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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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COMMITMENT DECISIONS IN ANTITRUST CASES

-- Note by the United Kingdom --

15-17 June 2016

This document reproduces a written contribution from the United Kingdom 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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UNITED KINGDOM *

Introduction

1. The CMA's ability to accept commitments in appropriate cases is an important part of its antitrust enforcement toolkit. Under UK law, parties can voluntarily offer binding commitments to resolve the concerns identified in an investigation and the CMA has the discretion to decide whether to accept those commitments. While no decision is reached as to whether the law has been broken, commitments can allow competition concerns to be resolved more quickly or effectively than pursuing a case to its conclusion.

2. To date in the UK, the CMA and its predecessor (the Office of Fair Trading (OFT)) along with sector regulators exercising concurrent competition powers have accepted commitments in 11 antitrust cases in a variety of sectors (see the Annex for the full list of cases). They have issued 31 infringement decisions in the same timeframe. Commitments have been primarily accepted in cases investigating an abuse of a dominant position but also in some cases investigating anti-competitive agreements.

3. In light of the CMA's own case experience, the CMA held a roundtable in September 2015 to hear the views of competition law and policy specialists, including legal advisers, academics and competition authorities, on the opportunities and challenges of using commitments. The discussion has informed the approach to the CMA's use of commitments going forward, alongside the CMA's own ongoing practical experience, and we have summarised some of the points raised at the roundtable below¹.

1. Legal framework

4. The statutory framework that the CMA follows when accepting commitments is set out in the Competition Act 1998 (CA98). Section 31A CA98 allows the CMA to accept commitments from an undertaking that it will take (or refrain from taking) such action as the CMA considers appropriate for the purpose of addressing competition concerns it has identified in the context of an investigation under Chapter I CA98 / Article 101 of the Treaty on the Functioning of the European Union (TFEU) (anti-competitive agreements/cartels) or Chapter II CA98 / Article 102 TFEU (abuse of a dominant position). This power is a concurrent power and can therefore be exercised also by certain UK sector regulators.²

5. The legislation specifies that the proposal to accept, vary or release commitments must be publicly consulted on. This market testing allows other parties who may be affected by the commitments to put forward their views on their effectiveness. This is a key distinguishing feature of commitments in comparison to the standard investigative process.

* Written contribution submitted by the Competition and Markets Authority (CMA).

¹ A fuller summary of the discussion can be found on the CMA webpages at <https://www.gov.uk/government/publications/commitments-in-competition-enforcement-cma-roundtable-summary>.

² Details of the sector regulators with concurrent antitrust enforcement powers in the UK can be found at: <https://www.gov.uk/government/groups/uk-competition-network>

6. The legislation also specifies that where the CMA exercises its discretion to accept commitments, it must close its investigation by means of a formal decision without finding an infringement of the competition rules.

7. Commitments accepted by the CMA are legally binding on those who have offered them. However, the CMA does not have statutory powers to impose fines for breach of commitments. In the event of failure by a person to adhere to any commitments without reasonable excuse, the legislation provides that the CMA may apply for a court order requiring compliance with the commitments within a specified time.

2. The CMA's approach in deciding whether to accept commitments

8. The CMA will also have regard to its published guidance when considering whether to accept commitments as set out in CMA8³ and OFT407⁴. **The former** summarises the process for accepting commitments in particular in relation to governance and the latter sets out when it might be appropriate to accept commitments as well as further detail on the process. Broadly speaking, the principles set out in the guidance can be broken down into a two part test.

2.1 *Is the case right for commitments?*

9. The assessment of whether a case is right for commitments takes a number of factors into account, including the benefits and risks of doing so, as part of the overall strategic assessment of the best outcome for the case. Examples of these factors are set out below: the particular weighting given to any of these factors will vary from case to case.

2.1.1 *Ability to resolve the case more quickly*

10. Since commitments can allow for quicker resolution of a case, the CMA will take into account the extent to which commitments can achieve procedural efficiencies and protect consumers by addressing the concerns and resulting harm sooner. This can support the CMA's aims of conducting enforcement more quickly and efficiently. It also allows it to redeploy its resources for other work such as other enforcement cases. Commitments also offer the opportunity for a more flexible or effective outcome than might be achieved through a prohibition decision and any accompanying directions.

11. In order to achieve procedural efficiencies, the CMA will set out expected timeframes that will apply to both the CMA and the parties to ensure an efficient commitments process where commitments are appropriate. This also avoids delay to the ongoing investigation where the commitments offered are not acceptable to the CMA. The CMA expects parties to respect these and understand that the success of the process depends on their constructive engagement by offering effective commitments which allow it to adhere to those timeframes. Otherwise the CMA will have to revert to the normal investigative process.

12. These timeframes will also take account of the fact that ensuring the fairness and rigour of the commitments process can take time, and that there are a range of benefits that may be achieved through commitments decisions. Therefore we do not expect that speed or anticipated resource savings will play as decisive a role in determining whether cases are, prima facie, appropriate for commitments as they will do for settlement. Further contrasts between commitments processes and settlement processes are discussed below.

³ *Guidance on the CMA's investigation procedures in Competition Act 1998*, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288636/CMA8_CA98_Guidance_on_the_CMA_investigation_procedures.pdf.

⁴ *OFT407: Enforcement*, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284436/oft407.pdf.

2.1.2 *Adverse impacts on deterrence*

13. A further key factor in the assessment of whether commitments are appropriate is the impact that not reaching an infringement decision would have on deterring others. Accordingly, the CMA is unlikely to accept commitments in cases involving secret cartels between competitors or a serious abuse of a dominant position. An infringement decision may also prompt possible private actions following a case. These considerations are particularly important where the CMA might be able to use other tools that also allow it to resolve investigations more quickly and which result in an infringement decision and fines, such as settlement. The CMA will also consider what the impact of accepting commitments will be on legal certainty and whether the opportunity for setting a legal precedent – whether through an infringement decision itself or through possible further scrutiny on appeal – is lost.

2.1.3 *Stage of the case*

14. Equally, the case must be at a stage where the competition concerns are readily identifiable. This allows the CMA to provide the parties with a summary so that they can understand its concerns and offer commitments which are right for the case. However, commitments should not be offered too late in the case as there are likely to be very few procedural efficiencies to be gained at that stage. The CMA seeks to be clear to parties who offer commitments whether the investigation is sufficiently advanced so that it can make this assessment.

15. The CMA will also indicate if it does not consider that the case is suitable for commitments and whether and when alternatives such as settlement might be available. The CMA has considered and rejected commitments offered by parties because they did not satisfy the criteria set out in the guidance, including as a result of the late stage that the commitments were offered, the impact on deterrence considering the seriousness of the infringements or that they were not capable of being implemented effectively.

16. The CMA considers it important that the decision to accept commitments is based on strong evidence. Commitments are an alternative to an infringement decision and are not appropriate where the CMA would otherwise close a case for lack of evidence. This rigour is reinforced by the governance processes the CMA has in place. The Senior Responsible Officer's decision to accept commitments must be approved by a committee of senior staff (the Case and Policy Committee).

2.1.4 *Are the commitments offered right for the case?*

17. The commitments must address the competition concerns and be capable of being implemented effectively, possibly within a short period of time.

18. The flexibility of the commitments process offers the opportunity for authorities, parties and third parties to identify and develop clear, practical and effective solutions to the concerns identified. The CMA does not favour any particular type of remedy over others; simply that the remedies proposed – whether they are, for example, behavioural or structural or both – should be sufficiently clear that it is not difficult to discern whether they are effective and being complied with.

19. The guidance gives examples of the types of commitments the CMA may consider: ceasing or modifying conduct in a particular area, terminating an exclusive arrangement, removing a particular clause from an agreement, withdrawing from a particular activity, licensing specific assets or divesting a part of a business.

20. In practice, the CMA, its predecessor the OFT and sector regulators have accepted structural or behavioural commitments or a combination of both (see the Annex summarising the types of

commitments accepted in the UK). For example, in 2013 the sectoral regulator Ofwat⁵ investigated possible predatory pricing by Severn Trent plc, a water company, in water analysis services by means of giving its subsidiary, Severn Trent Laboratories, cross-subsidies. Ofwat accepted structural commitments, which involved divesting the subsidiary.⁶

21. In 2014 the CMA accepted commitments in a case concerning the supply of road fuels in the Western Isles. The CMA investigated a possible abuse of dominance in the supply of road fuels in the Western Isles by way of long term contracts. The commitments the CMA accepted involved terminating existing supply contracts with filling stations and opening up access to marine terminals to competitors⁷. In the same year the CMA also accepted commitments in relation to vehicle service maintenance and repair systems. The CMA investigated the possible abuse of dominance by Epyx in the market for the supply of service maintenance and repair platforms (SMR platforms) by way of certain provisions in its contracts potentially restricting its SMR platform customers from evaluating, developing, marketing or using alternative systems. The CMA accepted commitments to remove certain provisions from Epyx's contracts with demand- and supply-side customers that the CMA considered were potentially restrictive of competition.⁸

22. The CMA also recognises that the flexibility of commitments, in that they can be time limited or even reviewed and varied, can in particular circumstances provide the opportunity to resolve competition concerns in a more effective way than through an infringement finding and fine. For example, in the *TV Eye*⁹ case, the OFT had concerns regarding anticompetitive practices concerning the sale of TV advertising airtime by broadcasters to media agencies. The commitments reduced the restrictions and requirements placed on advertising agencies and gave TV Eye members more freedom to apply their own selection terms. A year later the OFT released TV Eye from most of the commitments because the latter ceased to be engaged in the relevant activities.

23. In assessing and monitoring antitrust commitments, the CMA benefits from the specialist remedies, business and financial analysis expertise it has developed in investigations assessing markets and mergers remedies. This includes market testing as well as determining the most effective means of monitoring the implementation and impact of commitments. As mentioned above the guidance emphasises that an important feature of commitments is that compliance with them should not be difficult to discern either by the CMA or by third parties. The CMA will therefore typically expect the parties offering the commitments to evidence ongoing compliance with the commitments rather than undertaking significant investigative steps itself to for that purpose. For example, the commitments that the CMA accepted in the cases concerning the supply of road fuels in the Western Isles and vehicle maintenance and repair systems included reporting requirements on the parties and in one case an annual compliance statement.

3. Judicial review of commitments and the relationship with private actions

24. The decision to accept commitments is subject to judicial review by the Competition Appeal Tribunal (CAT) and there has been one such judicial review to date. In 2014, a third party, Skyscanner, appealed the OFT's decision to accept commitments in the Hotel Online Booking cases.

⁵ The Water Services Regulation Authority, or Ofwat, is the body responsible for economic regulation of the privatised water and sewerage industry in England and Wales.

⁶ See <http://www.ofwat.gov.uk/ib-0213-ofwat-accepts-commitments-from-severn-trent-plc/>.

⁷ See <https://www.gov.uk/cma-cases/investigation-into-the-distribution-of-road-fuels-in-parts-of-scotland> .

⁸ See <https://www.gov.uk/cma-cases/investigation-into-the-supply-of-vehicle-service-maintenance-and-repair-platforms-in-the-uk>.

⁹ See <http://webarchive.nationalarchives.gov.uk/20081023141438/http://oft.gov.uk/news/press/2005/93-05>.

The commitments allowed online travel agents and hotels to offer discounts on rates for room only hotel accommodation bookings¹⁰. The CAT annulled these commitments¹¹ on the grounds that the OFT failed to give sufficient consideration to Skyscanner's arguments that the commitments, while in the OFT's view they promoted competition in one area of the market, may have restricted it in a different area by reducing price transparency with adverse effects on price comparison websites.

25. The fact that the CMA or a sectoral regulator has accepted binding commitments does not prevent third parties from pursuing standalone private actions before the courts in relation to agreements or conduct which they consider infringe Chapter I/Article 101 and/or Chapter II/Article 102. There have been no such actions to date.

4. Benefits and risks – views from the CMA roundtable

26. The CMA's approach set out above on when to accept commitments reflects the CMA's views on the benefits and risks of accepting commitments. These benefits and risks were also identified by the participants in the CMA's roundtable on commitments.

27. It was generally felt that commitments can be a useful enforcement tool:

- For the authority, they can provide a means of achieving procedural efficiencies by resolving investigations more quickly and allowing those resources to be deployed elsewhere. This means the competition concerns and resulting harm can be addressed more quickly for the benefit of consumers. They can also allow for more flexible remedies and improve market conditions more than could be achieved through directions in an infringement decision.
- For the parties, they offer quicker procedures, the possibility of avoiding costs of an ongoing investigation, business uncertainty, ongoing negative publicity and possibly reducing the risk of damages actions.

28. However, since commitments do not determine whether the law has been broken, authorities need to be mindful of the impact that accepting commitments has on the wider deterrence of anti-competitive conduct or on the potential for third party damages actions. At the roundtable there were mixed views on the value of commitment decisions in providing legal certainty and setting precedents although some regarded them as useful 'soft law' in the same way as published guidance from authorities. It was felt that clear and detailed reasoning in commitment decisions can help in this respect. There were also mixed views on whether particular sectors were better suited for commitments, for example regulated industries or dynamic markets.

29. When considering the commitments process, it was also noted that the incentives to appeal against commitment decisions are low: parties offer commitments voluntarily and third parties have less access to the detail of the competition concerns. Therefore it is particularly important for the authorities to consider fully the impact on other parties affected by commitments, specifically through consultation with third parties and effective market testing. Many felt that the intensity of scrutiny offered by judicial review in the CAT was adequate and there was no general consensus on suggestions mooted by certain participants to move to a regime under which commitments had to be judicially approved before becoming effective, similar to the 'consent decrees' used by the US authorities.

¹⁰ *Skyscanner v CMA [2014] CAT 16 (Skyscanner)*.

¹¹ The CAT also remitted the case back to the CMA. On 16 September 2015 the CMA closed the investigation. The CMA is maintaining a careful watch on how the market develops both in the UK and across Europe and it also continues to work closely with other national competition authorities (who also investigated this market and in some cases accepted commitments) and the European Commission.

30. On a more practical level participants emphasised the importance of the authority, as part of the process, providing clarity in a particular case on:

- the stage of a case it is appropriate for parties to offer commitments;
- what the competition concerns are; and
- the structure and expectations for the process.

31. The point was also made that the success of the commitments process relied on a good faith relationship between the authority and the parties, requiring a shift in engagement on all sides from the potentially more adversarial nature of the investigative phase.

5. Conclusion

32. The CMA is willing, in appropriate cases, to engage with parties in a constructive manner to explore proposed commitments. Commitments can be an effective and flexible means of resolving competition concerns in appropriate cases and can result in a quicker outcome for the benefit of the authority, the public interest as well as for the parties. However, the CMA is mindful of the potential impact of commitments on deterrence and legal precedent as well as on other parties affected by them. This is why it places importance both on ensuring the CMA considers accepting commitments only in the right cases and on the third party consultation and verification provided by market testing.

ANNEX.
UK COMMITMENT DECISIONS BY THE CMA,
ITS PREDECESSOR THE OFT AND SECTOR REGULATORS

Authority	Title	Date	Type of conduct investigated	Summary of commitments
Office of Rail and Road	Provision of Deep Sea Container rail transport services between ports and key inland destinations in Great Britain	December 2015	Anticompetitive agreement and/or abuse of dominance	1) No exclusivity contracts; 2) Contracts with duration up to 5 years and no rollover clause; 3) Restrictions on permitted rebates; 4) No reselling restrictions
Ofwat	Bristol Water plc	March 2015	Abuse of dominance	1) Structural commitments
CMA	Vehicle service, maintenance and repair platforms investigation	September 2014	Abuse of dominance	2) Process commitments
CMA	Supply of road fuels in Western Isles	June 2014	Abuse of dominance	Removal of certain provisions from contracts
OFT	Hotel Online Booking	January 2014	Anticompetitive agreement	Terminating existing supply contracts and opening up access to competitors
Ofwat	Severn Trent	January 2013	Abuse of dominance	Enabling online travel agents and hotels to offer discounts on rates for room only hotel accommodation booking
Ofgem	Electricity North West	May 2012	Abuse of dominance	Divestiture of downstream subsidiary
OFT	Motor insurers data exchange pool	December 2011	Anticompetitive agreement	Undertaking the costs of boundary metering and refunding certain charges
OFT	Associated Newspapers Ltd	March 2006	Anticompetitive agreement and abuse of dominance	1) Data aggregated and anonymized; 2) Ceased data exchange
Ofgem	SP Manweb	October 2005	Abuse of dominance	1) Exclusive distribution rights removed; 2) Access for third parties
OFT	TV Eye	May 2005	Anticompetitive agreement	1) Non-discrimination and 2) access to information for third parties
				Limiting restrictions in agreements