

The Commitment Procedure

The EU experience

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I. Informal Settlements Prior to Regulation 1/2003

Informal Settlement Practice

- Prior to Regulation 1/2003, the Commission had developed an extensive **informal settlement practice** under which it would put an end to an investigation and close the file after having received commitments to terminate or amend infringing conduct by the companies concerned
- At the time, the most famous informal settlement case involved **IBM (1984)**, which undertook to introduce a number of changes in its marketing practices with regard to its most powerful range of computers
 - Upon the receipt of the undertaking, the Commission decided to suspend the infringement proceeding for breach of Article 86 EEC (currently Article 102 TFEU)
 - The then-Commission in charge of Competition warned IBM that the implementation of the undertaking would be reviewed annually
 - The undertaking, which was found by the Commission to operate satisfactorily, was terminated in 1995
 - The *IBM* settlement was remarkable because it was the first and only informal settlement the terms of which were fully publicly disclosed

De Facto Settlements in the Context of Notification for Exemption or Negative Clearance

- A large number of cases were *de facto* settled in the context of the notification procedure under Regulation 17/62
 - Notifying parties frequently undertook to amend the agreement notified for an individual exemption, or take specific steps when implementing such agreement, to obtain negative clearance or an individual exemption from the Commission
- The formal negative clearance and individual exemption decisions had their informal equivalent: the so-called *comfort letters*
 - Comfort letters were administrative letters signed by an official of Directorate-General for Competition stating that no action would be taken with respect to a particular notified agreement
- If the notification procedure had not been abolished, most of the commitment decisions involving Article 101 TFEU would likely have taken the form of an old-style exemption

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Drawbacks of Informal Settlements

- The Commission had **no power to sanction** a company which failed to comply with the undertakings it had offered
 - In case of breach, the only step the Commission could take was to reactivate the proceeding if it had been suspended, or to open a new proceeding if it had been closed
- The informal settlements were characterised by a **lack of transparency**: there was limited public information (if any) about the content or the existence of an informal settlement

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II. Why Commitment Decisions under Regulation 1/2003 Have Been so Successful

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Commitment Decisions under Regulation 1/2003

- Regulation 1/2003, which entered into force on 1 May 2004, introduced a **formal commitment** procedure under Article 9: a company suspected of a breach of EU competition rules may offer commitments to meet the concerns expressed by the Commission
- The Commission makes the commitments **binding** on the company
- Since May 2004, commitment decisions have accounted for **one-third** of all EU antitrust decisions

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Absence of Fines

- Recital 13 of Regulation 1/2003: "*Commitment decisions are not appropriate in cases where the Commission intends to impose a fine*"
- The absence of fines is likely **the most important incentive for a company** to make use of the Article 9 commitment procedure
 - Ever increasing levels of fines : e.g., € 462 imposed on Hoffman-La Roche (2001); € 497 on Microsoft (2004); € 1 billion on elevator and escalator companies (2008)
 - Over half of the Article 9 commitment decisions (22 out of 38) have been taken in the context of resolving abuse of dominance cases, which have attracted some of the highest fines ever imposed (e.g., € 1 billion in *Intel* in 2009)

Absence of Fines

- While fines have significantly increased, **the chances of a company to succeed in having them annulled or reduced by the EU judiciary have not**
 - The last finding of abuse of dominance that was annulled on substantive grounds was in 1983 when the Court of Justice dismissed the tying obligations in the *Michelin I* decision
 - In the last 25 years, every single fine for abuse of dominance was upheld

Absence of Finding of Infringement

- If the commitments offered are accepted by the Commission, a formal finding of infringement under Articles 101 or 102 TFEU can be avoided:

*“Commitment decisions should find that there are no longer grounds for action by the Commission **without concluding whether or not there has been or still is an infringement**” (Recital 13 of Regulation 1/2003)*

Absence of Finding of Infringement

- The absence of a finding of infringement **reduces the risk of civil enforcement**
 - Aggrieved private parties seeking damages for harm caused by the conduct which gave rise to the investigation will not be able to rely on the commitment decision to establish the existence of a cause of action
- **But note: private parties are not prevented from seeking damages provided they establish a course of action.**

Absence of Finding of Infringement

- Another benefit of the absence of a finding of infringement is that the company will **not** be considered as a **repeat infringer** should it engage in the same conduct after the expiry of the commitment
 - The 2006 Fining Guidelines provide for an increase in the amount of the fine of up to 100% on account of this aggravating circumstance
 - Claims for recidivism are frequently made by the Commission

Absence of Finding of Infringement

- In theory, Regulation 1/2003 does not prevent a **national competition authority** from opening a case, and eventually, finding an infringement, even though the Commission has closed its proceeding through a commitment decision
 - In practice, however, national competition authorities have so far not found such breaches

Ability to Craft Remedies Which Go Beyond Those Allowed in an Article 7 Prohibition Decision

- **Article 7 Prohibition Decision:** the measures which the Commission may lawfully impose to remedy competition concerns **are limited**
- In the 2004 *Microsoft decision* (issued under Article 7), Microsoft had to submit a **proposal to the Commission for the appointment of an independent monitoring trustee** who would have the right to access Microsoft's information, documents, premises as well as the source code of Microsoft's relevant products
- Microsoft challenged this obligation before the General Court on the grounds that:
 - The Commission lacked authority to delegate to a private individual the enforcement powers conferred on it
 - The Commission could not require Microsoft to bear the costs of the monitoring trustee

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Ability to Craft Remedies Which Go Beyond Those Allowed in an Article 7 Prohibition Decision

- The General Court **annulled the monitoring mechanism** on the following grounds:
 - While the Commission may be assisted by experts in the exercise of its powers of investigation, as well as require companies to provide information, it could not require the appointment of an independent trustee entrusted with powers which the Commission was not authorised to confer on a third party
 - The Commission exceeded its powers by making Microsoft responsible for all the costs associated with the appointment of the monitoring trustee
- However, had the *Microsoft* case been concluded by an Article 9 Commitment Decision, rather than by an Article 7 Prohibition Decision, **a monitoring trustee as envisaged in the 2004 Decision could have been validly put in place if Microsoft had proposed this as a component of its commitments to end the case**

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Ability to Craft Remedies Which Go Beyond Those Allowed in an Article 7 Prohibition Decision

- Commitment decisions can be useful to craft remedies that might better address the Commission's competition concerns
- This is illustrated by the *Microsoft* case:
 - One of the two abuses identified in the 2004 Prohibition Decision was the tying by Microsoft of Windows Media Player with the PC operating system, Windows
 - While the Commission allowed Microsoft to keep producing and distributing a version of Windows that included Windows Media Player ("Windows") ...
 - ...the Commission also imposed on Microsoft an obligation to untie both products by offering a version of Windows without Media Player ("Windows N")
 - In practice, this remedy was pointless: as the Commission had not required a specific price difference between Windows and Windows N, they were sold at the same price. So no one bought Windows N

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Ability to Craft Remedies Which Go Beyond Those Allowed in an Article 7 Prohibition Decision

- During the administrative procedure, Microsoft had proposed to the Commission an informal settlement under which three rival players besides Windows Media Player would be bundled with Windows, giving consumers the choice of the default player
 - Although the Commission seriously considered this undertaking, it ultimately did not accept this remedy and instead adopted an Article 7 Prohibition Decision
- In 2008, the Commission learned from its past mistakes:
 - The Commission again initiated a formal investigation against Microsoft, this time with respect to the tying of Internet Explorer with the Windows PC operating system
 - This time, however, the Commission decided to follow an Article 9 commitment procedure: the remedy for the tying allegation was a commitment by Microsoft to give users of Windows a choice among different web browsers, and to allow computer manufacturers and users the possibility to turn off Internet Explorer

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Ability to Craft Remedies Which Go Beyond Those Allowed in an Article 7 Prohibition Decision

■ Other examples of Commitment Decisions that went beyond what the Commission could require in a Prohibition Decision:

- Energy sector: 10 Commitment Decisions involving either full ownership divestment of energy infrastructures or undertakings to make available additional capacity to competing firms
- Financial sector: A Commitments Decision regulating prices of certain financial products (*Visa MIF*)
- IT sector: Commitment Decision capping royalties for standard essential patents (*Rambus*); Commitment requiring to make available spare parts and necessary technical information (*IBM*)
- Other: Commitment Decision amending joint selling arrangements designed to avoid downstream foreclosure (*Bundesliga*); Commitment Decision improving access to technical information in standard agreements between car manufacturers and after-sales partners (*DaimlerChrysler, Fiat, Toyota* and *Opel*)

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Ability to Craft Remedies Which Go Beyond Those Allowed in an Article 7 Prohibition Decision

■ The Commission's power to accept commitments that go beyond what the Commission could itself impose in an Article 7 prohibition decision was **expressly confirmed by the Court of Justice in *Alrosa***:

"Undertakings which offer commitments on the basis of Article 9 of Regulation No 1/2003 consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the regulation after a thorough examination. On the other hand, the closure of the infringement proceedings brought against those undertakings allows them to avoid a finding of an infringement of competition law and a possible fine." (Case C-441/07, Commission v Alrosa, para. 48)

- Thus, in effect, the Commission has a **broad licence to secure commitments which are not subject to a strict proportionality requirement** between the proposed remedy and the Commission's competitive concerns
- This Court's **pragmatic approach** preserves all the incentives for companies and the Commission to develop mutually beneficial negotiated solutions

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III. Conclusion

■ The Commission's practice has **attracted critical comments on:**

- Can the Commission, in the name of effectiveness, use its bargaining power to request commitments which it knows are over-reaching and which may unduly restrict the ability of undertakings to compete on the market?
- The Parties' procedural rights are limited
- It enables the Commission to avoid articulating a theory of harm that could withstand the scrutiny of EU Courts
- Loss of legal certainty: legal principles are not clearly defined but can only be extrapolated from non-authoritative guidance
- Is the Commission entitled to use its powers to enforce competition under Article 9 to, in fact, "regulate" a certain sector such as the energy sector?

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- There is certainly merit in these criticisms. However, **the commitment procedure fulfils a useful function** in the EU public enforcement system in which the Commission enjoys wide discretion and judicial review is essentially limited to a control of legality of decisions adopted by the Commission
- Commitment decisions are the product of a **bargaining process** which the Court of Justice accurately described in *Alrosa*, in which companies

"consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the regulation"

in exchange for an outcome which allows them to

"to avoid a finding of an infringement of competition law and a possible fine"