COMMON MARKET LAW REVIEW

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Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Establishment and Aims
The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden.The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Commitments and network governance in EU antitrust: *Gasorba*

Case C-547/16, *Gasorba SL and Others* v. *Repsol Comercial de Productos Petrolíferos SA*, Judgment of the Court (Third Chamber) of 23 November 2017, EU:C:2017:891

1. Introduction

The adoption of Regulation 1/2003[1] was a big step towards the modernization of EU competition law.[2] One innovation was to grant the Commission the power to adopt commitments decisions.[3] Commitments are a form of antitrust settlement that allow undertakings under investigation to avoid a fine by proposing remedies that address the Commission's competition concerns as expressed in a preliminary assessment. If the remedies are adequate, there are "no longer grounds for action" and the Commission would close the case. Unlike infringement decisions, commitments do not involve an adjudication on the merits of the Commission's competitive assessment, nor do they contain an elaborate theory of harm or an in-depth factual investigation. The committing undertaking denies any substantive allegation of wrongdoing and, more importantly, commitment decisions are not conclusions that an infringement exists.[4]

At first glance, the legal effects of Commission commitments appear clear-cut. Recitals 13 and 22 of Regulation 1 state that National Competition Authorities (NCAs) and national courts can fully examine the compatibility of a practice that has already been subjected to commitments under EU antitrust law. Yet, the general principles of uniform and effective application of EU competition law in Article 16 of Regulation 1 together with the duty of sincere cooperation as laid down in Article 4(3) TEU create some doubts about the latitude of NCAs or national courts when dealing with an agreement or a practice already covered by commitments. If the Commission closes a case via

1. Regulation 1/2003, O.J. 2003, L 1/1.
2. The terms "antitrust", "antitrust law" and "competition law" are used in this annotation interchangeably.
3. Art. 9(1), Regulation 1.
4. Recital 13, Regulation 1. See also the Commission notice on best practices for the conduct of proceedings concerning Arts. 101 and 102 TFEU, O.J. 2011, C 308/6, paras. 115–133. For an overview of commitment decisions during the first five years, see Rab, Monnoeyur and Sukhtankar, "Commitments in EU competition cases – Article 9 of Regulation 1/2003, its application and the challenges ahead", 1 JECLAP (2010), 171–188.

commitments, can an NCA or a national court find an infringement without violating these principles? If so, would that frustrate the undertaking's legitimate expectations? Should NCAs or national courts perceive commitments as a form of individual exemption similar to the old comfort letters?[5]

These questions lie at the heart of the controversy in *Gasorba*. This case provided the ECJ with the opportunity to clarify the legal nature and effects of commitments and specify what is the elbow room of other antitrust institutions,[6] particularly of national courts. In a nutshell, the ECJ confirmed that commitments cannot preclude national courts from finding that a practice which is the subject of commitments constitutes an antitrust violation. A commitment decision does not create any legitimate expectations for the concerned undertakings as regards the legality of their conduct. Nonetheless, the ECJ stressed that national courts cannot overlook these decisions. Commitments include a preliminary assessment that must be taken into account by national courts as an indication of a competition threat. In this regard, commitments have only informational, and not precedential value. Furthermore, as we argue here, their precise informational value consists in indicating that the probability of an expected competition harm in the given case is at least marginally higher than the likelihood of a neutral or a pro-competitive scenario. What is more, in our view the impact of the ECJ's preliminary ruling is not only restricted to national courts' elbow room. Rather, *Gasorba* makes an important contribution, as it implicitly clarifies the scope of action of other NCAs in cases that have been already subject to a Commission commitment decision.

One might argue, however, that *Gasorba* could be problematic from a rule-of-law perspective and thwarts the efficiency and effectiveness of EU competition law. The ECJ makes it clear that antitrust institutions can adopt different substantive and procedural pathways when dealing with a practice involving commitments. If these divergences lead to ad hoc enforcement, it follows that commitments could create tensions with legal certainty and undercut the consistent application of EU antitrust. What is more, the critique

5. Under former Regulation 17/62, O.J. 1962, 13/204, all agreements that restricted competition had to be notified to the Commission for an individual exemption. Due to the large number of notifications, the then DG IV issued so-called "comfort letters" without the need of the entire Commission's approval, and their content varied on a case-by-case basis (e.g. negative clearance or exemption comfort letters). If any, they contained very limited reasoning and they were not published. Mainly, the Commission stated that there was no reason to intervene against the notified agreement and therefore closed the file. In this regard, see Montag, "The case for a reform of Regulation 17/62: Problems and possible solutions from a practitioner's point of view", 22 *Fordham International Law Journal* (1998), 819–852, 826–829.

6. This term includes NCAs and national courts when applying EU competition law.

adds, after *Gasorba*, commitments are more likely to lead to coordination failures and chill business activities. The empowerment of NCAs[7] and the proliferation of soft enforcement tools like commitments[8] might further increase the possibility of such coordination failures. Thus, if *Gasorba* undermines rule-of-law principles and increases the likelihood of coordination failures, it may have a negative impact on EU antitrust enforcement.

Contrary to these criticisms, it is argued here that *Gasorba* strikes a dynamic balance between public and private enforcement, and allows for uniformity and "modest experimentalism" in EU antitrust enforcement. Our position is justified by two main arguments. First, we claim that a proper understanding of legal certainty indicates that the use of commitments, as framed by the ECJ in *Gasorba*, cannot undermine the uniform application of the law. Legal certainty, we argue, should be understood as "reasonable predictability and argumentative controllability" (RPAC). Legal certainty as RPAC requires that: (a) undertakings can discern not the exact legal consequence of their behaviour, but the range of the few possible legal consequences applicable to their actions; and (b) legal enforcers are *ex ante* constrained by the legal framework and *ex post* obliged to justify properly their actions. It is this implicit understanding of legal certainty, we maintain, that allows the ECJ in *Gasorba* to shape a workable framework for institutional cooperation when it comes to commitments: NCAs and national courts can only modestly experiment and thus are bound to respect the uniform application of the law.

Second, we submit that *Gasorba* is not likely to lead to coordination failures because it relies on and stimulates "regulatory conversations".[9] Arguably, this judgment implicitly recognizes that Regulation 1 was designed to allow for some degree of divergence in the application of the law. Yet, the ECJ does not worry about coordination failures, as it appreciates that such divergences cannot amount to a systemic failure due to regulatory conversations. These conversations push NCAs to revisit or re-evaluate their performance, and national courts to justify their deviations. It seems that *Gasorba* understands

7. Wils notes that NCAs have become the primary public enforcers in quantitative terms of Arts. 101 and 102 TFEU adopting 88% of the decisions; see Wils, "Competition authorities: Towards more independence and prioritization? – The European Commission's 'ECN+' proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers", (2017) *King's College London Law School Research Paper No. 2017–39*, 11, available at <www.ssrn.com/abstract=3000260>, (all websites last visited 13 Aug. 2018).

8. Petit and Rato, "From hard to soft enforcement of EC competition law – A bestiary of 'sunshine' enforcement instruments", (2008), available at <www.ssrn.com/abstract=1270109>.

9. Black, "Regulatory conversations", 29 *Journal of Law and Society* (2002), 163–196.

the value of such conversations and stimulates their functioning: after *Gasorba*, if national courts – or NCAs – need to deviate from Commission commitments, they will have to take into consideration the Commission's preliminary assessment and justify their deviation. As a result, the limited divergences possible when enforcers use commitments do not impinge on the consistent and effective application of the law or its efficiency. Rather, they empower antitrust institutions to test different substantive and procedural pathways and apply the law contextually. Simultaneously, divergences allow antitrust enforcers to set out their enforcement and prioritization policies without undercutting private enforcement and victims' compensation.

2. Factual and legal background

After six decades of national monopoly in the domestic retail fuel market,[10] Spain triggered a liberalization process,[11] as a requirement to enter the European Union in 1986.[12] In this context, fuel suppliers started organizing their distribution networks through a series of complex contractual arrangements with service stations from the early 1990s onwards, as in *Gasorba*. In February 1993, Ms Rico Gil and Mr Ferrándiz González, who set up Gasorba SL one year later, concluded two 25-year agreements with Repsol, one of the main distributors of fuel in Spain. By the first agreement, the two individuals granted Repsol a right of usufruct over their plot of land and the service station already built upon it for a sum of money. In the second agreement, Repsol leased back to Gasorba the land and the service station at a monthly rent. These two interlinked agreements entitled Gasorba to operate the service station and, in return, Repsol became Gasorba's exclusive supplier for the relevant period.[13] On the expiration of the agreements, Gasorba would

10. The market was dominated by Campsa, a semi State-owned oil company created under the dictatorship of Primo de Rivera in 1927. For a historical account, see Tortella Casares, "Oil policies in 20th-century Spain" in Beltran (Ed.), *A Comparative History of National Oil Companies* (PIE Peter Lang, 2010), pp. 143–161.

11. For a critical review of the liberalization process in the distribution market, see Contín, Correljé and Huerta, "The Spanish distribution system for oil products: An obstacle to competition?", 29 *Energy Policy* (2001), 103–111.

12. European Commission's Sixteenth Report on Competition Policy, 1986, paras. 304–305.

13. Furthermore, Repsol could periodically communicate to Gasorba the maximum retail selling prices of fuel, while Gasorba was free to apply discounts as long as Repsol's profit margins were not affected. The compatibility of this clause with EU competition rules was discussed before the Spanish courts and also with the Commission during the negotiation of "Repsol commitments", COMP/B-1/38.348 – *Repsol CPP*, O.J. 2006, L 176/104. For the purpose of this case comment, however, we leave this debate aside.

recover full rights over the plot of land and the service station. The economic rationale behind this exclusivity clause was to allow Repsol to recoup its initial investment costs and prevent free riders.

It must be noted that this type of long-term supply agreements complied with EU competition law at that time. Particularly, Article 10 of Regulation 1984/83[14] granted a general exemption to the agreements of fuel resale to service stations, and Article 12(2) explicitly stated that exclusive purchasing obligations or non-compete clauses would be exempted from the reach of competition law for the whole duration of the agreements. The legal landscape changed, however, with the replacement of that legal text by Regulation 2790/99.[15] According to the new Regulation, the former exemption was extended until 31 December 2001.[16] This legislative change, together with the fact that the notification system under Regulation 17/62 was still in force, pushed fuel suppliers to notify to the Commission their long-term exclusive distribution agreements to get an exemption from the application of EU antitrust.

Just a few days before the expiry of the exemption, Repsol notified its fuel distribution agreements to the Commission. In its application, Repsol sought a negative clearance under Article 2 of Regulation 17/62 or, alternatively, an individual exemption under Article 101(3) TFEU (ex 81(3) EC). However, the Commission was on guard. In a meeting held on 2000, the then Commissioner Mario Monti expressed his reservations about market foreclosure in the motor fuel sector.[17] The Commission suspected that Repsol's long-term, exclusive supply agreements could have a foreclosure effect on the Spanish fuel retail market and initiated an investigation under Article 101 TFEU.[18] The main concern was that the non-compete clauses, agreed for 25 to 40 years, tied service stations to Repsol and created significant barriers to entry.[19] As a result, Repsol's rivals would not have access to the downstream market and inter-brand competition would be significantly weakened. To address these concerns, Repsol offered commitments to the Commission. Among other proposals, Repsol suggested that the new supply agreements would not

14. Commission Regulation (EEC) 1984/83 of 22 June 1983 on the application of Art. 85(3) of the Treaty to categories of exclusive purchasing agreements, O.J. 1983, L 173/5.

15. Commission Regulation (EC) 2790/1999 of 22 Dec. 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, O.J. 1999, L 336/21.

16. Ibid., Art. 12(2).

17. European Commission, Memo of 20 Sept. 2000, EC competition policy and the motor fuel sector (MEMO/00/55), available at <www.europa.eu/rapid/press-release_MEMO-00-55_en.htm>.

18. Notice pursuant to Art. 27(4) of Council Regulation (EC) No 1/2003, concerning case COMP/B-1/38348 – *Repsol CPP SA* (O.J. 2004, C 258/7), paras. 21–25.

19. Ibid., paras. 22–23.

contain non-compete clauses of more than 5 years and Repsol would offer to the service station tenants financial incentives to terminate their current contracts earlier.[20] In April 2006, the Commission decided that the proposed remedies met its concerns and closed the investigation with a commitment decision (Repsol commitments).[21]

Far from releasing the tension, these commitments added fuel to the fire: they prompted a wave of both public[22] and private[23] claims against Repsol, including Gasorba's action, before the domestic courts. Essentially, Gasorba sought to: (i) declare the long-term supply agreements with Repsol void pursuant to Article 101(2) TFEU; and (ii) receive compensation for the harm caused because of Repsol's illegal behaviour. In sum, Gasorba argued that the 25-year non-compete clause well exceeded the scope of Regulations 1984/83 and 2790/99.

Gasorba's action was dismissed in first and second instance. First, the Commercial Court of Madrid[24] stated that even though the long-term exclusivity clause did not benefit from the exemptions laid down in Regulations 1984/83 and 2790/99, it was not automatically illegal.[25]

20. Ibid., para 26.

21. Repsol commitments, cited *supra* note 13.

22. Two associations representing about 45% of all the Spanish service stations sent from 2007 to 2010 several documents to the Commission reporting Repsol's – and other fuel suppliers' – anticompetitive practices, which included the breach of the 2006 Repsol commitments concerning the restriction of operators' freedom to set the selling price (see Repsol commitments, cited *supra* note 13, p. 14). Commissioner Almunia, however, put aside these claims arguing that the Spanish NCA was better placed to investigate the matter (Case COMP/39461, *CEES/AOP – Repsol* (C(2011)2994 final)). The NCA had already opened an investigation in 2004 that led to an infringement decision in 2009 and fined Repsol €5 million for indirectly fixing the retail price (Exp. 652/07 *Repsol/Cepsa/BP*, decision of 30 July 2009). The NCA decision was appealed before the Spanish High Court, however, and the appeal was still pending when Commissioner Almunia stated the Commission's official position. In the end, Repsol's appeal was dismissed by the High Court and subsequently by the Supreme Court (judgment of 5 Nov. 2012, High Court (Ch. No. 6); judgment of 22 May 2015, Supreme Court (Ch. adm.). The NCA keeps an updated view of the case record (only available in Spanish) at <www.cnmc.es/expedientes/vs065207>.

23. To our knowledge, two operators brought annulment actions against the Repsol commitments before the EU courts. These claims were dismissed (Case T-274/06, *Estaser El Mareny* v. *Commission*, EU:T:2007:323; Case T-45/08, *Transportes Evaristo Molina* v. *Commission*, EU:T:2008:499; and Case C-36/09 P, *Transportes Evaristo Molina* v. *Commission*, EU:C:2010:670). Furthermore, although it is difficult to take stock of all the private claims that emanated from the 2006 Repsol commitments, at least 6 other operators apart from Gasorba sued Repsol: judgments of 9 May 2011, 11 May 2011, 30 Nov. 2012, 3 Apr. 2012, and 4 Jan. 2013, Spanish Supreme Court (Ch. civ.); and judgment of 5 Feb. 2016, Appeal Court of Madrid (Ch. no. 28). An appeal against this last judgment before the Supreme Court is pending at the time of the writing. Every judgment dismissed the plaintiffs' claims.

24. Judgment of 8 July 2011, Commercial Court of Madrid (Ch. no. 4bis).

25. Ibid., legal basis 3.

Moreover, the Commercial Court underlined that even though commitments have no binding effects for other national courts or NCAs, the Repsol commitments provided operators with the opportunity to withdraw from Repsol's distribution network.[26] This interpretation was followed by the Appeal Court of Madrid.[27] That court emphasized the importance of the informational value of commitments by drawing a parallel with comfort letters under Regulation 17/62,[28] and concluded that national courts need to take into account the Commission's commitments when deciding a relevant case. On this basis, the Appeal Court held that the Repsol commitments sufficiently addressed the Commission's competition concerns. Unsatisfied with this outcome, Gasorba lodged a cassation appeal before the Spanish Supreme Court (the SC),[29] which decided to stay proceedings and refer two questions to the ECJ for a preliminary ruling. The ECJ was asked whether Article 16 of Regulation 1 precludes a national court from declaring invalid an agreement that has been previously subjected to Commission commitments; and whether commitments function as an individual exemption.

3. Opinion of the Advocate General

In order to tackle the first preliminary question, Advocate General Kokott analysed three points: the boundaries of the principle of uniform application of EU law, the legal effects of commitments, and the scope of legal certainty. For this purpose, she engaged in a teleological and systematic interpretation of Articles 9(1) and 16(1) of Regulation 1.

The starting point of her analysis was that commitments are binding only for the parties involved.[30] The fundamental difference between infringement and commitments decisions is that the former include a finding of an antitrust violation, detailed theory of harm and an in-depth investigation of facts; while the latter consist only of a summary examination and include a preliminary

26. Ibid.

27. Judgment of 27 Jan. 2014, Appeal Court of Madrid (Ch. no. 28).

28. Ibid., legal basis 3, para. 12. Notably, the Spanish Court relied on settle case law of the ECJ who already stated that comfort letters do not prevent national courts from reaching a different finding. See *inter alia* Case 99/79, *SA Lancôme and Cosparfrance Nederland BV* v. *Etos BV and Albert Heyn Supermart BV*, EU:C:1980:193, para 11.

29. Among the reasons for filing the preliminary question, the SC considered that the Commission itself had diminished the effects of the Repsol commitments in an amicus brief forwarded to the Commercial Court of Barcelona saying that commitment decisions do not imply the finding of an antitrust infringement (Order of 18 Oct. 2016, Supreme Court, at legal basis 6, para 2).

30. Opinion of A.G. Kokott in Case C-547/16, *Gasorba SL and Others* v. *Repsol Comercial de Productos Petrolíferos SA*, EU:C:2017:692, para 28.

competition assessment.[31] Furthermore, the purpose of infringement decisions is to bring an antitrust violation to an end, whereas commitments are aimed at allowing the Commission to economize resources, exercise its discretion effectively, and at providing the undertakings with the opportunity to avoid costly and time-consuming litigation.[32] On these grounds, the Advocate General noted that commitments do not preclude national courts from carrying on the investigation and deciding the case differently.[33]

However, the general principle of the uniform application of EU competition law, which is also encapsulated in Article 16(1) of Regulation 1, dictates that national courts must not take any decision that runs counter to a decision previously adopted by the Commission on the self-same case. The principle of uniformity intends to ensure consistency in a system of decentralized governance and covers all conceivable decisions that the Commission may adopt under Regulation 1.[34] Yet, the Advocate General argued that this prohibition of divergences refers only to the prescriptive content of the relevant Commission decision.[35] Repsol commitments prescribed only the relationship between Repsol and its service operators, but they left aside the issues of lawfulness of the exclusive purchasing agreements.[36] Consequently, national courts were not barred, according to her, from conducting their own analysis and finding that an infringement was committed. Whether their analysis involves aspects already assessed in the commitments or new is immaterial.[37] From that angle, commitments leave in general a broad leeway to national courts and NCAs also to engage in divergent substantive analysis of the same case.

The Advocate General noted that commitments have certain legal effects, as NCAs and national courts cannot disregard the provisional preliminary assessment included in them.[38] Moreover, she noted that the Commission's appraisals included in commitments should be deemed as "strong indications, if not *prima facie* evidence, of the anticompetitive nature of the relevant practice".[39] By this statement, she made clear that a national court could deviate and go beyond commitments assessment because of the summary and provisional nature of such decision. Yet, in that case the national court ought to

31. Ibid., paras. 35, 37, 38, 40 and 46–48. See also Case C-441/07, *Commission* v. *Alrosa Company Ltd.*, EU:C:2010:377.
32. Opinion, para 40.
33. Ibid., para 42.
34. Ibid., paras. 28–29.
35. Ibid., para 30.
36. Ibid., para 31.
37. Ibid., paras. 33–34.
38. Ibid., para 35.
39. Ibid.

consult the Commission and take into consideration its preliminary assessment.[40] The opposite would be at odds with the principle of sincere cooperation and the general objective of applying EU antitrust effectively and uniformly.[41]

The Advocate General's reply to the second preliminary question was thus straightforward: commitments are neither an endorsement nor an exemption of the individual practice.[42] This conclusion was supported not only by the fact that Regulation 1 abolished the system of *ex ante* individual exemptions, but also by a comparison of commitment decisions with the inapplicability decisions of Article 10 of Regulation 1.[43] Therefore, the committing undertaking cannot legitimately expect that commitments entail Commission's endorsement or legalization of its agreement or conduct. In other words, Repsol's legal certainty argument failed because it misconceived the bilateral and provisional nature of commitments.[44] As highlighted by the Advocate General, commitments are merely expressions of Commission discretion and manifestations of its enforcement strategy; they do not preclude other antitrust institutions from following a divergent approach, nor do they create any further legitimate expectations for committing undertakings.[45]

4. Judgment of the Court

The ECJ also read Articles 9(1) and 16(1) of Regulation 1 conjointly to answer the first preliminary question. The Court, however, did not tackle the second preliminary question since it considered it already covered by its reply to the first question. Unsurprisingly, the ECJ's ruling focused on the principle of uniform application of EU competition law, the legal effects of commitments and on the principle of legal certainty.

First and foremost, the ECJ began by recalling that the enforcement model of EU competition law is a system of parallel powers where national courts, NCAs, and the Commission can apply Articles 101 and 102 TFEU.[46] In this context, Article 16(1) of Regulation 1 means that national courts cannot take

40. Ibid.
41. Ibid.
42. Ibid., paras. 38–39 and 45–46.
43. Ibid., paras. 48–49. By inapplicability decisions, which are issued only in exceptional circumstances, the Commission declares that it is not in the Union's public interest to apply EU competition law to a specific agreement or practice.
44. Ibid., paras. 36–39 and 47.
45. Ibid., paras. 40, 42 and 51.
46. Judgment, para 23.

a decision that runs counter to a previous Commission decision.[47] That being said, under Article 9(1) of Regulation 1, the Commission carries out merely a preliminary assessment without deciding whether there is an antitrust infringement. On this basis, the ECJ concluded that as commitments are binding only for the parties involved, national courts cannot be precluded from concluding that a practice already subjected to a commitment decision is also an infringement of EU antitrust.[48]

The ECJ agreed with the Advocate General also regarding the legal effects of commitments. A national court, the ECJ said, cannot disregard a commitment decision that deals with the same case.[49] The duty of sincere cooperation and the general principles of uniform and effective application of EU competition law require the national court to take into consideration the preliminary assessment carried out by the Commission. However, and here comes a slight twist from the Advocate General's Opinion, the ECJ stated that the said preliminary assessment constitutes only an "indication, if not prima facie evidence" of the anticompetitive nature of the relevant practice, while it omitted the adjective "strong".[50] The Court also omitted the reference to "prescriptive content of commitments" or to "any obligation to consult the Commission" in case of deviation. As we suggest below, these omissions may have decisive practical implications.

The last point tackled by the ECJ was the question on legal certainty and legitimate expectations. Once more, the ECJ agreed with the Advocate General that committed undertakings cannot invoke the principle of legal certainty to block a national court's divergent approach. Commitments "cannot create a legitimate expectation in respect of the undertakings concerned as to whether their conduct complies with Article 101 TFEU".[51] With regard to this point, although not cited in the judgment, the ECJ followed settled case law. For an undertaking to successfully invoke a "legitimate expectations" defence, three conditions must be met: (i) a Union authority should have given precise, unconditional and consistent assurances; (ii) those assurances must comply with the applicable rules; and (iii) give rise to a legitimate expectation.[52] From Recitals 13 and 22 of Regulation 1, it is inferred that commitments can never create any expectation about the legalization or exemption of a conduct from the scope of EU competition law.

47. Ibid., para 24.
48. Ibid., paras. 25–26.
49. Ibid., para 29.
50. Ibid. This linguistic choice also exists in the official, Spanish version of *Gasorba*. While in the A.G. Opinion, the word "*importante*" appears, in the ECJ's judgment is omitted.
51. Ibid., para 28.
52. Case T-347/03, *Eugénio Branco Ld^a* v. *Commission*, EU:T:2005:265, para 102.

Therefore, it did not come as a surprise that the Court held that a "legitimate expectations" defence cannot be accepted in these circumstances.

5. Judgment of the Spanish Supreme Court

Following the ECJ's preliminary ruling, the SC finally issued its judgment on 7 February 2018.[53] For the SC, the key issue was the legal effects of commitments: to what extent could a commitment decision bind a national court? According to the SC, *Gasorba* entails that the preliminary assessment carried out by the Commission in the Repsol commitments has to be taken into account. However, in the SC's own words, commitments decisions do not have "healing powers".[54] This means that the Repsol commitments could not certify the compliance of the relevant exclusive supply agreements with EU competition law.[55] The Commission's preliminary assessment in this decision tackled only a market foreclosure concern in the Spanish fuel retail market.[56]

Accordingly, the SC assessed the said agreements in the light of the Commission's preliminary assessment. It endorsed the Commission's view that the exclusive supply agreements led to market foreclosure and weakened inter-brand competition.[57] The essence of the SC's analysis is that in virtue of the replacement of Regulation 1984/83 by Regulation 2790/99, Repsol's exclusive supply agreements were not covered by any exemption anymore and therefore infringed EU antirust law since 1 January 2002.[58] Indeed, one can observe that the remedies agreed in Repsol commitments compelled neither Repsol nor Gasorba to adjust the duration of their exclusive supply agreements to the new legal landscape. Rather, the remedies were of voluntary nature since Repsol had to offer the service station operator the opportunity to switch to any other supplier to break the exclusivity clause and permit third parties to enter the market.[59] In other words, the remedies only created an exit door to service station operators to terminate their agreements with Repsol. The Repsol commitments did not have any material impact on the relationship between Gasorba and Repsol. On this basis, the SC declared the two interlinked agreements between Repsol and Gasorba void and left the door open for further litigation between the concerned undertakings.[60]

53. Judgment of 7 Feb. 2018, Spanish Supreme Court (Grand Ch.).
54. Ibid., legal basis 9, para 2. Our translation.
55. Ibid., legal basis 7, para 6.
56. Ibid.
57. Ibid., legal basis 7, para 5.
58. Ibid., legal basis 9.
59. Repsol commitments, cited *supra* note 13, para 44; and the Annex thereto.
60. Spanish Supreme Court judgment, legal basis 9, para 3.

6. Comment

6.1. *On the binding effects, (non-)precedential value and informational function of commitments*

Gasorba is a timely ruling because it elucidates the legal effects of commitments in a period when their use has increased[61] and the Commission searches for ways to empower NCAs and enhance EU competition law enforcement.[62] In *Gasorba* the ECJ clarified the informational value of commitments and shaped a framework for cooperation between different antitrust institutions. By doing so, it struck a reasonable balance between public and private enforcement with regard to commitments.

The bilateral legal effects of commitments, unlike informal settlements under the former Regulation 17,[63] are quite straightforward. Article 9 of Regulation 1 states that the Commission cannot initiate further investigations against the same undertaking for the same case once commitments were accepted.[64] Moreover, Article 23(2)(c) of the said Regulation is clear in that undertakings will be fined should they not comply with a commitment decision.

Nonetheless, the scope of action of national courts – and of NCAs, eventually – regarding agreements or practices already covered by commitments was not entirely well defined until *Gasorba*. The Commission had underlined that commitments are not statements of the law but only useful points of reference with regard to its competition policy. However, as Advocate General Kokott noted, Article 9, unlike other Regulation 1 provisions, had not been examined in detail by the EU courts.[65] Thus, the ECJ felt obliged to clarify the overall legal effects of commitments in virtue of the general principles of EU antitrust enforcement. The Court offered additional

61. Gerard, "Negotiated remedies in the modernization era: The limits of effectiveness" in Lowe, Marquis and Monti (Eds.), *European Competition Law Annual 2013: Effective and Legitimate Enforcement of Competition Law* (Hart Publishing, 2016), pp. 139–184.

62. Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, COM(2017)142. The aim is to strengthen NCAs by enhancing their capabilities and ensuring their independence. Simultaneously, while the uniform application of the law continues to be the ultimate goal, NCAs are envisaged to have greater discretion. At the time of the writing, the European Parliament and the Council have reached a provisional political agreement on the text. For an update, see <ww.ec.europa.eu/competition/ecn/index_en.html>. For an analysis of the proposal, see Wils, op. cit. *supra* note 7.

63. See generally Van Bael, "The antitrust settlement practice of the EC Commission", 23 CML Rev. (1986), 61–90.

64. There are some exceptions in Art. 9(2), Regulation 1.

65. Opinion, para 1.

guidance by stressing that national courts can differ from the Commission's approach as long as they do not overlook the Commission's preliminary assessment. This reasoning allowed the SC to decide the matter differently after it considered the preliminary assessment of Repsol commitments. As a result, the SC opened the door for the fair compensation of Gasorba while, additionally, it corrected the ineffectiveness of the said commitments.

That said, the "obligation not to overlook" of antitrust institutions when they intend to deviate from a commitment decision plays a key role in this enforcement framework. Taken seriously, this duty implies that the deviating national court or NCA should evaluate the preliminary assessment and justify its different conclusion. This is actually what the SC did. Yet, the exact content of the obligation is unclear. For instance, the ECJ did not explain what are the rights of the undertakings in case the deviating national court or NCA overlooks the preliminary assessment. This issue is further obfuscated by the fact that the ECJ omitted two important points made by the Advocate General. First, the ECJ did not impose on the deviating national court or NCA an "obligation to consult" the Commission. Such obligation could take the form of asking for an amicus brief, and it would enable a more structured interaction between antitrust institutions.[66]

Second, the Court did not reiterate the Advocate General's argument that the prescriptive content of commitments should bind national courts and NCAs in accordance with Article 16 of Regulation 1. The Advocate General's statement implied that when an antitrust enforcer decides to deviate from Commission's commitments, it would need to identify their prescriptive content and make sure that its dictum does not run counter to what those commitments have prescribed. In our understanding, the "prescriptive content" refers to the agreed remedies.[67] Take, for instance, the *RWE gas foreclosure* commitments, where RWE promised to divest its gas transmission system to an independent operator.[68] If, subsequently, RWE was sued before the German courts for breaching Article 102 TFEU, these courts could either: (a) find no infringement and dismiss the action; (b) find an infringement and impose a fine; or (c) find an infringement and compensate the harmed parties. In all these scenarios, the German courts would not be allowed to prescribe behaviour running counter to the remedy or absolve RWE from its distinct legal obligation undertaken by the commitments, unless they directly review the commitments and annul them for a specific reason.[69] From this angle, it

66. See *infra* section 6.3.

67. Opinion, para 31.

68. Cases COMP/39.388 – *German Electricity Wholesale Market* and COMP/39.389 – *German Electricity Balancing Market*, decision of 26 Nov. 2008.

69. E.g. *Skyscanner Ltd* v. *CMA*, [2014] CAT 16.

could be argued that the content of the not-to-overlook obligation, as framed by the ECJ, is not entirely clear-cut. It seems that the ECJ offers less clear guidance than it could and relaxes the guarantees of uniformity provided by the Advocate General.

Yet, it cannot be said that *Gasorba* does not offer at least sufficient guidance to antitrust institutions. Following this preliminary ruling, a national court can conclude that given the remedies agreed in the commitments, there is no anticompetitive harm and dismiss the claim. Alternatively, a national court can decide – as the SC did – that even though the Commission intended to solve a competition concern, the harm remains and, therefore, it is necessary either to indirectly complement the commitments or take a step further and declare the agreements void. In either case, the national court should comply with its "not-to-overlook" obligation and not disregard the Commission's preliminary assessment.

To the above, it should be added that *Gasorba* elucidates the informational value of commitments: these decisions function as indications of a potential competition problem to other antitrust enforcers and provide guidance to market participants about an existing or emerging antitrust policy.[70] In the present case, this means that the Commission used the Repsol commitments to shed some light about its policy in the motor fuel sector and kept the Spanish antitrust institutions alert.[71] It also means that Spanish fuel suppliers and station operators knew about the Commission's reservations about long-term contracts already at the time the Repsol commitments were issued. From this angle, it could be argued that NCAs and national courts can use commitments to communicate with each other, clarify the law and enhance legal certainty in a light-touch manner before invoking the "benign big guns", such as infringement decisions and imposing fines.[72]

Moreover, *Gasorba* specifies the precise informational value of commitments. In her Opinion, the Advocate General stated that the Commission's preliminary assessment carried out in the commitment decision must be regarded by national courts as a strong indication, if not *prima facie* evidence, of an anticompetitive scenario.[73] The ECJ, however, took some distance from this statement, reiterating it without the adjective "strong". Characterizing commitments as strong indications of an antitrust

70. For instance, in *Distrigaz* the Commission presented its approach concerning market foreclosure by long-term contracts (Case COMP/B-1/37966 – *Distrigaz,* decision of 11 Oct. 2007).

71. Let us recall that one year before the then Commissioner Mario Monti had expressed his concerns on market foreclosure in this sector (see *supra* note 17).

72. Ayres and Braithwaite, *Responsive Regulation – Transcending the Deregulation Debate* (OUP, 1992), pp. 4–7.

73. Opinion, para 29.

infringement while simultaneously stressing that they contain only a preliminary appraisal of the situation at hand seems paradoxical. Therefore, the ECJ rightly avoided this tension by omitting the said adjective. Furthermore, it would be wrong to consider commitments as referring to a "Schrödinger's cat" type situation.[74] Even though commitments do not include a finding of an infringement, the pro-competitive and the anticompetitive explanation of the practice at stake are not equally probable. Both the Advocate General's statement and the ECJ's re-statement are useful in this respect. In our view, they suggested that commitments signal that the probability of an expected competition harm is at least marginally higher than the likelihood of a neutral or pro-competitive scenario.

A fair reading of *Gasorba*, therefore, warrants the conclusion that commitments are at least a respectable indication of a competition problem. Being perceived as such, commitments may motivate NCAs to investigate the relevant matter further and the national courts to be more vigorous when reviewing the said decisions. Granted, one might highlight that commitments are supposed to put an end to an infringement. Therefore, if *Gasorba* stimulates further enforcement despite the existence of commitments it may have a distorting effect upon competition enforcement. Nonetheless, this preliminary ruling does not deny that in most occasions commitments will address the competition problem. In our view, it opens the possibility of an *ex post* corrective intervention by other antitrust institutions. The ECJ, in this sense, merely incentivizes them to remain vigilant *vis-à-vis* the precision of the commitments' theory of harm or the implementation of the agreed remedies. If an NCA or national court realizes that, even after commitments, the competition problem remains, it should not refrain from action only on the basis that the suspected undertaking has conceded certain commitments. From this angle, under *Gasorba* commitments can reasonably stimulate further enforcement, but only on limited occasions. The same is true for private claims.[75] National courts are not be precluded from compensating the victims of an antitrust violation only because Commission's concerns were met via commitments.

From this perspective, it is understandable that in the present case the SC was alarmed by the Repsol commitments and used the Commission's preliminary assessment as an indication of a competition problem. Without taking a competition infringement for granted, the SC inquired whether

74. That is to say, the controversial agreements cannot be deemed as having equal chances to be lawful and unlawful.

75. See the European Commission's antitrust manual of procedures of March 2012, ch. 16, para 12, available at <www.ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf>.

Repsol's exclusive supply agreements still caused anticompetitive harm and decided to annul the relevant agreements.

6.2. *The evolving concept of legal certainty*

Another crucial question raised in *Gasorba* relates to legal certainty. Repsol argued that since the Commission terminated the investigation with a commitment decision, its legitimate expectations would be frustrated should a national court declare its agreements invalid under Article 101(2) TFEU.[76] According to Repsol, this would be contrary to the principle of legal certainty. This issue touches upon a general problem in EU antitrust enforcement: could commitments by allowing for divergences in the application of the law undermine legal certainty? Would further empowerment of NCAs and national courts affect such a fundamental rule-of-law value? In the end, all these questions boil down to what legal certainty means and entails.

The thrust of our argument in this regard is that the ECJ in *Gasorba* did not understand legal certainty as absolute certainty, but rather in a common-law fashion as "reasonable predictability and argumentative controllability" (RPAC). By relying on this premise, the Court managed to deliver a sensible solution to the issue at stake. The normative appeal of the latter conception against the former vindicates the ECJ's holding.

Let us clarify this point. As Hart noted, all legal systems seek to balance two major social needs: the need for certain rules which can be applied straightforwardly and predictably, and the need to leave open certain issues which can be properly assessed when they arise in a specific context.[77] Given that legislators cannot predict in advance all the possible combinations of circumstances, legal rules will inevitably suffer to a certain extent from a "relative ignorance of fact" and a "relative indeterminacy of aim".[78] Therefore, legal certainty cannot be perceived as the absence of indeterminacy in law or as absolute certainty and predictability. It would be unrealistic to ask the legal system to ensure a state of affairs where all subjects of law can predict all the consequences of a legal provision.[79] And, certainly, the EU competition law system would be unworkable.

Another way to conceptualize legal certainty is as a principle that denounces the arbitrariness of unpredictable enforcement and intends to exclude situations where people do not know which rule they can rely on or

76. Opinion, para 36.
77. Hart, *The Concept of Law*, 2nd ed. (OUP, 1994), p. 130.
78. Ibid., p. 128.
79. Dicey, *Introduction to the Study of the Law of the Constitution* (McMillan, 1982), pp. 110–114. This edition is based on the 8th ed. published in 1915.

are subject to.[80] From this angle, legal certainty does not mean absolute calculability; rather, it becomes a demand for a state of reasonable knowability, reliability and calculability.[81] It exists when the individuals are able to reconstruct the facts and the abstract legal qualifications and fairly accurately predict not the actual consequence of any action, but the various legal consequences applicable to their actions. This means that legal certainty exists where a legal system: (i) obliges legal institutions to *ex ante* explain their reasons for action; and (ii) imposes on the same institutions *ex post* checks with regard to the soundness of their intervention. Legal certainty, in this sense, is more of a property of a legal framework as implemented in practice rather than a requirement of fully predictable enforcement outcomes.[82] As noted below, this conception of legal certainty as RPAC allows the network-based enforcement model to operate effectively.

Truth be told, the ECJ has not always been clear regarding its understanding of legal certainty. This tension between different competing conceptions has actually tormented the Court and infused vagueness in its case law.[83] Legal certainty has sometimes been used as an "umbrella concept",[84] and in many occasions it has been framed in absolute and rigid terms.[85] Simultaneously, however, the ECJ has recognized that a degree of uncertainty could be inherent in law and compatible with the rule of law.[86] In addition, in many instances the Court has linked legal certainty to the concept of legitimate expectations.[87] Expectations can more readily give flesh to legal certainty as RPAC. Yet, this

80. Locke, "Two treatises of government" (1689) in Laslett, *John Locke, A Critical Edition with an Introduction and Apparatus Criticus*, 2nd ed. (CUP, 1988), paras. 135–137 of Locke's text. For Locke, the whole point of moving from a state of nature to a situation of positive law was to introduce some predictability into social interactions and avoid being subject to others' incalculable volition. See in this regard Bingham, *The Rule of Law* (Allen Lane, 2010), p. 38.

81. Avila, *Certainty in Law* (Springer, 2016), pp. 172–176.

82. As Davis argues, discretion is inevitable in the modern administrative State. The role of the rule of law, hence, is not to ensure absolute certainty, but to warrant that such discretion is properly framed and exercised. See Davis, *Discretionary Justice: A Preliminary Inquiry* (LSU Press, 1969), pp. 27–32.

83. Van Meerbeeck, "The principle of legal certainty in the case law of the European Court of Justice: From certainty to trust", 41 EL Rev. (2016), 275–288.

84. Groussot, *General Principles of Community Law* (Europa Law Pub., 2006), p. 24.

85. Joined Cases C-72 & 77/10, *Costa and Cifone*, EU:C:2012:80, para 74; and Case C-391/05, *Jan de Nul NV* v. *Hauptzollamt Oldenburg*, EU:C:2007:126, para 23.

86. Case C-110/03, *Belgium* v. *Commission*, EU:C:2005:223, para 31.

87. Case C-335/09, *Poland* v. *Commission*, EU:C:2012:385, para 180; Case C-201/08, *Plantanol GmbH & Co. KG* v. *Hauptzollamt Darmstadt*, EU:C:2009:539, para 53; Case C-337/07, *Ibrahim Altun* v. *Stadt Boblingen*, EU:C:2008:744, paras. 59–60; Case C-519/07, *Commission* v. *Koninklijke FrieslandCampina NV*, EU:C:2009:556, para 85; Joined Cases C-65 & 73/02 P, *ThyssenKrupp* v. *Commission*, EU:C:2005:454, para 41; and Case 223/85, *Rijn-Schelde-Verolme (RSV) Machinefabrieken en Scheepswerven NV* v. *Commission*, EU:C:1987:502, paras. 17–19.

conceptual move does not solve the problem since legitimate expectations can be also understood in two different opposing ways, as happens with legal certainty. Thus, it is necessary to reconstruct Court's reasoning in each case to see what conception of legal certainty fits best.[88]

In *Gasorba*, it seems that the ECJ's reasoning was premised on legal certainty as RPAC. This may become clearer if we examine first Repsol's defence based on a more absolutist understanding of legal certainty. This reasoning starts from the idea that the commitments created some expectations for the firm. Repsol could thus expect that the Spanish NCA or national court would not find an infringement of Article 101(1) TFEU since, according to the Commission, any competition concern was met. Repsol could also understand that as its proposal satisfied one enforcer, it would also please any other antitrust institution given that the law must be applied uniformly. Furthermore, given that commitments are "not appropriate where the Commission intends to impose a fine",[89] accepting commitments could suggest that the Commission did not consider the said practice as a serious antitrust violation calling for an infringement decision.[90] Therefore, the argument goes, if another antitrust institution sanctions Repsol for the same agreement, it is implied that the undertaking has to comply with conflicting interpretations of the same law within the EU, despite the absence of any material difference justifying the divergent approaches.[91]

To these arguments, it could be added that extending the concept of legitimate expectations to cover the expectations of committing undertakings can serve as a means for disciplining antitrust enforcers. If enforcers know

88. This line of argumentation is inspired by Dworkin's claim that legal interpretation should put legal practice in its best light in Dworkin, *Law's Empire* (Harvard University Press, 1986), pp. 49–53.

89. Regulation 1, Recital 13.

90. This argument can be supported by the way the ECJ conceives the principle of legal certainty regarding soft law instruments: "In adopting [soft law instruments] and announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations"; in Joined Cases C-189 & 202, 205, 208 & 213/02 P, *Dansk Rørindustri* v. *Commission*, EU:C:2005:408, para 211. One might argue that an extensive interpretation of this case law combined with the principle of uniformity could reinforce Repsol's legal certainty argument.

91. See Akman and Sokol, "Online RPM and MFN under antitrust law and economics", 50 *Review of Industrial Organization* (2017), 133–151. These authors claim that the divergence in NCAs' approaches on the MFN clauses cases is a "borderline inexcusable mistake" that undermines the consistency of the law. We argue, however, that a different understanding of legal certainty and experimentalism in EU antitrust enforcement suggests that their criticism is exaggerated. See in this regard Gerber and Cassinis, "The 'modernization' of European Community competition law: Achieving consistency in enforcement: Part 1", 27 ECLR (2006), 10–18.

that they create certain legitimate expectations by accepting commitments, they will refrain from circumstantial commitments or from over-committing. If the Commission knows that commitments would have a "blocking effect" on further public or private enforcement, it would not take this decision lightly. In this respect, legal certainty could be used to set the barrier of uniformity higher and discourage favouring enforcement effectiveness over fundamental rights. These issues cannot be swept under the carpet by simply underlining the provisional and preliminary character of commitments. If absolute certainty offers the most attractive conception of legal certainty, *Gasorba* creates tensions with the rule of law. That is because an absolutist idea of legal certainty extends the prohibition of divergences of Article 16 Regulation 1 and implies that commitments should bind NCAs and national courts in virtue of the legitimate expectations of the committing undertakings.

However, Repsol's argument is unconvincing not only because legal certainty as RPAC seems to hold more normative appeal than an absolutist conception; but also because legal certainty as RPAC proves in practice more functional. To illustrate this point, we discuss some scenarios that, although not explicitly mentioned by the ECJ, can derive from the framework set up by *Gasorba* conceiving legal certainty as RPAC. Imagine, for instance, that two NCAs from two Member States (NCA1 and NCA2) deal with Repsol's exclusivity agreements with suppliers in their territories, like in the case of MFN clauses in the *Booking.com* saga.[92] Also, say that these agreements are identical, and that Repsol has the same market share and there are the exact relevant market features in both Member States. Yet, NCA1 issues an infringement decision, while NCA2 closes the case via commitments. According to legal certainty as RPAC, NCA2 accepting Repsol's commitments proposal does not undermine the uniform and predictable application of EU antitrust. This would be the case even if NCA2 acts first and NCA1 second. Now, imagine that a third NCA (NCA3) is alarmed about Repsol's practices and opens proceedings against the undertaking in its territory. After negotiations, NCA3 closes the case via commitments, but the remedies agreed differ from those of NCA2; for example, they provide for a different duration of the exclusivity clauses. Accordingly, Repsol would have to comply with different interpretations of the same law even though the three different markets have identical characteristics. Again, this enforcement

92. In this saga, several NCAs dealt with the competition concerns arose by the use of MFN clauses by online travel agents. For a view of this saga, see Colangelo, "Parity clauses and competition law in digital marketplaces: The case of online hotel booking", 8 JECLAP (2017), 3–14; Akman and Sokol, op. cit. *supra* note 91; and Akman, "A competition law assessment of platform most-favoured-customer clauses", 12 *Journal of Competition Law and Economics* (2016), 781–833.

outcome would be approved by legal certainty as RPAC, but condemned by its more absolutist rival.

Further, let us suppose that Repsol is sued before the domestic courts of all three Member States (NC1, NC2 and NC3). NC1 finds that the plaintiff was harmed by the infringement accredited in NCA1 decision. NCA1's infringement decision will be used as solid evidence of antitrust infringement. However, NC2 and NC3 need to consider the informational value of NCA2's and NCA3's preliminary appraisals as an indication of possible antitrust infringement. These courts will need further evidence to condemn Repsol. Additionally, it can be possible that NC2 finds NCA2's remedies adequate, and that NC3 considers NCA3's remedies differently. In any case, commitments will not block them from conducting their own assessment about the said practice. NC2 and NC3 will be able to examine whether commitments remedies adequately addressed the problem at hand and compensate Repsol's victims if an antitrust injury is proven.

In all these scenarios, Repsol's legal certainty understood as RPAC is respected. Legal certainty as RPAC justifies an enforcement framework where commitments have only a bilateral legal effect, perform an informational function for antitrust institutions and market participants, and do not block further public or private enforcement. This is because: (a) undertakings can predict in advance that the above divergences are among the few possible legal consequences of their committing activity; and (b) antitrust institutions have a limited range of enforcement options and are obliged to justify their deviations. These observations may explain why the ECJ in *Gasorba* was not convinced by Repsol's legal certainty argument: Repsol could have reasonably predicted that its agreements could come under antitrust scrutiny before a national court. What is more, these scenarios, elucidating the potential further implications of the *Gasorba* framework, show why the ECJ was right in imposing on the SC a not-to-overlook duty with regard to the Commission's preliminary assessment, while allowing it to diverge.

If *Gasorba* is read as relying on legal certainty as RPAC and allowing such divergences, antitrust institutions would have significant elbow room to engage in different interpretations of EU antitrust law, follow diverse procedural paths, and adopt disparate remedies when using commitments. Given that EU antitrust law contains numerous open-textured terms and many market practices have ambivalent welfare effects, this possibility seems reasonable, as different enforcers would be able to test diverse substantive interpretations or remedial responses. This would allow for natural experiments that could eventually reveal which precise legal standard is

optimal for a specific market practice.[93] It would be misguided to assume that this enforcement style, due to its emphasis on divergence, necessarily chills efficient business conduct. Different rules and standards do not necessarily damage business nor do they undermine the predictability and the coherency of the law.[94] Additionally, the potential increase of transaction costs triggered by these divergences could be outweighed by the efficiencies gained by sharpening our legal standards through learning and experimentalism.

On the contrary, a more absolutist conception of legal certainty would not only dictate a different holding than the one provided by the ECJ in *Gasorba,* but it would also affect the EU antitrust response to the above-mentioned scenarios. First, the divergences between NCA1, NCA2 and NCA3 would not be permitted. If NCA1 had adopted an infringement or a commitments decision, then NCA2 and NCA3 would have to move along the same lines not to undermine the uniformity and predictability of EU competition law. If NCA2 had adopted a specific legal standard or remedy for a concrete practice, then NCA3 would have to do the same or abstain from action. Furthermore, if NCA2's commitments were overly lenient, NC2 would not be able to correct a Type II (false negative) error, because it would frustrate Repsol's legitimate expectations. In addition, under such a framework, the Commission would have to bear in mind that a commitment decision binds every NCA or national court, and therefore would be more hesitant in accepting commitments. As a result, the workability and effectiveness of Article 9 would be eliminated or significantly diminished. Last, if divergences such as in the example were prohibited, the current network-based enforcement system would turn into a centralized hierarchical structure incapable of mutual learning.[95] Thus, conceiving legal certainty in absolute terms would not only make commitments essentially ineffective; it would also have broader repercussions on the EU antitrust enforcement system.

In light of the above analysis, the ECJ's narrow formulation of legal certainty as RPAC seems to be in line with the nature of commitments and to stimulate both public and private enforcement by not injecting unworthy rigidity into the system. As Advocate General Kokott recalled, commitments

93. See *infra* section 6.3.

94. As Monti observes (work on file with the author) about US antitrust, in many issues there are differences between the various appellate courts (e.g. on rebates) but nobody complains that business is harmed. Sometimes the US Supreme Court clarifies some of those differences, but not always. See in this regard Pijetlovic, "Reform of EC antitrust enforcement: Criticism of the new system is highly exaggerated", 25 ECLR (2004), 356–369, especially 366–369.

95. As De Visser shows, a centralized enforcement structure was justified at the time of Regulation 17/62; but nowadays a decentralized system such as the one set up by Regulation 1 seems more appropriate. See De Visser, *Network-based Governance in EC Law – The Example of EC Competition and EC Communications Law* (Hart Publishing, 2009), pp. 7–9.

allow the Commission to economize resources and exercise its discretion effectively.[96] They are only a point of reference of an enforcer's policy that flags a competition concern.[97] They help the Commission or NCAs pursue their enforcement agenda and prioritize effectively in a network-based enforcement structure without hindering private enforcement. In this context, as we further explained below, *Gasorba* oils the wheels of the EU competition law enforcement system.

6.3. *A pragmatic approach: Experimental network governance and regulatory conversations*

Even though the *Gasorba* solution is compatible with legal certainty as we suggest, one may still wonder whether it could trigger coordination failures; namely scenarios where divergences among antitrust institutions thwart the efficiency and effectiveness of EU antitrust. *Gasorba* incentivizes NCAs or national courts to shape substantive rules differently for the same case, pursue a case through divergent procedures or impose diverse remedies as long as the principle of uniformity is not undermined.[98] In public enforcement, commitments accepted by one NCA can be combined with an infringement decision taken by another, while in private enforcement, commitments cannot block or disincentivize stand-alone actions.[99] It should be added that EU and national antitrust systems comprise two separate spheres of competences: NCAs and national courts apply both national and EU competition law, whilst the Commission applies only the latter.[100] So, could *Gasorba* create centrifugal forces that undercut the uniformity and effectiveness of the law?

The ECJ does not seem to worry about coordination problems. Regulation 1 sets up a constellation of mechanisms that ensure the effective coordination of NCAs and national courts and the coherent application of the law.[101]

96. Opinion, para 40.

97. Manual of procedures, cited *supra* note 75, ch. 16, para 11.

98. E.g. Case C-428/14, *DHL Express Srl and DHL Global Forwarding SpA* v. *AGCM,* EU:C:2016:27, paras. 17–27.

99. Reichelt, "To what extent does the co-operation within the European competition network protect the rights of undertakings?", 42 CML Rev. (2005), 745–782.

100. The nature of this model has been described as dual federalism given the system of parallel competences. See Van Cleynenbreugel, "Sharing powers within exclusive competences: Rethinking EU antitrust law enforcement", 12 *Croatian Yearbook of European Law and Policy* (2016), 49–79, 56.

101. See generally the analysis in Maher and Stefan, "Competition law in Europe: The challenge of the network constitution" in Oliver, Prosser and Rawlings (Eds.), *The Regulatory State: Constitutional Implications* (OUP, 2010), pp. 178–200.

Article 3 clarifies the relationship between EU and national competition laws,[102] while Articles 11, 12 and 13 set some ground rules for cooperation.[103] Article 15 creates a workable framework for cooperation among national courts, NCAs and the Commission, and Article 16 guarantees uniformity by preventing NCAs or national courts from taking decisions that are at odds with a Commission decision. Hence, all these enforcers and courts can and should share knowledge and work with each other to tackle competition problems uniformly and effectively.[104] This enforcement system can be perceived as a deliberative process made possible by several mechanisms leveraging shared learning. In this process, different nodes (the Commission, the NCAs and the national courts) can set goals and evaluation benchmarks, act autonomously but also in coordination, report and peer review their performance and eventually revise their policies.[105]

Nonetheless, one might say that the empowerment of NCAs and the proliferation of soft enforcement tools like commitments could trigger coordination failures. However, the ECJ's tranquility in *Gasorba* regarding this point does not simply stem from the Regulation 1 legal framework; it derives from an understanding of how this system works in practice. The

102. The relationship is as follows: national competition law can be applied more strictly than EU law regarding unilateral conduct, but not in the case of collusive agreements or practices. Besides, EU merger control belongs exclusively to the Commission, while national merger control can have different goals and legal standards.

103. These Arts. impose some duties and leave open other possibilities. For instance, the Commission should send to NCAs key documents, while NCAs should inform the Commission before commencing their first formal investigation and before taking any final decision. NCAs can exchange even confidential information among themselves and consult the Commission in any case. When an NCA receives a complaint concerning a case already dealt with by another NCA, it can suspend its proceedings or reject the complaint. Also, the Commission and NCAs can submit *amicus curiae* to national courts of their respective Member States. Complementarily, national courts can also forward to the ECJ those judgments adopted following a preliminary ruling (O.J. 2012, C 338/1. Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, para 35). Moreover, the ECN Notice establishes some rules for case allocation and coordination (O.J. 2004, C 101/43. Commission Notice on cooperation within the Network of Competition Authorities). In this regard, see Wilks, "Agency escape: Decentralization or dominance of the European Commission in the modernization of competition policy?", 18 *Governance: An International Journal of Policy, Administration, and Institutions* (2005), 431–451.

104. Sabel and Zeitlin, "Learning from difference: The new architecture of experimentalist governance in the EU", 14 ELJ (2008), 271–327, 272–276.

105. See Maher, "The networked (agency) regulation of competition" in Drahos (Ed.), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017), pp. 693–709, p. 702; and Svetiev, "Networked competition governance in the EU: Delegation, decentralization, or experimentalist architecture?" in Sabel and Zeitlin (Eds.), *Experimentalist Governance in the European Union* (OUP, 2010), pp. 79–120, pp. 98–106.

design of the network makes regulatory conversations possible, but the practice of the EU antitrust nodes makes them real. Regulatory conversations as an informal or semi-formal process of communication among antitrust enforcers constantly improves enforcement. As noted, Regulation 1 sets a framework where enforcers can interact, build common understandings and express their divergent opinions.[106] Remarkably, so far antitrust enforcers have cooperated on many occasions, exchanging knowledge, revisiting and re-evaluating their common performance and, in the end, producing coherent enforcement outcomes.[107] Consequently, despite the fragmentation of actors, regulatory conversations can and do generate a shared competition discourse which progressively improves enforcement and compliance and reduces the scope of substantive conflicts on the proper meaning of competition law.

In our view, *Gasorba* facilitates such conversations. In this preliminary ruling, the ECJ said to the referring SC that if it wanted to deviate from the Commission's commitment, it had to take into account the Commission's approach in the said decision. This "obligation not to overlook" triggers a conversation that does not flow hierarchically from the Commission to the national courts or the NCAs, but allows them to know the Commission's view and decide the case by themselves. The ECJ did not spell out how this conversation should be conducted, though. Apparently, the not-to-overlook duty stimulates a "relaxed" conversation in the sense that the national court must consider the preliminary assessment either implicit or explicitly. In the present case, the conversation between the SC and the Commission really took place, even though at a superficial level, since information about the case flowed back and forth. One may argue that this relaxed conversation suggests that attaching "an obligation to consult with the issuing authority" as the Advocate General proposed might be more effective. She could even have gone further and claim that an "obligation to consult" means that the national court must seek a Commission's amicus brief.[108] In this way, the regulatory conversation would be more structured without reducing the national court's elbow room. Nonetheless, even the relaxed conversation of *Gasorba* empowers national courts and NCAs and ensures the coherent application of EU antitrust.

106. This should be seen as a potential, rather than a handicap: "The closer the shared context of those using or interpreting a provision, the less indeterminate the meaning of that provision will be", in Kingsford Smith, "Interpreting the corporations law – Purpose, practical reasoning and the public interest", 21 *Sydney Law Review* (1999), 161–201, 175.

107. The current decentralized system has not had any systemic failure so far. See Wils, "Ten years of Regulation 1/2003 – A retrospective", 4 JECLAP (2013), 293–301, 296.

108. Art. 15(3) of Regulation 1 simply states that the Commission can submit an amicus brief by its own initiative.

The added value of regulatory conversations lies in their ability to materialize and simultaneously keep constrained the experimentalist element of the current enforcement structure. As admitted by several scholars, one of the reasons behind the adoption of the decentralization enforcement model was to allow for more innovation and adaptability in the interpretation and application of competition law.[109] It has been recognized that experimentation has its own dynamic, pro-competitive rewards; it can stimulate collective learning and enhance the self-correcting capacities of the antitrust system.[110] For instance, divergences can help enforcers to evaluate their performance and find out which legal standard has the most positive welfare implications. Coming back to our example above, NCA1, NCA2 and NCA3 can share information thanks to the ECN channels[111] and the mechanisms of Regulation 1. They can additionally learn from their different substantive analyses and enforcement techniques.[112] The same applies to the present case, indeed. The Commission decided to adopt commitments concerning Repsol's exclusive supply agreements, whilst in a similar case involving BP Oil's long-term exclusive supply agreements, one of Repsol's rivals, the Spanish NCA simply compelled BP Oil to align their agreements to Regulation 2790/99.[113] Eventually, enforcers will be able to evaluate their performance and correct their own mistakes, while third antitrust enforcers would be able to choose which approach to take in light of others' previous experiences.[114]

109. Wils, op. cit. *supra* note 7, 11; Gerber and Cassinis, "The 'modernization' of European Community competition law: Achieving consistency in enforcement: Part 2", 27 ECLR (2006) 51–57, 53–54; Fox, "Modernization: Efficiency, dynamic efficiency, and the diffusion of competition law" in Ehlermann and Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernization of EC Antitrust Policy* (Hart Publishing, 2001), pp. 123–128, pp. 127–128; and Venit, "Brave new world: The modernization of enforcement under Articles 81 and 82 of the EC Treaty", 40 CML Rev. (2003), 545–580, 562–563.

110. Fox, "Antitrust without borders: From roots to codes to networks" in Guzman (Ed.), *Cooperation, Comity, and Competition Policy* (OUP, 2011), pp. 265–286, p. 267.

111. Commission ECN Notice, cited *supra* note 103, paras. 16–30.

112. According to Wilks, the ECN is "a vehicle for the creation and dissemination of ideas, not just a vehicle for cooperation and exchange of information" in Wilks, "Competition policy – Challenge and reform" in Wallace, Wallace and Pollack (Eds.), *Policy-making in the European Union*, 5th ed. (OUP, 2005), pp. 113–139, p. 133. Similarly, de Búrca argues that bottom-up interdependence can deal with strategic uncertainty and complex policy problems since it enables mutual learning and engaged benchmarking. See de Búrca, "New governance and experimentalism: An introduction", 2 *Wisconsin Law Review* (2010), 227–238.

113. At the time of Repsol's notification to the Commission, one of her rivals, BP Oil, notified the Spanish NCA on 28 Dec. 2001, 22 agreements of the same kind seeking an exemption under the Spanish competition law (NCA's Exp. A 352/02, *BP Oil España S.A.*, decision of 30 March 2005).

114. The 2016 Report on the monitoring exercise carried out in the online hotel booking sector by EU competition authorities, available at <www.ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf>, is a tangible proof of this possibility.

Similarly, when a national court justifiably departs from the NCA's or the Commission's position in commitments, it creates room for assessing *ex post* the legal and economic consequences of different legal standards and enforcement techniques. From this angle, the fact that the SC decided to annul Repsol's agreements opened the possibility of assessing later whether the Commission and Spanish Courts' approach was superior. Consequently, if national courts justifiably experiment by testing divergent substantive standards they augment collective learning.[115] In this sense, experimentalism can enhance the self-correcting capacity of the system. For example, the fact that the SC annulled Repsol's agreements may suggest that the Repsol commitments were weak or impractical.

Nonetheless, it would be misleading to assume that experimentalism within the existing system is unlimited. Regulatory conversations in conjunction with the principles of uniformity and sincere cooperation put effective constraints on experimentalism. Imagine, for instance, that an NCA decides to abstain from pursuing behaviour that is overall anticompetitive only because the benefits to the domestic economy outweigh the respective costs.[116] In this case, regulatory conversations will create peer pressure and push the system to quickly weed out the inconsistent or inefficient solution and self-correct through mutual learning. Thus, divergences, if they arise, will be more a matter of degree and emphasis and not a fundamental set of differences regarding the purpose and the content of the law. Regulatory conversations can, thus, enhance legal certainty as RPAC by allowing for a workable mix of uniformity and modest experimentalism.

On these grounds, it seems sensible to claim that *Gasorba* allows for modest experimentalism when it comes to commitments. The Court did not worry about coordination failures because by adopting a pragmatic approach towards the current enforcement system it recognized the existence of regulatory conversations. It admitted, in other words, that informal communication procedures can ensure legal certainty as RPAC. This explains also why the Court stimulated regulatory conversations: the not-to-overlook

115. One example of this is *Streetmap.EU Ltd.* v. *Google Inc. & Others.* [2016] EWHC 253 (Ch), of 12 Feb. 2016, in the UK where Judge Roth deviated slightly from the ECJ's approach towards appreciability and abuse of dominance. While the UK court complies with the ECJ case law of Art. 102 TFEU, it makes a contribution regarding the assessment of the anticompetitive effects, paras. 92–98. And for a brief comment on this, see Monti, "Article 102: Sources of interpretation" in Parcu, Monti and Botta (Eds.), *Abuse of Dominance in EU Competition Law: Emerging Trends* (Edward Elgar, 2017), pp. 34–51, pp. 46–47.

116. Gatsios and Seabright, "Regulation in the European Community", 5 *Oxford Review of Economic Policy* (1989), 37–60, 40–41.

obligation pushes antitrust enforcers to communicate each other either implicit or explicitly.

7. Conclusion

The ECJ has clearly stated in *Gasorba* that national courts have full jurisdiction to examine whether an agreement between undertakings complies with EU competition law when that same agreement has been subject to a commitment decision. Thus, *Gasorba* provides national courts – and eventually NCAs – with a two-step plan when deciding a case in such a context. First, they must identify the prescriptive content of commitments and refrain from deciding anything that could run counter to it. Practically, this implies a special care not to undo what the relevant remedies intend to fix. Second, national courts have to build on the preliminary assessment of commitments as *prima facie* evidence and articulate a theory of harm or a pro-competitive explanation of the agreements at stake. If they decide to pursue the matter further and sanction the undertaking, they need to show what new evidence or substantive reasons justify such ruling. For instance, they can argue that, notwithstanding the remedies agreed in the commitment decision, the competition problem remains. This is indeed what seems to underlie the SC's reasoning after *Gasorba*: even though Repsol had agreed certain commitments with the Commission, Repsol's agreements still foreclosed the market and did not comply with EU competition law.

Gasorba, at the same time, shapes a workable relationship between the Commission, NCAs and national courts when it comes to commitments. The ECJ not only clarified the legal effects and informational value of commitments, but also articulated a framework for regulatory conversations that allows for modest experimentalism without undermining the coherent and predictable application of EU antitrust. What the Court said in *Gasorba* is particularly helpful in a world of decentralized enforcement where commitments and other soft law instruments thrive and coordination failures might be possible.

That said, one may wonder whether commitments are still attractive for undertakings: can *Gasorba* unintentionally chill the use of commitments? In fact, sometimes undertakings accept intrusive remedies such as a divestiture to avoid the litigious path.[117] If undertakings continue running the risk of further public or stand-alone private litigation, they may refrain from

117. E.g. the *German Electricity* cases, cited *supra* note 68.

committing in the first place. As reasonable this concern may sound, we should not lose sight of the fact that, since *Alrosa,* commitments have effectively become appeal proof.[118] Moreover, undertakings are more likely to under- than over-commit,[119] since as rational agents they will not offer or accept commitments that reduce their welfare or significantly impair their freedom of trade and property rights.[120] Thus, regardless of the said concerns, *Gasorba* is unlikely to chill the use of commitments since in most cases commitments entail the effective closing of the case at stake. This will continue to be the case insofar as infringement decisions increasingly lead to higher fines[121] that EU courts tend to uphold, and commitments offer a quicker and swifter way out.

Instead of reducing the attractiveness of commitments, *Gasorba* is more likely to empower NCAs and stimulate private enforcement. According to the ECJ's reasoning, commitments flag a potential competition problem. Thus, NCAs or national courts should first be alerted about the fact that there could be a competition issue and, later on, they can choose either to follow the Commission's commitment decision or engage in a different substantive analysis (or remedial solution), as long as they consider the commitments' preliminary assessment. This approach empowers the NCAs while freeing up the Commission to shape its own enforcement strategy. Simultaneously, national courts are able to compensate victims of antitrust violations even in cases where NCAs or the Commission have decided, based on their prioritization and cost-benefit analysis, not to pursue a case further. The judgment, therefore, makes a contribution to antitrust enforcement especially in light of the Commission's proposal for a Directive to empower NCAs.[122]

118. Case C-441/07, *Commission* v. *Alrosa;* Little, "Boost for Commission's antitrust enforcement policy: ECJ overturns General Court's decision in *De Beers* case", 1 JECLAP (2010), 508–510; Cengiz, "Judicial review and the rule of law in the EU competition law regime after *Alrosa*", 7 *European Competition Journal* (2011), 127–153, 149–153.

119. This might be the reason why A.G. Kokott argued that commitments constitute a "strong indication" of anticompetitive behaviour. Her statement intends to stimulate enforcement and reveals a concern that commitments may undershoot the mark.

120. This also means that commitments proceedings are likely to lead to more false negatives than false positives.

121. Slater, Thomas, and Waelbroeck, "Competition law proceedings before the European Commission and the right to a fair trial: No need for reform?", 5 *European Competition Journal* (2009), 97–143, 110.

122. See *supra* note 62. This legislative initiative shows that the existing system of decentralized network-based enforcement will be pursued further. Given the success of the current enforcement network, it is reasonable to expect a higher degree of experimentalist governance.

Gasorba can only be applauded for showing how the EU antitrust network can operate in a coherent and predictable fashion without becoming monolithic.

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