/07 P, *Alrosa,* EU:C:2010:377.
[178] The rational course of action for investigated firms is to adopt "salami tactics" to cover the "entire spectrum of adequate remedies": Wagner-Von Papp, *supra* note 20, 937-938. Similarly Messina and Ho, *supra* note 170, 747.
[179] Wagner-Von Papp, ibid., 942-943.
[180] E.g. Cengiz, *supra* note 23, 150-151; Wagner-Von Papp, ibid., 967-968; Botteman and Patsa, *supra* note 137, 369; Jenny, *supra* note 19.
[181] T-76/12, *Morningstar Inc., v. Commission,* EU:T:2016:481.
[182] *Reuters Instrument Codes (RICs)* (COMP/39.654).
[183] T-76/12, *Morningstar,* paras. 47-48. As a rival datafeed producer, Morningstar would benefit from easier switching.
[184] Ibid., paras. 61-74.
[185] Ibid., para. 57.
[186] Ibid., para. 59.
[187] Ibid., para. 73.

foreseeability of the Commission's exercise of its remedial discretion. That legality is conditional upon unknowable concessions is only one element in a phenomenon with complex implications for normative comprehensibility; remedial proportionality would not have touched upon the undesirable consequences of enforcement against business conduct beyond and below the pre-existing norms of EU competition law. Put differently, commitment decisions predicated upon novel theories of harm but where the Commission's remedial discretion is exercised in a more restrained fashion (e.g. *E-Books, Amazon*) still foster legal uncertainty, but owing to issues unrelated to their actual outcomes.

In contrast, the pending *Groupe Canal* judgment offers an opportunity for the ECJ to address other problematic divergences from the formal rule of law which have hitherto fallen outside the scope of review.[188] Unlike *Alrosa* and *Morningstar* which primarily focused upon *remedies*, *Groupe Canal* relates to the *potential illegality* forming the subject-matter of the investigation. The Commission's treatment of absolute territorial protection in copyright licensing agreements in *Pay-TV* is arguably an expansion of the pre-existing scope of the Article 101(1) TFEU prohibition. In *Coditel II*, the ECJ ruled that copyright licences partitioning Europe along national lines for both active and passive broadcasts were not necessarily a restriction by object owing to the idiosyncrasies of the cinematographic industry and copyright as a form of IP.[189] Although *Coditel II* is acknowledged in both of the *Pay-TV* commitment decisions,[190] the Commission ultimately found that licences granting strict absolute territorial protection for films frustrate market integration and eliminate cross-border broadcasts. It primarily relied instead upon the ECJ's ruling in *Murphy* which concerned exclusivity contracts with obligations not to supply decoding devices allowing access to matches broadcast in other Member States.[191] Unlike *Coditel II*, preventing the circulation of such devices was found to violate Article 101 TFEU.[192] However, as Ibáñez Colomo has suggested,[193] *Murphy* was distinguishable from *Coditel II:* the ECJ stressed that copyright was not in play in *Murphy* as football matches cannot be classed as original works under EU legislation,[194] and therefore that its main competition law concerns were the supplemental contractual obligations preventing cross-border trade in the *physical devices* themselves.[195] With this in mind, it is not clear whether *Murphy* is the appropriate precedent for the *Pay-TV* commitment decisions as the Commission's citations therein suggest, or whether its approach to geo-blocking has reached some way beyond the ECJ's treatment of more analogous restrictions in *Coditel II*. The General Court doesn't seem to think so, issuing a judgment which mirrors the Commission's reasoning in *Paramount*, and that has since been added to the footnotes of the other *Pay-TV* commitments alongside *Murphy*. On further appeal, the ECJ may well agree with the Commission's analysis, thereby minimizing the scope of the *Coditel* exception which offered a legal shelter for absolute territorial protection in copyright licensing agreements. But this is why an authoritative ruling by the EU Courts on the law deduced from Article 101 TFEU is so important for the normative comprehensibility of competition policy: absent such a judicial statement, copyright licensors and licensees would be faced on the one hand with the complex case law of *Coditel* and *Murphy*, and on the other with the broader, seemingly inconsistent enforcement activity through the *Pay-TV* commitment decisions. Even if the ECJ were to simply rubber-stamp *Paramount*, authoritative judicial approval itself of the scope of the Article 101 TFEU prohibition is valuable for promoting legal certainty.

But the opportunity in *Groupe Canal* to better realize the formal rule of law simultaneously stresses what is the real problem with judicial review of commitment decisions. If anything, fascination with the Courts' standard of review is a distraction. The ECJ's finding in *Alrosa* may have been a missed opportunity for curtailing remedial discretion, but a second reason to be somewhat

[188] C-132/19 P, *Groupe Canal+ v. Commission*, (pending), reviewing T-873/16, EU:T:2018:904.
[189] C-262/81, *Coditel SA, Compagnie générale pour la diffusion de la télévision v. Ciné-Vog Films SA*, EU:C:1982:334.
[190] *Paramount*, recitals 36-37; *Pay-TV*, recitals 65-66.
[191] Joined Cases C-403/08 and C-429/08, *Football Association Premier League Ltd v. QC Leisure and Karen Murphy v. Media Protection Services Ltd.*, EU:C:2011:631.
[192] Ibid., para. 146.
[193] Ibáñez Colomo, "More on AG Wahl and restrictions by object: issues raised by the Commission pay-TV investigation", <https://chillingcompetition.com/2014/05/30/8372/>, (last visited 30 October 2019); Ibáñez Colomo, "Article 101 TFEU and Market Integration", 12(4) *Journal of Competition Law & Economics* (2016), 749-779, 773-778.
[194] C-403/08 and C-429/08, *Murphy*, paras. 96-99. National IP regimes could still recognize them as copyright protected: paras. 100-104.
[195] Ibid., paras. 141-144.

more forgiving of the Courts – and concerned for the realization of the rule of law - is that judicial oversight is generally a *missing* opportunity. Given the rise of commitment decisions as a tool for EU competition enforcement, it is astounding that judicial engagements have been so infrequent: *Repsol* in *Transportes Evaristo Molina* and more recently in the *Gasorba* preliminary reference;[196] *De Beers* in *Alrosa*;[197] *Reuters Instrument Codes* in *Morningstar;*[198] and now *Paramount* (and indirectly *Pay-TV*) in *Groupe Canal*.[199] Furthermore, although the latter directly engages with the legal issues of the conduct deemed problematic by the Commission, *Alrosa* and *Morningstar* primarily focused on the nature of the remedies agreed, and both engagements with *Repsol* raised purely procedural issues.[200] Despite the possibility for the Courts to alleviate the ad hoc, subject-specific, widely incomprehensible and legally unauthoritative nature of commitment decisions, a major problem is that this form of enforcement leaves few opportunities for judicial review.[201] The much maligned *Alrosa* is almost a decade old and perhaps in *Groupe Canal* the ECJ will more incisively review preliminary legal analysis within commitment decisions. But will it really make a difference in practice, paving the way towards approximating the formal rule of law? Regardless of the intensity of judicial scrutiny exercised by the ECJ, instances for the Courts to structure the Commission's discretion and afford greater normative clarity to businesses are simply few and far between. Having made the strategic decision to agree a remedial package with the Commission for reasons of time, cost, reputational damage etc., it makes little sense for the investigated undertaking to then launch judicial review proceedings of it.[202] This contrasts with experience under the regime prior to Regulation 1/2003. Even parties whose agreements were granted an individual exemption pursuant to Article 101(3) TFEU would frequently challenge before the Courts their alleged contravention of paragraph 1 or the conditions imposed,[203] sometimes successfully.[204] Furthermore, exemption decisions were subjected to routine scrutiny by EU Courts at the behest of third parties.[205] One possible explanation for few reviews of commitment decisions launched by other firms may be the Commission's discretion to very effectively counter practices beyond and below the pre-existing scope of the law, commonly with substantial remedial packages. Such frequently *severe* outcomes present very different circumstances to the pre-modernization suspicion that, in granting an exemption decision, the Commission had exercised *leniency*. As vividly demonstrated by Metro's repeated challenges to Commission findings of inapplicability and exemption for SABA's selective distribution arrangements,[206] feelings of light-touch competition enforcement were a catalyst for disgruntled competitors and trading partners to initiate proceedings in Luxembourg. Although the small number of challenges indicate that similar third party motives can still arise, businesses close to a firm subjected to a commitment decision would probably feel overjoyed with their use by the Commission rather than litigious. Another reason may be that the Commission does not reach a formal conclusion on the illegality of the conduct

[196] *Repsol CPP* (COMP/B-1/38.348); T-45/08, *Transportes Evaristo Molina SA v Commission*, EU:T:2008:499, upheld in C-36/09 P, EU:C:2010:670; C-547/16, *Gasorba SL, Josefa Rico Gil, Antonio Ferrándiz González v. Repsol Comercial de Productos Petroliferos SA*, EU:C:2017:891.

[197] *De Beers* (COMP/B-2/38.381); T-170/06, *Alrosa*, overturned in C-441/07 P.

[198] See *supra* pp.20.

[199] A challenge was also brought by Hynix against *Rambus* as to the royalty rate commitment, but withdrawn after signing a patent agreement.

[200] *Transportes Evaristo Molina* was decided on the basis of proceedings for review being brought out of time. *Gasorba* the considered the impact of EU commitment decisions on national competition claims. See Makris and Ruiz Feases, "Commitments and Network Governance in EU Antitrust: *Gasorba*", 55(6) CML Rev. (2018), 1959-1987.

[201] As noted by Geradin and Mattioli, *supra* note 6, 637-638

[202] Wagner-Von Papp, *supra* note 20, 968.

[203] E.g. T-112/99, *Métropole Télévision (M6) v. Commission*, EU:T:2001:215; T-419/03, *Altstoff Recycling Austria AG v. Commission*, EU:T:2011:102.

[204] E.g. C-17/74, *Transocean Marine Paint Association v. Commission*, EU:C:1974:106 (partial annulment); Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94, *European Night Services Ltd. v. Commission*, EU:T:1998:198; Joined Cases T-79 and 80/95, *SNCF and British Railways v. Commission*, EU:T:1996:155; T-144/99, *Institute of Professional Representatives before the European Patent Office v. Commission*, EU:T:2001:105 (partial annulment); T-328/03, *O2 (Germany) GmbH & Co. OHG v. Commission*, EU:T:2006:116 (partial annulment).

[205] E.g. T-17/93, *Matra Hachette SA v. Commission*, EU:T:1994:89; T-131/99, *Shaw and Falla v. Commission*, EU:T:2002:83; T-231/99, *Joynson v Commission*, EU:T:2002:84, upheld in C-204/02 P, EU:C:2003:660; Joined Cases T-185/00, T-216/00, T-299/00 and T-300/00, *Métropole Télévision SA (M6) v. Commission*, EU:T:2002:242 (annulment granted), upheld in C-470/02 P, EU:C:2004:565.

[206] C-26/76, *Metro* (rejected); C-75/84, *Metro SB-Großmärkte GmbH & Co. KG v. Commission*, EU:C:1986:399 (rejected).

investigated, instead providing a preliminary assessment of its competitive concerns. This might lead third parties to question the strength of their legal challenge to commitments. But the veracity of such explanations for third party inertia can only be substantiated through further investigation.

To summarize, the unlikelihood of judicial review ensures that the Commission's discretionary enforcement of EU competition policy through commitment decisions remains absolute. There are few chances for the Courts to address the divergence occasioned from the formal rule of law ideal, offering authoritative interpretations of the Treaty, facilitating normative certainty, and transforming ad hoc, subject-specific determinations into generalized norms. *Groupe Canal* is a rare exception, offering some increase in legal clarity even if the ECJ follows the GC's lead in rubberstamping the somewhat inconclusive use of *Coditel II* and *Murphy* by the Commission. But it doesn't solve the practical problem of missing opportunities for judicial engagement with commitment decisions.

Serious questions must be asked as to how the EU Courts can better fulfil their role envisaged under the formal rule of law ideal, minimizing the undesirable implications of the discretionary means of commitment decisions. There are a number of possible proposals. The purpose is not to explore all the options in minute detail to find the one perfect solution, but to lay the initial groundwork for a necessary debate in the future on how to give EU Courts more oversight of commitment decisions.

The first options is reversing *Alrosa* and *Morningstar* by increasing the intensity of review over the proportionality of remedies. This can be quickly dismissed. As already argued, such a change only scratches at the surface of the problems posed by commitment decision. The preceding analysis of enforcement reaching conduct beyond and below the pre-existing law also fosters considerable issues for legal certainty in EU competition law. These would not be addressed through remedial proportionality alone. Nor would it resolve the dearth of commitment decisions before the Courts.

Second, the Commission could be required to bring concurrent Article 7 prohibition and Article 9 commitment decisions when it is pursuing unprecedented business conduct and proposing a novel theory of harm. There would thus be at least one fully-reasoned decision for businesses to internalize and which may be reviewed by the EU Courts, thereby offering the opportunity for an authoritative ruling on the scope of competition law and, if necessary, generalization into more broadly applicable norms. An example of this occurred with the *Motorola* prohibition decision and *Samsung* commitment decision,[207] a process praised by Whish.[208] The problem is whether two similar investigations concerning novel business conduct are likely to arise at the same time. Where were the possible prohibition decision partners to *Rambus* on patent ambush, *E-Books* on MFNs, or the aborted *Google Search* commitments? As argued previously, many of these decisions where highly context-, industry-, or firm-specific, making a second instance ripe for a prohibition decision somewhat wishful thinking. Double decision-making would also entirely remove the impetus for commitment decisions: procedural efficiency. Furthermore, as *Motorola* itself demonstrates, having a simultaneous prohibition decision does not guarantee subsequent judicial review.

Third, it has been suggested that investigated firms could more effectively constrain the Commission's discretion in commitment decisions by forcing novel or weak investigations into a fully-substantiated prohibition decision and pursuing judicial review, thus authoritatively clarifying the reach of EU competition law.[209] There are a couple of reasons to question this recommendation. First, commitment decisions are not an inherently problematic form of enforcement. Where the theory of harm is well-established in the case law and the remedial package concluded is not far-reaching, they can indeed be an effective means for both the Commission and investigated firms to conserve resources. The fact that such a method of decision-making considerably predates Regulation 1/2003 is a testament to the long-recognized capacity for mutual benefit. The problematic consequences from the perspective of the formal rule of law concern the wrong types of investigations being concluded in this fashion (e.g. novel or controversial conduct, unrelated remedies). The second reason for caution is a simple question: why aren't investigated firms forcing the Commission into a fully-substantiated

[207] *Motorola – Enforcement of GPRS Standard Essential Patents* (AT.39985); *Samsung – Enforcement of UMTS Standard Essential Patents* (AT.39939).

[208] Whish, "*Motorola* and *Samsung*: An Effective Use of Article 7 and Article 9 of Regulation 1/2003", 5(9) JECLAP (2014), 603-604.

[209] Some have argued that investigated firms already exercise this leverage over Commission discretion: Svetiev, *supra* note 23, 484; Wathelet, "Commitment Decisions and the Paucity of Precedent", 6(8) JECLAP (2015), 553-555.

prohibition decision and judicial review already? There is no clear answer to this,[210] though the incentives to accept even the most problematic commitment decisions – money, time, reputation, future relations with the Commission – are obvious, especially where the legality of conduct is borderline, but even when it might be found legal.[211] This one-to-one calculation in commitment decisions does not take into account the systemic degradation in the normative comprehensibility of EU competition enforcement. But although tinkering with investigated firms' incentives to commit could theoretically alter the calculation of how they proceed, the actual changes necessary are not obvious. Should prohibition decisions be made more appealing through, for instance, scaling back the level of fines? Or should commitment decisions be made less appealing for businesses, which would risk losing the procedural efficiencies occasioned through the closure of legally and remedially uncontroversial decisions?

The clearest means to transform context-specific commitment decisions with novel theories of harm and far-reaching remedies into more generalised, comprehensible legal norms is to embrace the role of courts in gradually approximating the formal rule of law. Commitment decisions concluded by the Commission could *automatically* be subject to judicial review before the EU Courts,[212] guaranteeing an opportunity for rulings on how the individual decision fits – or doesn't - with the norms of EU competition law deduced from the Treaties. This would be closer to the process for consent decrees in the US, whereby the Antitrust Division of the Department of Justice must secure judicial approval that settlements concluded with investigated firms are in the public interest.[213] But it would not be identical: the commitment decision concluded by the Commission would still have to be legally binding on the investigated firm before judicial oversight (rather than authorization) was undertaken to avoid EU jurisdictional limits to the review of preparatory acts.[214] As with prohibition decisions stretching the scope of Articles 101(1) and 102 TFEU, it may well be the case that the EU Courts simply agree with the new theories of harm pursued by the Commission.[215] But even routine light-touch scrutiny of commitment decisions would nevertheless address the currently missing opportunities for oversight, allowing for authoritative judicial clarification of the scope of EU competition law. As envisaged by the formal rule of law ideal, it would provide chances for the Courts to generalize any ad hoc, subject-specific decision-making, thus further improving normative certainty for *all* businesses.

Although arguably the most effective means to remedy the problems arising from the Commission's use of commitment decisions, automatic judicial review could clearly raise a plethora of practical problems. In 2018 there were over 1000 cases pending at both the ECJ and General Court,[216] but given how few commitment decisions are concluded by the Commission, there is little reason to believe that this would significantly affect the already bloated dockets in Luxembourg. Necessitating judicial oversight would surely have an effect upon the procedural efficiency of commitment decisions as an enforcement tool, increasing the time, cost, and uncertainty of concluding them. Still, mitigating solutions can be envisaged. The Preliminary Report of the allocated Judge-Rapporteur[217] could be an opportunity to quickly filter-out commitment decisions grounded on recognized legally-problematic conduct and with simple remedies, reserving only the more concerning decisions highlighted in this piece for full judicial consideration. But even if greater scrutiny were deemed necessary to clarify and generalize decisions, would the Courts be able to

[210] See Wagner-Von Papp, *supra* note 20, 944-948.
[211] Dunne, *supra* note 39, 437.
[212] Supported by Wagner-Von Papp, *supra* note 20, 967; Ratliff, "Negotiated Settlements in EC Competition Law: The Perspective of the Legal Profession' in Ehlermann and Marquis, *supra* note 104, p. 314; Massarotto, "The Deterrent and Enunciating Effects of Consent Decrees", 11(2) JECLAP (2015), 493-499, 499.
[213] See Epstein, *Antitrust Consent Decrees in Theory and Practice: Why Less is More*, (American Enterprise Institute Press, 2007); Ginsburg and Wright, "Antitrust Settlements: The Culture of Consent", 13-18 *GMU Law & Economics Review Paper Series* (2013); Dunne, *supra* note 26, pp. 98-107.
[214] Case 60/81, *IBM v. Commission*, EU:C:1981:264 (statement of objections not reviewable); Cases T-125/97 and 127-97, *Coca-Cola v. Commission*, EU:T:2000:84 (measures producing binding legal effects are reviewable).
[215] A common criticism of US consent decrees: Georgiev, "Contagious Efficiency: The Growing Reliance on U.S.-Style Antitrust Settlements in EU Law" 4 Utah L. Rev. (2007), 971-1037, 1010-1011; Gerard, *supra* note 79, 27-28; "Dunne, *supra* note 26, p. 103.
[216] *Annual Report 2018: Judicial Activity* (Court of Justice of the European Union, 2019), pp. 121, 235.
[217] Article 87, Rules of Procedure of the General Court; Article 59, Rules of Procedure of the Court of Justice.

meaningfully engage with the Commission's preliminary assessments, indicative of competition concerns but not actual violations of Articles 101 and 102? There is a risk that judicial insistence upon fuller reasoning by the Commission would degrade the efficiency of commitment decisions, raising the standard of proof and reasoning to that of a full prohibition decision. This would have to be avoided to ensure that time and cost savings are not unintentionally lost for legally innocuous and remedially conservative commitment decisions, which do not detract from the formal rule of law.

But the most substantial hurdle to compulsory judicial engagement with commitment decisions is conceptual. Putting to one side any changes to the procedural rules of the Courts and maybe even the EU Treaties, this solution would mark a fundamental divergence from the constitutional choices underpinning the institutional architecture of EU competition enforcement. As this section began by explaining, the general division of labour within the EU gives priority to administrative decision-making by the Commission, subject to the potential for judicial review by the Courts of the legality of decisions. The exceptional, as-necessary nature of judicial review, affording latitude for the Commission to enforce the vague prohibitions of Articles 101 and 102, has been in place since the Treaty of Rome. Even before that, the prioritization of independent administrative decision-making may be part of the Ordoliberal legacy on European thinking about competition enforcement.[218] Specifically mandating judicial review by EU Courts of commitment decisions concluded by the Commission would be an unprecedented break with this tradition. But if the systemic damage to normative certainty occasioned by the current use of such decisions is to be addressed, and if the formal rule of law ideal is to be better realized in contemporary EU competition enforcement, fundamental reorientation of long-held institutional principles may be the only way forward.

7. Conclusion

The meteoric rise of commitment decisions as a procedure for closing non-cartel competition investigations comes down to their undeniable appeal, which would surely be recognized by any administrative authority. They afford the Commission the unbridled discretion to pursue its policy goals with utmost efficacy, through addressing conduct beyond and below the pre-existing reach of EU competition law, and concluding ambitious remedial packages. This article has argued that such a form of market intervention is not without its consequences. The current use of commitment decisions is entirely at odds with approximating the politically and economically valuable ideal of the formal rule of law. Enforcement in the form of ad hoc, subject-specific decisions without any discernible generalized norms to structure future determinations has undermined the systematic legal certainty of EU competition law, as authoritatively deduced by the Courts from Articles 101 and 102 TFEU. Although at times embroiled in missed opportunities to rein-in the Commission's discretion, the broader issue is arguably that judicial review of commitment decisions represents a *missing* opportunity. In the absence of private attorneys-general proactively dragging problematic decisions before the EU Courts, it may be necessary to obligate judicial scrutiny of commitments. This change would certainty require a fundamental recalibration of long-held ideas about the appropriate relationship between administrative decision-making and judicial review in Europe. But perhaps only then would a more balanced reconciliation of policy effectiveness and approximating the formal rule of law, of ends and means, be discernible in contemporary EU competition enforcement. In this important field of European activity, the Art. 2 TEU declaration of a Union founded upon the rule of law would not ring as hollow.

[218] Eucken, "The Competitive Order and its Implementation", 2(2) *Competition Policy International* (2006), 241; Röpke, *The Social Crisis of Our Time* (University of Chicago Press, 1950), p. 234.