Negotiated and Imposed Remedies

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Overview of Presentation

➢ What do we mean by ‘negotiated’ or ‘imposed’ remedies?

1. What informs choice between coercion and cooperation

2. What can be achieved under settlement?

3. Scope of review/judicial control of remedies?

4. Longer terms implication of settlement?
From Coercion to Cooperation

➢ Article 7 Decision + no cooperation

• Article 7 Decision + cooperation
  • Leniency Notice
  • Cartel Settlement Procedure
  • Cooperation outside Leniency Notice
  • ‘Quasi-consent decrees’ under para.37 of Fining Guidelines (e.g. ARA Foreclosure)
  • Art.9 cases that revert to Art.7 (e.g. Google Shopping)

• Article 9 Decision (premised entirely on cooperation)

• Informal settlements

➢ Merger control commitments
1. What Informs choice between Coercion and Cooperation?

1. Voluntarism
   - D must *opt* to cooperate
   - Decision may be informed by, e.g., likelihood of discovery, size of (anticipated) sanction, internal dynamics of firm, legal advice, shareholder reaction, public reaction etc.

2. Nature of the Breach
   - *Objective* aspect: type of conduct (e.g. Art.9 unavailable for hard-core cartels)
   - *Subjective* aspect: nature & quality of D’s participation (e.g. full immunity unavailable for cartel ringleaders)

➢ *BUT* distinctions may not be so clear-cut, e.g. treatment of constructive refusal to deal in *Telekom Polska & energy Art.9* decisions; *Hoffmann La Roche & Novartis* as ‘cartel’; differing treatment of Apple E-books case in EU & US
2. What can be Achieved under Settlement?

- Links to overarching purpose of public enforcement: solving market failures, punishing transgressors, or deterring future breaches?

- Article 7: Infringement
  - Finding of breach
  - Fines for intentional/negligent breach, except in ‘exceptional’ circumstances (Schenker), e.g. immunity, novelty
  - Formal, largely unused power to impose ‘behavioural or structural remedies’ (Art.7(1))

- Article 9: Commitments
  - Commission precluded from making any finding on breach
  - Commitments must ‘meet Commission’s concerns’ – explicit acknowledge of bargaining and compromise at issue (Alrosa)
  - Formal enforcement power (e.g. Microsoft (Tying))
2. What can be Achieved under Settlement?

➢ Why the paucity of cases applying Art.7(1) power to impose **behavioural or structural remedies**?

- Strict requirement of *proportionality* (necessary, suitable, least restrictive alternative)?

- Where finding of breach is disputed, easier to put fines ‘on ice’ for duration of appeal?

- Commission reluctance to ‘pick winners’ among potential options available to remedy breach? (*but*, see e.g. *MasterCard, Google Shopping*)

➢ Cf. *ARA Foreclosure* – voluntarism! offer to settle originating in D; explicit acknowledgement of proportionality
3. Scope of Review/Judicial Control of Remedies

- Broadly speaking, where Commission ‘imposes’ a remedy under Art. 7, subject to rigorous review by Courts (Art. 261 TFEU)

- Where Commission ‘negotiates’ a remedy under Art. 9, by contrast, Courts adopt a far more deferential approach (Alrosa)

- Interesting case law emerging under Cartel Settlement Procedure
  - Commission’s hands not tied where D eventually opts out of settlement procedure (Timab)
  - But must respect general legal principles when imposing fines on either settling party (Printeos)...
  - …or on non-settling party in hybrid procedure (ICAP)
4. Broader Implications of Settlement

- **Article 7**
  - Finding of breach as formal statement of competition law, regardless of level of cooperation
  - (Limited) specific protections for leniency and CSP applicants under Damages Directive; strategic benefit of truncated infringement decision?

- **Article 9**
  - Perennial question of whether ‘bargain’ reflected in settlement can/should be interpreted as statement of competition law – an ‘absence’ of precedent?
  - To what extent does settlement preclude subsequent enforcement by NCA, or facilitate private damages claims? ➤ Gasorba