Article 9 Commitment Procedures
Can they achieve optimal outcomes?

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GCLC Conference
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1. The EU Commitment Process – Origins & Initial Objectives

2. Overview of 10+ Years of EU Commitments

3. Takeaways from 10+ years of EU Commitments

The EU Commitment process

Origins & initial objectives
Antitrust enforcement tool introduced by Reg 1/2003 (Art. 9) as an alternative to the prohibition decision process (Art. 7) by allowing to close investigation (i) without infringement finding, (ii) subject to binding remedies

- Not contemplated for cartel enforcement (perception that sole remedy is to commit to obey the law, which investigated parties should have done anyways)
- But rather for suitable dominance and non-cartel Art. 101 cases

- Replaced prior practice of informal closure based on voluntary, non-binding commitments
Initial objectives

- A more flexible tool to efficiently close down investigations at no material “costs” for the Commission and the investigated companies

Efficiencies for the Commission

- Streamlined / no full-blown investigation (no access to file, no SO, etc.)
- Quicker resolution of concerns and impact on the market
- More effective remedies: largely designed by company itself, market-tested, forward-looking (vs. focused on sanctioning past conduct as with prohibition decisions), sanctionable breaches
- Appeals less likely = additional procedural gains

Efficiencies for investigated companies

- Quicker and less “expensive” resolution
- Avoid lengthy & adversarial proceedings, incl. at court level to contest Commission case
- No substantive fine, no infringement finding, limited damaging press, and otherwise limited financial exposure if commitments easy to implement
- No infringement decision = reduced exposure to damage claims: no follow-on; only standalone possible (much less attractive to plaintiffs)
The Art. 9 Commitment process was seemingly envisaged as an alternative to the “main” enforcement route, i.e. prohibition decisions

“In the modernized system, Commission policy on competition would continue to be reflected in prohibition decisions in individual cases, and these would be of great importance as precedents. As the Commission would be concentrating its attention on the most serious restrictions, the number of individual prohibition decisions can be expected to increase substantially.” (Commission Modernization White Paper, 1999)

Key procedural choice-driver

- Set precedent, deter, punish >> Art. 7 / Prohibition Decision
- Swift, forward-looking solving of competition concerns >> Art. 9 / Commitments
Overview of 10+ years of EU Commitments
The EU Commitments process has proved very attractive, beyond what was initially foreshadowed... to the point that, today, the commitment route has become the main EU antitrust enforcement tool.

“What is the record in the 10 years since the Regulation 1/2003 gave the commitment option to companies? It appears that they welcomed it. Out of 41 decisions taken by the Commission, we have had 15 prohibitions and 26 commitments.” (Former Commissioner Almunia – March 8, 2013)
Commitments have supplanted prohibition decisions to resolve antitrust cases in the EU

Since their introduction in 2003 until end 2016: 37 commitment decisions vs 23 antitrust prohibition decisions.

(2004 not meaningful as enforcement approach to these cases probably already decided when Reg 1/2003 entered into force in May 2004)
<table>
<thead>
<tr>
<th>Case</th>
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vs. 23 prohibition decisions

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Commission appears less inclined to use the Commitment process to address:

- Perceived competition issues in the pharma sector, maybe to set clear precedents on practices concerning generics, esp. in the wake of its sector inquiry
- Conduct that it may see close to a cartel (e.g. Ordre des Architectes Belges, Ordre des Pharmaciens en France)
- Certain type of unilateral practices such as loyalty rebates and margin squeeze, maybe to also set clear precedents on those issues

Covington
Takeaways from 10+ years of EU Commitments
Takeaways from 10+ years of EU Commitments

• The commitment track has become an increasingly attractive route to resolve antitrust cases, and more antitrust cases proportionately “settle” through commitments than go through prohibition proceedings.

• Does this mean that Commitments always achieve optimal outcomes?

• The experience from the past 10 years proves overall positive.

• But have the EU Commitment process’ success and evolution generated incentives that could threaten to somewhat limit the positive takeaways?

• In particular, has it not created some potential for instrumentalization?
  • By the Commission?
  • By private parties?
The EU Commitments – An overall positive experience
The experience remains overall positive...

**On the enforcer side**

- Commitments have become a most used enforcement tool, beyond the initial anticipations.
- Commitments used extensively in the energy, IT & digital sectors – confirms that process suitable to those markets?
- Great flexibility to design remedy, with court confirmation that can go beyond what could be ordered in Art. 7 track (C-441/07P Alrosa) >> room for misuse?
- Perceived procedural efficiencies: few appeals, but unclear if allows to reach decision faster than Art. 7 track.

**On the investigated company’s side**

- Faster resolution limits commercial disruption (e.g. avoids lengthy EU court battle), no substantive finding of infringement.
- Certainty / comfort for company that it is “safe” from further action as long as complies with the commitments... but strict liability for breach (see MSFT).
- Overall more limited civil damage exposure (Mastercard as an outlier), though watch out for aftermath if commitment breach?
But has the EU Commitment process generated incentives on the enforcer side to instrumentalize that process?
1. Commitments as a means to take enforcement action that may not have happened otherwise?

• No matter how strong the theory of harm looks like, companies under investigation inherently face uncertainty, including that they may have to go through years of EU court litigation to attack a prohibition decision
  • A commercially disruptive situation
  • Commitments, which do not entail an infringement determination, may appear an attractive alternative to that prolonged uncertainty

• Commission is in a position to leverage that uncertainty to (i) close potentially difficult cases without major opposition; and (ii) more generally intervene in cases that may not have resulted in an enforcement decision had it followed the Art. 7 process

• Virtually no court oversight
2. Commitments as a means to potentially extract wider-ranging remedies?

- Through the commitment process, Commission can extract remedies it may not have been able to secure in the Art. 7 process
  - See *Alrosa* (C-441/07P) – proportionality test looser than for Art. 7 decisions, incl. as a result of the voluntary nature of the process: “*Undertakings which offer commitments on the basis of Art. 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 Art. 7 of the regulation after a thorough examination. (...)*” (at ¶48).
  - Remedies in principle offered/devised by the company, but Commission “*can make proposals (...) on how to modify certain elements of the text, and may even provide concrete drafting proposals on specific issues*”. (ManProc, 16(43))
  - Experience shows that sometimes enforcer gets actively involved into the crafting of the commitments
  - Mindful of the uncertainty that investigated companies inherently face, isn’t there a risk that they can be “pressured” into accepting wider-ranging commitments, with the strict liability that ensues if they breach those?
3. Commitments as a means to regulate or “police” a sector or industry?

- Through commitments, Commission may be able to extend its regulatory powers to durably change an industry viz. further its own policy / political agenda, with virtually no oversight
  - See e.g. Container Shipping: commitments sought by the Commission will materially transform the way shipping lines had been communicating with their customers to date
  - See e.g. UMTS SEPs: enabled the Commission to lay out & apply its policy approach to the hot issue of SEP licensing, which it doubled with the Motorola – SEPs prohibition decision
  - See e.g. Rambus: commitments close to price regulation, something the Commission normally stays away from
  - See e.g. the multiple Art. 9 decisions in the energy sector, which one can view as a means to further boost the liberalization of those markets

- Can this lead to a creeping source of precedent?
- Not necessarily a bad thing, but quid if not in synch with the industry / sectoral dynamics?
But has the EU Commitment process generated incentives on the private side to instrumentalize that process?
Room for misuse to serve private interests?

- Market operators have the “commercial knowledge advantage” – i.e., better knowledge of the industry than the enforcers

- Room for complainants, rivals and/or customers to use the Art. 9 process to push for remedies that serve their own interests vs. competition overall?

- Do enforcers have sufficient knowledge/tools to assess adequacy of the remedies being pushed or feedback from the market test, especially in nascent or fast-moving markets and given the preliminary / potentially quicker nature of the commitment process?

- Most cases are triggered by private complaints – a factor that increases this risk?
Can commitments achieve optimal outcomes?

Conclusive thoughts & looking to the future
Commitments are and remain a “good” enforcement tool

• Offer a practical and swift commercial resolution seemingly more constructive than simply imposing a fine

• Commitments likely to remain an attractive solution for companies, especially in scenarios where preliminary antitrust concerns are clear and remedies easy to implement...

• ... unless concerns an issue of principle for the company, in which case company may have to fight it all to the EU courts
But commitment process should not be the sole enforcement tool

- Is it an adequate process when preliminary concerns are unclear or change in the course of the investigation?
  - E.g. the Google saga

- Is it an attractive or adequate process when there is no obvious “easy-to-implement” remedy or implementation is likely to be subject to interpretation?
  - Inefficiency for enforcer as may have to continue engaging with parties informally on interpretation issues
  - Higher risks of inadvertent commitment breach, with the strict liability that ensues for the company

- Commitments may be instrumentalized

- Commitments may be less adequate to deal with key issues of principle
  - Commitment process provides guidance with a particular focus on the industry concerned
  - But does not set the type of precedent that results from an Art. 7 decision let alone an EU judgment
  - Important to have clear precedents on key issues in a system where companies must self-assess compliance of their activities?
  - Recourse to a prohibition decision with no fine as a reaction to this concern, esp. for ‘new’ issues? (see the Art. 7 Motorola-SEPs decision adopted alongside the Art. 9 UMTS-SEPs decision)

But commitment process should not be the sole enforcement tool
Thoughts for discussion – How to maintain a good “Commitment” process?

• **Re-invigorate judicial oversight over adequacy of commitments?**
  • E.g., in the US, the DoJ’s consent decrees must be approved by a court, which will consider whether the remedies accepted are “within the reaches of the public interest”
  • A similar system may be difficult to import in the EU, but should there be more external oversight (judicial or otherwise, say, within the Commission) to contain “instrumentalization” of the process?
  • Is it possible to set up a judicial process such that it does not undermine the key benefits of the commitment route?

• **Doubling market test with more pro-active information gathering from market participants?**
  • E.g. through more systematic use of questionnaires to test concerns, market dynamics, type of remedies, etc.?
  • A way for the enforcer to better assess adequacy of the commitments “offered” by the parties (viz. pushed for by complainants)?
Questions?
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