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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

COMMITMENT DECISIONS IN ANTITRUST CASES

-- Note by the European Union --

15-17 June 2016

This document reproduces a written contribution from the European Union submitted for Item 9 of the 125th meeting of the OECD Competition Committee on 15-17 June 2016.

*More documents related to this discussion can be found at
www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm*

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1. Introduction

1. The effective enforcement of the antitrust rules requires a set of tools aimed at adequately addressing different types of competition concerns. Regulation (EC) No 1/2003¹ gives the European Commission (Commission) the option to choose from four different types of decisions to tackle an antitrust investigation: a decision based on Article 7 finding an infringement, also referred to as a "prohibition decision"; a decision based on Article 8 ordering interim measures; a decision based on Article 9 making commitments given by the investigated undertaking(s) binding, also referred to as a "commitment decision"; and a decision based on Article 10 finding no infringement.

2. So far, the Commission has most often used the tools of the prohibition decision and the commitment decision. Indeed the Commission has not used interim measures decisions since 2002 and has never used "no infringement" decisions since they were created by Regulation (EC) No 1/2003 in 2004. The subsequent sections of this paper will focus more in detail on commitment decisions, especially compared to prohibition decisions.

3. Pursuant to Article 7 of Regulation (EC) No 1/2003, where the Commission finds that there is an infringement of Article 101 or 102 of the Treaty on the Functioning of the European Union (TFEU), it may by decision require the undertakings concerned to bring such infringement to an end (cease and desist); it may also impose any necessary remedy, including behavioural or structural remedies, and a fine.

4. Article 9 of Regulation (EC) No 1/2003 provides the Commission with the possibility to conclude cases by means of a commitment decision. "Commitments" refer to the type of measure offered by the parties that is rendered binding by the Commission decision at the end of the proceedings. The main difference with prohibition decisions is that commitment decisions do not establish the existence of an infringement; they refer to "concerns expressed by the Commission". For this reason, commitment decisions do not impose a fine on the undertakings concerned.

5. Practical guidance on the conduct and use of the commitment decision procedure by the Commission is contained in the Commission notice on best practices for the conduct of antitrust proceedings². The Notice sets out the framework of antitrust proceedings conducted by the Commission; it provides, among others things, a detailed overview of the commitment decision procedure.

6. Pursuant to Recital 13 of Regulation (EC) No 1/2003, commitment decisions are not an option in cases where the Commission intends to impose a fine, as is the case with the most serious restrictions. Accordingly, the Commission does not apply the commitment procedure to the most serious infringements such as cartels where there is no commitment possible to solve the competition problem. The Commission's commitment procedure under Article 9 has to be distinguished from the cartel specific "settlement procedure". Under this procedure the parties in a cartel acknowledge their participation in the infringement and agree with certain administrative efficiencies, while in return

¹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

² Commission Notice on Best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, *Official Journal of the European Union*, C 308, 20.10.2011, p. 6-32.

receiving a 10% reduction in the fine.³ Cartel settlement decisions are always based on an Article 7 prohibition decision and therefore contain a finding of an infringement and the imposition of a fine.⁴

2. Commitment Decisions: Main Characteristics and Procedure

2.1 Main Characteristics of Commitment Decisions

7. Article 9 of Regulation (EC) No 1/2003 provides undertakings with the possibility to offer commitments that are intended to address the competition concerns identified by the Commission. If the Commission accepts these commitments, it may adopt a decision which makes them binding on the parties subject to the proceedings. It is at the discretion of the Commission whether or not to accept commitments. The commitments can be of a behavioural or of structural type. Behavioural commitments include a commitment by a company to provide certain services or goods under specified conditions; structural commitments include the divestiture of assets of the concerned companies.

8. In order to be acceptable, the commitments offered by the undertakings concerned must adequately address the identified competition concerns. They must also be unambiguous and self-executing, that is to say, their implementation must not be dependent on the will of a third party which is not bound by the commitments.

2.2 The procedure leading to a commitment decision

2.2.1 Initiation of the commitment discussions

9. Undertakings under investigation may contact the Commission at any time during an investigation to discuss a possible commitment decision. The Commission encourages undertakings to signal their interest in doing so at the earliest possible stage. A "State of Play" meeting will be offered to the parties during which the Commission will indicate to them the timeframe within which the discussions on potential commitments should be concluded and will present to them the preliminary competition concerns arising from the investigation.

10. After initiating the commitment procedure, the undertakings concerned may decide at any moment to discontinue their discussions. The Commission can then normally continue formal proceedings leading to the adoption of a prohibition decision pursuant to Article 7 of Regulation (EC) No 1/2003.

2.2.2 Preliminary assessment

11. Once the Commission is convinced of the undertakings' genuine willingness to propose commitments which will effectively address the competition concerns, a "Preliminary Assessment", summarising the main facts of the case and identifying the competition concerns, will be issued. Prior to issuing the Preliminary Assessment, the parties will also be offered a State of Play meeting. If the proceedings are more advanced and a "Statement of Objections" has already been sent to the parties under the "Article 7 track", commitments may nevertheless still be accepted, in appropriate cases. In such cases the Statement of Objections serves as a Preliminary Assessment.

12. The Hearing Officer guarantees that the procedural rights of the parties are respected by the Commission during all types of competition proceedings. Pursuant to Article 15(1) of the Terms of

³ Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (Text with EEA relevance), *Official Journal of the European Union*, L 171, 1.7.2008, p. 3–5.

⁴ Additional guidance on and overview of the conduct of the settlement procedure in cartel investigations is publicly accessible in the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases; Notice amended in 2015 (*Official Journal of the European Union*, C 256, 05.08.2015, p.1).

Reference of the Hearing Officer⁵, the parties to the proceedings that offer commitments may call upon the Hearing Officer at any time during the commitment procedure in relation to the effective exercise of their procedural rights. The Hearing Officer can, among other things, act as an independent arbiter in case of a dispute between the parties and the Commission.

2.2.3 *Submission of the commitments*

After receiving the Preliminary Assessment, the parties will normally have one month to formally submit their commitments.

2.2.4 *Market testing of the offered commitments*

13. The Commission must conduct a market test of the offered commitments in accordance with Article 27(4) of Regulation (EC) No 1/2003. A Market Test Notice is thus published in the *Official Journal of the European Union*; it contains, in particular, a concise summary of the case and the main content of the commitments.⁶ Interested third parties are invited to submit their observations within a fixed time limit of not less than one month.

14. These interested third parties include competitors and customers. Their responses are of particular importance as they facilitate the evaluation by the Commission that the offered commitments are suitable and proportionate to address the identified competition concerns.

15. After receipt of the replies to the market test, a "State of Play" meeting is organised with the parties during which the Commission informs them of the substance of the replies. Depending on the results of the market test, the undertakings may amend the commitments before the Commission makes them binding through a formal commitment decision.

2.2.5 *Commitment decision*

16. With the adoption of a commitment decision, the Commission concludes that there are no longer grounds for action. In many cases, the decision is adopted for a specified period of time. In case of a material change of any of the facts on which the decision is based, a review of the decision is possible, upon request, or on the initiative of the Commission in accordance with Article 9(2)(a) of Regulation (EC) No 1/2003.

17. A summary of the commitment decision is published in all 24 official languages of the European Union in the *Official Journal of the European Union*.⁷ On the website of the Directorate General for Competition of the Commission, it is possible to access a non-confidential version of the full text of the commitment decision and the accepted commitments together with all relevant

⁵ Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, *Official Journal of the European Union*, L 275, 20.10.2011, p. 29.

⁶ For example, see the Market Test Notice in Case COMP/39.595 — Continental/United/Lufthansa/Air Canada, available online at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2012.396.01.0021.01.ENG

⁷ For example, see Summary of Commission Decision of 12 May 2015 in Case AT.39964 – Air France / KLM/ Alitalia / Delta, available online at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2015.212.01.0005.01.ENG

documents of the case.⁸ Moreover, a press release published on the day of the decision highlights the key facts of the case and the substance of the accepted commitments.⁹

2.2.6 *Compliance monitoring*

18. The monitoring requirements depend on the nature of the commitments. Reporting obligations by the undertakings concerned and the vigilance of other market players are often the starting point of the monitoring actions taken by the Commission. In most cases and, especially, when structural commitments are concerned, the commitments should foresee that a trustee will be suggested by the concerned parties shortly after the adoption of the proposed decision. The trustee will monitor in detail the different steps of implementation of the commitments and regularly report on this to the Commission.

19. In case of non-compliance with the commitment decision, the Commission can impose a fine of up to 10 per cent of the undertaking's annual turnover without having to prove any violation of the substantive competition rules. The Commission can, as an alternative, impose periodic penalty payments of up to 5 per cent of the average daily turnover until the undertaking complies with its commitments. In parallel, the Commission may decide to re-open the investigation that was closed pursuant to the commitment decision, with a view to adopting a prohibition decision on the matter.

20. So far, a sanction has been imposed because of non-compliance with a commitment decision in only one case.¹⁰

2.2.7 *Judicial review*

21. A commitment decision can be contested within two months of its adoption before the General Court of the European Union (General Court) by any interested third party in accordance with Articles 256 and 263 TFEU. The decision of the General Court could be appealed, in whole or in part, to the Court of Justice of the European Union (Court of Justice). Such appeal is limited to questions of law and is allowed within two months after the decision of the General Court.

22. Since 2004, judicial review was initiated in relation to six commitment decisions¹¹; two actions for annulment were lodged by the concerned undertaking and four were brought by interested third parties. The ultimate result of all judicial review was hitherto the confirmation of the Commission's commitment decision.

⁸ For example, see the commitment decision and all other relevant documents in the Case AT.39939 – Samsung - Enforcement of UMTS standard essential patents, available online at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39939

⁹ For example, see the press release for the commitment decision adopted in the Case AT.39964 — Air France / KLM/ Alitalia / Delta, available online at http://europa.eu/rapid/press-release_IP-15-4966_en.htm

¹⁰ Summary of Commission Decision of 6 March 2013 relating to a proceeding on the imposition of a fine pursuant to Article 23(2)(c) of Council Regulation (EC) No 1/2003, *Official Journal of the European Union*. In this case, Microsoft made commitments that it did not effectively respect in practice; the Commission imposed a fine of EUR 561 million that Microsoft did not challenge in court.

¹¹ From the six instances, two were subsequently discontinued (T-148/10 SK Hynix v Commission; T-447/12 Visa Europe v Commission); one was held inadmissible (C-36/09 Transportes Evaristo Molina v Commission); two were concluded by a decision confirming the Commission's decision (C-441/07 Commission v Alrosa; T-342/11 CEEES and Asociación de Gestores de Estaciones de Servicio v Commission); and one is still pending before the General Court (T-76/14 Morningstar v Commission).

2.3 *Statistics*

23. Since 2004, out of 57 antitrust decisions (cartel cases not included), 35 decisions concerned commitment decisions; 16 cases thereof involved proceedings pursuant to Article 101 TFEU prohibiting anticompetitive agreements, 18 commitment decisions involved proceedings pursuant to Article 102 TFEU prohibiting abuse of dominance, and one case involved proceedings pursuant to both articles. The most common type of commitments was of behavioural nature (74% of all commitments); commitments of structural type were included in 26% of the decisions.

24. As commitment decisions allow for a quick impact on the market, they are particularly important in markets that are in the process of liberalisation, such as the energy sector, and markets that require prompt intervention. Antitrust proceedings in all sectors could nevertheless be concluded with a commitment decision; the sector in itself is not a determining element for the choice between commitment decision and prohibition decision.

3. **Considerations for the Choice between Commitment Decision and Prohibition Decision**

25. The decision whether a commitment or prohibition decision is the most appropriate outcome of an antitrust investigation is made after careful examination of all of the distinctive facts and features of each case taking into consideration the characteristics of the commitment decision and prohibition decision procedures further described below.

3.1 *Commitment Decisions*

26. The commitment procedure has some specific features that make it more suitable for remedying the competition concerns in some situations. These specificities result, in particular, from the more cooperative nature of the procedure.

3.1.1 *Procedural efficiencies and quick impact on the market*

27. Commitment decisions usually lead to a swift impact on the market thanks to the procedural efficiencies and the quicker resolution of competition concerns. When undertakings offer commitments early in the process, the procedural gains are even more significant. This is, however, not the case where companies seek to obstruct the investigation by engaging in protracted negotiations or where the Commission market tests commitments that turn out not to be suitable to address the competition concerns. In these cases, the negotiation process and the necessary modification of the commitments after the market test may actually take even longer than pursuing a prohibition decision from the start.

3.1.2 *More effective commitments*

28. Commitment proceedings may allow for a better tailoring of the remedies and their swifter implementation. The conduct of a market test as well as the greater willingness of the undertakings to cooperate with the Commission allow for a more efficient tailoring of the remedies to the needs of the market. Also, the fact that the commitments are designed by the undertakings concerned themselves further facilitates their implementation.

3.1.3 *Advantages for the undertakings concerned*

29. For the undertakings concerned, the commitment proceedings allow for a significant reduction of the costs related to the conduct of the legal proceedings; these are also shorter than the proceedings in a prohibition decision. The concerned parties themselves initiate the commitment discussions and they decide what type of commitments they are willing to offer. The parties are also not subject to a fine that could be of up to 10% of their respective annual turnover in case of a

prohibition decision. Finally, the reputational damage entailed by a commitment decision is limited as the Commission only finds concerns and not an infringement.

3.2 *Prohibition Decisions*

30. In number of situations, a prohibition decision is the more appropriate choice for concluding antitrust proceedings. Characteristic for the Article 7 prohibition decision procedure is the clear finding of an infringement and the imposition of sanctions for the violation of the competition rules.

3.2.1 *Stronger deterrent effect*

31. Article 7 decisions include a sanction for the breach of competition rules, and are therefore particularly suited to influence the behaviour of companies in the market and to prevent infringements from being committed. For this reason, prohibition decisions may have stronger deterrent effect. Such decisions will be taken into account in the calculation of an increase of fines for recidivism in case the undertaking concerned engages in a new anticompetitive conduct. Finally, Article 7 decisions trigger a certain reputational damage that has a pedagogical effect on potential infringers.

3.2.2 *Established precedential value*

32. Prohibition decisions are usually reasoned in greater detail, thereby giving guidance to the market players and beyond. Prohibition decisions are often challenged before the General Court and give judges the occasion to contribute to clarifying and developing the law. However, Article 9 decisions also often provide guidance to undertakings. This was, for example, the case in the EDF Long Term Contract case¹² in relation to the standards applied by the Commission to customer foreclosure cases, or in the Siemens/Areva case¹³ where the Commission clarified the concept of ancillary restraints in antitrust cases.

3.2.3 *Advantages for private enforcement proceedings*

33. The finding of an infringement made by the Commission in prohibition decisions are binding on national courts¹⁴: plaintiffs only need to quantify the damage they suffered and to establish the causal link between the infringement and their damage. By contrast, commitment decisions are only an element of facts that the national courts may take into account in their assessment. Article 9 decisions are also less reasoned than Article 7 decisions, and therefore provide less information on the alleged infringement to potential claimants.

3.3 *Considerations Affecting the Choice Between Prohibition Decision and Commitment Decision*

3.3.1 *Appropriateness of the chosen decision for addressing the competition concerns*

34. The adoption of a prohibition decision should be preferred when there is no remedy available to solve the competition problem by other means than by a cease and desist order. A commitment under Article 9 to comply with the law in the future should not be accepted. Solving this type of cases with a commitment decision is both useless, as the law applies anyway, and detrimental to effective enforcement. The adoption of a commitment decision is, by contrast, more appropriate when the primary target is future behaviour rather than punishing for past behaviour.

35. Article 9 also requires that the necessary measures can be identified clearly and drafted in a self-executing, unambiguous manner. When too many details and regulation of the conduct are

¹² Decision of 17 March 2010, in Case AT.39386 – Long-term contracts France.

¹³ Decision of 18 June 2012, in Case AT.39736 – Siemens/Areva.

¹⁴ Article 16 of Regulation (EC) No 1/2003.

necessary, it might be more efficient to use Article 7 in order to impose a cease and desist and leave the undertaking determine its own conduct. Commitment decisions should not turn the Commission into a market regulator, or give the Commission a too prescriptive role.

3.3.2 Seriousness and duration of the infringement

36. The seriousness of the infringement is an important element for the choice between a prohibition decision and a commitment decision. In case of a serious violation of the competition rules, it is particularly important to ensure that the antitrust proceedings will result in adequate punishment and strong deterrence; otherwise, the effectiveness of the competition rules will be undermined. As prohibition decisions find an infringement and often impose a fine, they are the most suitable tool to address infringements of serious nature and discourage other market players from engaging in anticompetitive practice.

37. Furthermore, the duration of the infringement is taken into consideration as well. When the infringement has been going on for a long time, there is a stronger case for punishing the undertaking for it through a prohibition decision. By contrast, when the "concerns" have just started and there is an opportunity to fix them through commitments (whereas they would otherwise have continued significantly into the future), there is a stronger case for commitments. Commitment decisions are appropriate, therefore, when there is more to gain from fixing the future functioning of the market than from punishing the undertaking for the past.

3.3.3 Timing of the proposal of the commitments by the undertakings concerned

38. Procedural efficiency under the commitment procedure may be diminished if commitments are offered at a very late stage as the procedural efficiency is more limited when access to file, and possibly the oral hearing, has taken place. However, proposals to engage in commitments negotiations at a very early stage of the investigation may also be regarded with caution: the Commission can only negotiate successfully when the investigation of the facts is sufficiently advanced, and the competition concerns and necessary remedies have been identified.

3.3.4 Number of parties involved in the antitrust proceedings

39. The optimal use of the commitment procedure is when all parties under investigation are willing to offer commitments. As commitment decisions are shorter than prohibition decisions, they also allow for a quicker consultation process within the Commission. This advantage is lost when a prohibition decision has to be drafted against undertakings that, in the same proceedings, do not offer commitments. Such hybrid cases should therefore remain the exception. However, when only some of the undertakings under investigation offer commitments that the Commission decides to accept under Article 9, the Commission should, in principle, pursue the case against the non-settling undertakings under the Article 7 path. Otherwise, there would be a risk of undermining the effectiveness of the commitment procedure and limiting the incentives for undertakings to offer commitments.

40. The number of parties involved may also be an important consideration. Commitment negotiations are often technical, involving business secrets, and influence/are influenced by the undertakings' commercial strategy. As a result, a high number of parties will complicate the commitment negotiations, and the "speed" advantage of commitment proceedings may be lost.

4. Conclusion

41. The possibility to adopt commitment decisions enhances the efficiency and the effectiveness of the enforcement activities of the Commission. Both commitment decision and prohibition decision have their respective characteristics and advantages. The choice which procedure to follow hinges on the individual characteristics of each case. When commitment decisions are appropriate, practice has shown that there are benefits for both the enforcers and the parties concerned.