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The Emperor's Clothes Laid Bare: Commitments Creating the Appearance of Law, While Denying Access to Law

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SUMMARY

This article examines how the Article 9 commitments procedure under EC Regulation 1/2003 is increasingly being used to create policy under the guise of law and, in practice, to prevent courts from effectively providing review of, and guidance on, new areas of law. This problem is particularly acute in fast-moving high technology markets and is perfectly illustrated by the current standard-essential patent ("SEP") cases: Do commitments given to a competition agency by an individual company on the basis of a particular fact-pattern create a new abuse for SEP holders to seek injunctive relief? Are we seeing over-reaching by the executive branch based on an as-yet unproven and controversial theory of harm? Does denying litigants their day in court, albeit in very particular circumstances, violate the rule of law?

I. INTRODUCTION

A few years ago, Simon Bishop and I wrote an editorial asking that European Commission case teams enunciate a clear theory of harm in their antitrust decisions.[2] Explicit in that request was another standard that was patently essential: that the theory be tied to strong evidence of likely harm before intervention occurred.

If the likelihood of harm is sufficiently high, then certain rules of thumb such as rebuttable presumptions are justified as a way of promoting efficient and effective enforcement. However, it is entirely inappropriate to apply such a presumption where there is scant or conflicting evidence of harm. Regrettably, it seems that the latter approach has been adopted by the Commission in their recent use of the Article 9 commitments procedure.[3]

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[2] P.Marsden & S. Bishop, *Editorial: Intellectual Leaders Still Need Ground to Stand On*, 3(2) EUR. COMPETITION J. 315 (2007), available at http://www.biicl.org/files/3297_editorial_(marsden_%26_bishop).pdf

[3]Article 9(1) of Reg. 1/2003 provides:

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

Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, last amended by Council Regulation No 1419/2006 [2006] OJ L 269/1

Resolving cases by way of commitments is perfectly acceptable where a clear breach of the law has been established; indeed, undertaking a full review of the merits in such cases would be an inefficient and ineffective use of limited enforcement resources. The reality of the legal world is that the vast majority of cases are settled; only a small fraction have their "day in court" and competition law is no exception. In instances of clear harm, accepting commitments from a defendant can save investigative time, avoid protracted litigation, and prevent ongoing anticompetitive practices from suppressing product innovation and depriving consumers of related benefits.

These benefits can be particularly significant in high technology markets. Indeed, Competition Commissioner Almunia has made it very clear that "these fast-moving markets would particularly benefit from a quick resolution of the competition issues identified. Restoring competition swiftly to the benefit of users at an early stage is always preferable to lengthy proceedings."[4]

In line with this, the current Commission has focused a great deal of energy on resolving cases in fast-moving markets by way of commitments. Instances of clear breach benefit most from early resolution, so that the slow-moving wheels of regulation do not hold up business activity that is innovative and competitive.[5] As such, commitment decisions should be expected to be confined to real "cases" where a clear and well-accepted theory of harm is supported by significant evidence. Yet, as Yves Botteman has noted:

> … commitment decisions were originally expected to be unusual and rare; and mostly meant to resolve recurring competition problems…*However, in recent years, … the EC appears to make use of commitment decisions more and more, including in investigations that raise novel legal questions or rest upon less-established theories of harm*.[6]

II. TWO INCONVENIENT TRUTHS

There are at least two problems with this increased focus on the use of commitments to address novel theories of harm, particularly in fast-moving markets.

First, while defendants technically *offer* the commitments, the reality is often quite different. DG-Competition puts huge pressure on firms to come up with solutions to end investigations. A dynamic exists where the threat of years of investigation with the significant legal and commercial costs, distraction of senior management, ongoing negative publicity, uncertainty, and possibility of huge fines combine to make defendants particularly prone to offer

[4] J. Almunia, *Statement of Vice-President Almunia on the Google Antitrust Investigation*, SPEECH/12/372 (Brussels, 21 May 2012), *available at* http://europa.eu/rapid/pressReleases-Action.do?reference=SPEECH/12/372.

[5] Lugard & Mollmann have pointed out one irony: "It appears, however, that the three commitments decisions in IT markets were not reached particularly swiftly (IBM (2011): 17 months; Microsoft (2009): 24 months; and Rambus (2009): 29 months)." P.Lugard & M. Mollmann, *The European Commission's Practice Under Article 9 Regulation 1/2003: A Commitment A Day Keeps the Court Away*, (3) CPI ANTITRUST CHRON.7 (March 2013).

[6] Y.Botteman & A. Patsa, *Towards a more sustainable use of commitment decisions in Article 102 TFEU cases*, J. ANTITRUST ENFORCEMENT at 2 (2013) (emphasis mine)

commitments as a practical matter, no matter what the theory of harm may be or allegations they are facing.[7]

The practicalities of regulatory scrutiny and commercial realities often see defendants thus voluntarily forego various rights that are critical to sound decision-making—including due process and effective judicial review—in return for a timely resolution of the issue. This is acceptable when there is a clear breach of the law, and the only issue is whether the Commission is going to be put to the test of evidencing it further, so that it can produce a reasoned decision.

It is very troubling, however, when novel theories of harm are being raised, particularly in fast-moving markets. Here, not only is there the obvious pressure from the dynamics among the Commission, the defendant, and third parties, but also the pressure from the evolving market itself. Top management will be focused on keeping up with or staying ahead of the competition, and not want to be distracted by litigation about past conduct, and potential or even arcane theories of harm. As a result, there is even more pressure on firms to settle and move on.

To compound the problem, the very nature of the commitments process means that the chances of the Commission or the investigated firm challenging or seeking judicial confirmation of the agreement reached are infinitesimal. Third parties might bring a challenge but the standard of review is so low—essentially an examination only of whether the commitments are not disproportionate or onerous—that effective judicial review of the substance of the commitments—and the theory of harm and evidence behind them—will never occur.[8]

The second inconvenient truth is that, although commitments are technically *inter partes,* it would be myopic to think they go no further than that. When commitments decisions espouse novel theories of harm in fast-moving markets, they create important precedents, considered relevant by the industry as a whole who otherwise have little direct relevant case law or Commission guidance. However, with little pressure on the Commission to provide a well-reasoned and evidenced decision when commitments are given, rules can end up being set for an industry based only on case-specific facts and the interactions of a case team, a defendant, and at most some self-interested third parties.

Most significantly, there is no judicial review of commitments before they become binding. This means that a novel theory of harm proposed by the Commission, influenced in varying degrees by vociferous rivals of the defendant, can have a significant impact on a whole industry while remaining untested by the rigors of due process or judicial scrutiny. The Commission is thus provided with another mechanism with which it can direct industry subject only to its own internal deliberations, and not the checks and balances that would accompany a well-reasoned decision, subject to full appeal.

[7] As Lugard & Mollmann have noted (*supra* note 5):

> A look at the Antitrust Manual of Procedures published by the Commission clearly reveals that it considers itself entitled to put commitments on the table: Although the commitments are voluntarily submitted by the parties, the Commission can make proposals during discussions on how to modify certain elements of the text, and may even provide concrete drafting proposals on specific issues. It is up to the parties to decide whether to accept such proposals. (The last phrase may leave a bitter taste for companies that have faced this situation.)

[8] *See*, for example, case C-441/07 *Alrosa v commission*, 29 June 2010, [2010] ECR-I-05949.

The extraction of "voluntary" commitments to resolve, or more than resolve, preliminary untested concerns can also have far-reaching consequences. Once published, such commitments become soft law that can then be used in speeches, inserted into formal guidance, and referred to in future cases or other commitments decisions. As a result, commitment decisions, which should be narrowly confined to the facts of a case, may then not only influence industry practice as mentioned above, but even be viewed by regulators in other—and particularly—emerging antitrust jurisdictions as a possible direction to follow. This is of particular concern when we consider that commitments, and the "direction" they suggest, could be based on inappropriate theories of harm, and only given credence because of the "macro" pressures on an investigated company to settle.

The European Commission's commitments procedure is very much like the story of the Emperor's New Clothes. It has an elegant design but is policy in the guise of law that no one—let alone the defendant—feels able to challenge.

That this should be the case is particularly concerning in high-tech markets involving novel theories of harm, where it is even more incumbent on the Commission to prove its case with adequate evidence and well-reasoned, full decisions. The need for legal and commercial certainty is critical, to avoid the chilling hand of regulation in innovation markets. The current lack of adequate checks and balances on the commitments procedure has the potential to stifle industry and the development of the law and, indeed, raises challenges to the rule of law itself, particularly where courts are effectively barred from reviewing issues, as is happening in some unique cases.

III. COMMITMENTS, SEPs, AND ACCESS TO INJUNCTIVE RELIEF AGAINST 'WILLING' LICENSEES

The clearest example of these concerns is the use of commitments to ban the seeking of injunctive relief by holders of standard-essential patents ("SEPs") against "willing" licensees.[9] In this context, there has been a troubling triumph of a novel and unclear theory of harm as yet unsupported by evidence. As this is occurring under the commitments procedure, the theory cannot be tested by effective judicial review, and thus may well have a broad and detrimental impact on the industry. Actually depriving companies of access to injunctive relief also raises worrying concerns about a constitutional imbalance of powers, which again cannot be tested, let alone righted, under the commitments procedure.

IV. THIS IS A HOLDUP

The concern about SEP holders seeking injunctions is based on the following theory of harm: By holding patents that cover a technology deemed essential to a standard, a firm gains a dominant position. The standard-setting process already involved coordination among rivals that allegedly raised antitrust concerns about exclusion of some patents from the process (alternative technologies having been competed out). In return for incorporation of its patent

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[9] Commission's Press Release, *Commission Opens Proceedings against Samsung*, IP/12/89, *available at* http://europa.eu/rapid/press-release_IP-12-89_en.htm. *See* Commission's Press Release, *Commission Opens Proceedings against Motorola, IP/12/345, available at* http://europa.eu/rapid/press-release_IP-12-345_en.htm.

into a standard, a patent holder agrees to grant licenses to its IPR on so-called FRAND terms to all interested parties.

This ensures that rival suppliers of products that incorporate the standardized technology are not excluded from the market, thus promoting innovation and competition. In making this commitment to license on FRAND terms, it is argued that the patent holder *prima facie* agrees not to seek injunctive relief against "willing" licensees of its patents (i.e. further exclusion) but instead only to seek monetary relief for infringement (i.e. damages).[10] To allow the firm even to seek an injunction, let alone be awarded one, would exclude rivals, or force them to accept licensing terms that were non-FRAND, through either the extraction of higher royalty payments, or cross-licensing arrangements that would similarly harm competition and innovation (the "hold-up" problem).[11]

It is thus alleged that the very threat of the injunction constitutes an exclusionary as well as an exploitative abuse of a dominant position under Article 102. When the dominant firm makes commitments to the Commission not to seek such an injunction, nor to enforce it if granted, it is argued that this merely maintains the competitive balance, in favor of innovation, competition, and consumers, and thereby protects the delicate and dynamic technological ecosystem that the standardization process allows.[12]

V. BUT WHO'S HOLDING UP WHOM, REALLY?

The arguments above constitute a carefully thought-out theory of harm. Through the commitments process, firms are indeed giving up their rights to seek injunctions. That, of course, neither justifies the process, nor validates the theory of harm. The pressure to move on from an investigation is a considerable motivating factor, and does not signal a company's acceptance of the Commission's argument.

Most importantly, though, the evidence to back up the theory of harm is patchy. And it is clearly insufficient to justify blocking access to the very courts that could test such theories and evidence. Several industry commentators and experts at standard-setting bodies have failed to find any evidence of a holdup problem; and some expressly deny it exists.[13]Prices to consumers

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[10]Apple advisors have submitted that "companies that agreed to FRAND terms had agreed to a different form of adjudication and foregone a type of judicial relief to enjoy having their often dubious patent recognised as standard and essential." *UK Judge: DG COMP acting 'above the law' over patent litigation*, GLOBAL COMPETITION REV. (14 June 2013).

[11]*See* P. Hellstrom & T. Kramler, *Competition, Standards and Patents*, 9(2) CPI ANTITRUST CHRONICLE, (Sept. 2012) citing *eBay vs. MercExchange*, USSC judgment of 15 May, 2006: "an injunction ... can be employed as a bargaining tool to charge exorbitant fees' ... the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest."

[12]*Id.*

[13]K.Mallinson, *European Commission shouldn't change approach to standards-essential patents*,FIERCEWIRELESS.COM, (23 September 2013) in reference to *Microsoft v. Motorola*, W.D. Wash., November 2012; *Samsung v. Apple* (ITC Investigation 337-TA-794), June 2012:

> In the recent case with Microsoft pursuing claims of hold-up against Motorola in the Western District of Washington, even Microsoft's experts …conceded under cross-examination that hold-up was not necessarily a problem. Instead, they stated there was no evidence of hold-up and could not identify a single license that had been held up. Similarly, in a U.S. International Trade

are not going up due to the threat of injunctions; if anything, the quality of smartphones is soaring while prices fall and fall.[14]

Furthermore, even the risk of hold-up seems tiny: no court in the European Union would grant an injunction unless satisfied that the patent holder complied with its duty to offer a license on FRAND terms.[15] The parties know this and are not going to demand or agree to distorted terms. If anything, there seems to be a risk of a "reverse holdup"—one created by denying patent holders injunctive relief. Reverse holdup occurs when patentees continue to infringe patents, refuse to pay FRAND royalties, and then negotiate these terms down.[16]As a result patent holders are denied adequate and timely compensation for their innovations.[17]

Such conflicting theories of harm and evidence would normally warrant considerable caution by antitrust agencies. Instead, companies are made to offer commitments to give up their right to injunctive relief or face abuse of dominance proceedings. Noting this incursion, and afraid they will also not be able to enforce their right to a reasonable return on their investment, some major innovation companies are already putting less of their patents into standard-setting programs. This means that fewer innovations are available to firms and, inevitably, to consumers.[18]

Finally, there are problems with the purported abuse's own internal limiting principle. This principle refers to the ban on going to court being limited to those cases where injunctions

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> Commission investigation, … the European Telecommunications Standards Institute's chairman testified that patent hold-up has never been a problem at ETSI and that no standards have been blocked by SEPs.

[14]*Panellists clash over DG COMP approach to patent injunctions* GLOBAL COMPETITION REV. (14 June 2013): As James Flynn QC has noted, "fights over licensing fees for standard essential patents typically involve two well resourced companies that use one another's patents for years without paying … the idea that such fights 'hold up' products and innovations never becomes reality."

[15] Or, in the case of Germany, where the potential licensee puts the determination of FRAND terms in the hands of the court.

[16]Regional Court Düsseldorf, *Huawei Technologies*, Order 4b.O.104, 21/03/13: *36*.

> This, however, is the risk [that the patent infringer can dictate terms to e.g. push through unreasonably low royalties] if a proprietor of a SEPs prepared to grant a license is per se prohibited from asserting the claim for injunctive relief. The negotiating position of the patent proprietor is substantially weakened, as it lacks the 'leverage' necessary for equal license negotiations. It must tolerate the continuous unlawful use of its patent – permanently, independently of whether and when a license contract will actually be concluded. Only retrospectively at a point in time which is unforeseeable to the proprietor will it receive damages, the enforceability and amount of which are uncertain. If the patent proprietor lacks the possibility to have the use of the patent prohibited, the license seeker does not need to expect any sanctions in the near future. This is the case even if the negotiations regarding a license are only delayed for reasons for which it is responsible itself.

[17] A Qualcomm representative has explained that in this situation "the licensor is pressured to accept less than reasonable licensing terms due to the threat of unbalanced regulatory intervention," namely the threat of denying access to injunctive relief to prevent licensors from adopting an 'infringe and litigate' model. The licensees "just want to get a good deal [after] coming late to the development process." *Nokia counsel: major companies 'wilfully infringe' FRAND*, GLOBAL COMPETITION REV. (17 June 2013).

[18] MLex, *Ericsson, Qualcomm, Nokia cool on contributing technology to standard setting bodies*, (14 June 2013): Qualcomm said they are "considering holding back on improvements at SSOs"; Ericsson stated they would "probably reduce the level of what we contribute to the standard"; Nokia said that they had already "decided that some of its patents will no longer be available in SSOs." All cited their rationale as being that the risk that "companies licensing their inventions would no longer abide by fair and reasonable royalty terms."

are being sought against a licensee that is "willing" to agree to FRAND terms. Obtaining an injunction against a truly willing party would indeed be unfair and courts are well-placed to deal with such unmeritorious cases.

However, the "willingness test" introduces a worrying subjectivity into the process of identifying an abuse. Indeed, in these cases it may be particularly difficult to identify whether the patent owner's offer of FRAND terms is "cheap talk," or the cheap talk is actually on the part of the licensee trying to appear willing while free-riding as much use out of the patented innovation as possible. Some in-house counsel feel strongly that "the problem of free riding, whereby technology companies adopt ...SEPs without complying with ...FRAND licensing terms was a far bigger problem than patent holders pursuing injunctive relief."[19] Indeed, when focusing on any contest of wills in this arena, such insiders see the licensees as the ones that are "willfully" infringing IP rights.

VI. ABUSIVE USE OF ARTICLE 102

The potential harm to innovation of this misuse of the commitments procedure seems clear, but the harm to legal developments is just as worrying. First, and most obviously, by creating an antitrust barrier to the seeking of injunctive relief, competition law is stifling the legal rights of companies, particularly in competitive markets in which rivals regularly interact and use and benefit from one another's patented technology.

The idea that litigation could be an abuse has previously been strictly limited to extremely narrow circumstances of abuse of the judicial process through actual harassment with a plan to eliminate competition.[20]Expanding the "abuse" to seeking injunctive relief, while evading these existing legal strictures, is a major step that should have been taken only after thorough consideration by the Commission, its Legal Service, several full infringement decisions, and ultimate confirmation on appeal by the European Courts. Instead, the abuse is created through the commitments process alone. The lack of "slam-dunk" evidence of harm, the use of commitments rather than case law, the prevention of judicial examination of the issues, and the trumping of intellectual property rights by antitrust dogma in these narrow but hugely important circumstances, is unjustified.

[19] Nokia counsel "said this behaviour was unsustainable as it discouraged innovation and jeopardised standardisation." *Nokia counsel: major companies 'wilfully infringe' FRAND*, GLOBAL COMPETITION REV. (17 June 2013). Continuing, she noted that "in the past, established companied were far more likely to respect IP because they participated in the standardisation process and had the incentive to make sure it worked. But today, would be licensees apply the totally opposite strategy and established and well respected companies wilfully infringe IP."

[20]*See ITT Promedia v Commission,* Case T-111/96 [1998] ECR II-2937, recently confirmed by the General Court in *Protégé International v. Commission*, Case T-119/09, 13 September 2012: "As access to the Court is a fundamental right and a general principle ensuring the rule of law, it is only in wholly exceptional circumstances that the fact that legal proceedings are brought is capable of constituting an abuse of a dominant position." The action must be "manifestly unfounded," it "cannot reasonably be considered as an attempt to establish the rights of the undertaking and can therefore only serve to harass the opposite party;" and the action is conceived in the framework of a plan whose goal is to eliminate competition.

VII. RULE OF LAW AT RISK?

It is not mere rhetoric, but rather, a basic and fundamental human right, that everyone should have their day in court. Of course this right is not inviolable, and may be limited by contract (e.g. arbitration clauses) or by the court itself (which can close its door to vexatious or harassing litigation). In the commitments process at issue, though supposedly voluntarily, but clearly at the behest of the executive, firms are being compelled to relinquish their right to injunctive relief.

Competition policy may well have a constitutional value, upheld by the European Treaties, but it does not trump the protections of fundamental justice. Nor should it be taken lightly for an executive branch to facilitate denial of access to the courts. While the European Court of Justice may one day rule on the question of whether seeking injunctive relief in these patent cases is an abuse, it would seem dangerous to allow individual, voluntary commitments decisions to have that same effect. In the opinion of Sir Robin Jacob, "the Commission's recent attempt to prohibit owners of standard-essential patents from enforcing injunctions against rivals amounted to standing outside a court door with a gun, threatening people who want to go inside."[21]

What is even more bizarre and troubling are the cases in which a patent holder was allowed to go to the courts, as in Germany, was awarded injunctive relief, and then told by the Commission that enforcement of the awarded injunction is nevertheless an abuse.[22] This is an incredible finding, and by any analysis represents usurpation by the European executive of the role of national courts.

It is curious that the Commission has not exerted its right to intervene in national cases so it can present its arguments against injunctions, particularly if it believes its evidence to be so strong. Having the Commission involved in a hearing would be far more preferable from a rule of law perspective than having it bar the courtroom door. While it may be of some inconvenience to the Commission to appear, it can hardly add more delay than commitment negotiations, particularly since these would be hearings for injunctive relief on an already accelerated timescale. If the Commission's position was accepted at such a hearing, it would thus be fortified by such judicial review.

However, the Commission clearly believes its position is strong enough not to merit such an intervention. But, if that is so, then surely this is a clear case where the Commission should set its position out in a formal Guidance to industry, as well as a Notice to the courts—not as just one by one, *ad hoc* commitments. The Commission clearly considers it more convenient to extract the individual concession, create precedent, and direct the industry through the commitments procedure, with its scant likelihood of challenge and proper review.

However, this dynamic is clearly skewed. The individual company making the commitment rightly has no concern that it might be contributing to inappropriate policy; it simply wants to move on. The Commission, though, is the guardian of the public interest; it is the party that should not be allowing commitments to develop into a form of precedent, without

[21] *Supra* note 10.

[22] *Supra* note 9.

that precedent being adequately tested and checked by the courts. Former judge, and OECD committee chairman Frederic Jenny has warned:

> The increasing number of settlement decisions in antitrust investigations is perhaps the most negative trend in competition policy…When competition authorities accept commitments and settle investigations, it is at the cost of legal certainty,…Instead of carrying out a full-fledged analysis, regulators can opt for the easier route of closing investigations half-way... As a result, the legal and business communities miss out on the development of valuable jurisprudence and case law that could serve as guidance for compliance with competition rules.[23]

This is all the more so with novel theories of harm—these cry out for proper judicial consideration.[24]While the commitments procedure may provide a convenient way of avoiding full review of the Commission's position in court, the case teams should have the courage of their convictions and issue full infringement decisions. This would allow the review that is so essential given the complexity of balancing the considerations of competition and innovation in these kinds of cases.

As Botteman notes, though, the Commission may be accepting commitments precisely to avoid just such a burden of proof, given the difficulty in developing a plausible and well-articulated theory of harm adequately supported by economic evidence. As such, the Commission may see in commitment proceedings "a convenient way to circumvent the economic complexity and resource-intensive fact-gathering inherent to infringement actions."[25]

The Commission should not be allowed to have it both ways. If it has a clear theory of harm and a direction of travel in mind for an industry, it should allow for full and rigorous judicial review of its position, and then develop guidance on that basis. Commitment decisions avoid all of these inconveniences, and provide no guidance at all, other than to show where the Commission thinks there is an abuse. This is worrying when the very conduct being addressed may have both positive and negative features, and only a full inquiry can examine and balance the various interests.[26]

The dangers of excluding the courts cannot be underscored more. As Heike Schweitzer argues:

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[23] Financial Times, *Settlement decisions seen as negative trend - OECD Competition Committee Chairman*, Policy and Regulatory Report (23 September 2013).

[24] Botteman, *supra* note 6,explaining that "it is especially in cases involving novel legal issues or untested theories of harm that effective restraints to the use of commitment decisions by the EC are needed. The reason for this is that the EC's incentives to settle such cases are particularly strong: infringement decisions that are based on novel theories of harm, or employ novel remedies are more likely to be subject to judicial review and, eventually, be partly or wholly reversed."; *see also* F Wagner-Von Papp, *Best and Even Better Practices in Commitment Procedures after Alrosa: The Dangers of Abandoning the Struggle for Competition Law,* 49 COMMON MARKET L. REV. 929–70 (2012).

[25]Botteman, *supra* note 6.

[26] Per Lugard, *supra* note 5:

> commitment decisions provide less guidance on permitted and prohibited practices under the European competition rules. This is potentially worrying in light of the drastic decline of infringement decisions and the fact that under the regime of Regulation 1/2003 companies, in particular dominant firms, are required to self-assess their business conduct.

> In the name of administrative efficiency, the Art. 9 procedure … appear[s] to largely liberate the Commission from judicial control …and would enable the Commission to suggest commitments that it could not have imposed as remedies under Art. 7 of Reg. 1/2003.'
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> [As such] the Commission could be induced to use its bargaining power in commitment procedures to reach beyond the goal to remedy a given infringement and to pursue more ambitious strategies, attempting to restructure markets according to its own vision or to implement non- competition goals. *Commitment decisions could thus become a powerful instrument for regulating markets.*'[27]

American commentator and former Justice Department official, Douglas Melamed, has expressed precisely this concern with the U.S. equivalent of commitments, the consent decree procedure. He has submitted that "antitrust law is coming to the point [where] what matters is not what the law requires, but rather what the present government wants."[28]It is striking that Melamed has this concern about the American procedure even though such decrees are—unlike in the European Union—reviewed by courts to determine whether they are in the public interest.[29]

VIII. CONCLUSION

The Commission should not be creating law through commitments while refusing to commit to showing evidence and proving its case. Novel theories of harm should be tested through full adversarial combat. If there is a concern about the law's delay in high technology markets then these cases should be prioritized by the Commission and brought to full infringement decision with alacrity.

Unfortunately, the balance of power in commitments cases favors the Commission and this, itself, suggests it will continue with current practice. Until sufficient outcry is made against these developments, as in the tale by Hans Christian Anderson, the Emperor's procession will continue without full legal "cover", with harm not only to the market, but also to the credibility of the competition regime and the rule of law.

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[27] H. Schweitzer, *Commitment Decisions under Art. 9 of Regulation 1/2003: The Developing EC Practice and Case Law*, EUI Working Papers LAW 2008/22 http://ssrn.com/abstract=1306245, at 11 (emphasis mine).

[28]D. Melamed, *Antitrust: The New Regulation*,13 ANTITRUST 14 (Fall 1995).

[29]*See also* Lugard, *supra* note 5.