Editorial

Commitment Decisions and the Paucity of Precedent

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There is a growing and vocal disquiet within the EU competition law community concerning the European Commission's increasing recourse to commitment decisions pursuant to Article 9 of Regulation No. 1/2003.[1] The debate on the matter has identified a number of interlinked points.

Firstly, a great deal of discussion has focussed on the proportionality of commitments accepted (some have said 'extracted') by the Commission in order to meet the competition concerns expressed in its preliminary assessment or statement of objections. It is opined that if the commitments offered by undertakings and ultimately accepted by the Commission are overreaching or simply not necessary, the latter is effectively redrawing or regulating markets rather than strictly upholding competition rules. It is argued that the imposition of unnecessary or excessively restrictive behavioural and/or structural remedies may undermine an undertaking's ability to compete in the market, thereby weakening the competitive process itself.

This debate may, however, underestimate the ability of undertakings to defend their legitimate interests, not to mention the capacity of those undertakings and the Commission to act in a rational manner.

On a more positive note, the diverse benefits that accrue under commitment proceedings to the undertakings involved and the Commission as opposed to infringement proceedings, which are in principle more protracted and contentious, have been noted and welcomed. A swifter resolution of the matter together with the avoidance of fines and the negative publicity that a finding of infringement pursuant to Article 7 of Regulation No. 1/2003[2] by the Commission entails provides clear incentives for undertakings to engage in commitment proceedings and explain their popularity in that quarter. Commitment as opposed to infringement proceedings may also reduce undertakings' compliance costs most notably by reducing expenditure on legal fees. In addition, the use of commitment rather than infringement decisions undoubtedly frees up limited Commission and NCA resources, which can be employed in other (more serious) cases in the interest of competition and thus the consumer.

In that regard, I perceive the power granted by the legislature to the Commission pursuant to Article 9 of Regulation No. 1/2003 to adopt commitment decisions as a logical extension of its recognised entitlement to prioritise its case load.[3]

Little concern seems to be voiced about the possibility of the Commission accepting commitments that are inadequate to resolve the competitive harm outlined in the preliminary assessment. This is perhaps due to the fact that the Commission 'market tests' the draft commitments pursuant to Article 27(4) of Regulation No. 1/2003 prior to adopting a binding decision.[4] Market tests, which require a concise summary of the case together with the main content of the commitments proposed to be published in order to allow interested third parties to submit observations, undoubtedly increase the transparency and legitimacy of commitment proceedings as they open them up not only to public scrutiny but also to the possibility of public input. The institutionalised procedure under Article 27(4) of Regulation No. 1/2003 may indicate that Commission's preliminary assessment and the commitments initially offered are inadequate and thus enable a commitment decision to be perfected.[5] It may, however, lead to a ratcheting-up of the severity of the commitments

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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, OJ 2003 L 1, p. 1. The competition authorities of Member States ('NCAs') may also have recourse to commitment decisions if their legal systems so permit. Indeed, the European Competition Network has issued a recommendation on the matter. I have largely confined this editorial to Article 9 of Regulation No. 1/2003 and Commission commitment decisions, but my remarks may also be applicable to such decisions adopted by NCAs.

2 Reference to infringement decisions in this text refers to decisions adopted pursuant to Article 7 of Regulation No. 1/2003.

3 Judgment in Masterfoods and HB (C-344/98, ECLI:EU:C:2000:689, para. 46).

4 Moreover, I would stress that commitment decisions are not cast in stone and may be revised pursuant to the conditions provided under Article 9(2) of Regulation No. 1/2003.

5 I would note as an aside that only commitment decisions and findings of inapplicability are subject to that test rather than, for example, infringement decisions. This may be an indication that the Commission is treading in more uncertain territory than in infringement proceedings or may be a means to address legitimacy and transparency concerns of the

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accepted and do little to curtail the alleged disproportionate nature of (some) commitments.

Secondly, given that the undertakings concerned have offered and the Commission has accepted the commitments proffered, those undertakings may be less inclined, as a purely practical matter, to challenge the commitment decision before the General Court and ultimately before the Court of Justice.[6] While it is not universally true,[7] it is a truism that undertakings are more likely to adhere to a negotiated solution rather than one that has been imposed upon them. Moreover, in the event that a commitment decision is challenged either by an addressee or a third party who is directly and individually concerned by the decision, the scope of judicial review of the Commission's assessment of the proportionality of the commitments is narrow and 'relates solely to whether the Commission's assessment is manifestly incorrect'.[8]

This brings me back to the title of this editorial.

Perhaps the strongest criticism levied against the Commission's practice of adopting commitment decisions is that they fail to sufficiently elucidate the law in novel and complex competition cases. This is due to the lack of a formal finding of infringement[9] in commitment decisions coupled with the fact that they provide limited opportunity for the solution adopted to be challenged before the General Court and the Court of Justice. While a commitment decision may offer 'legal comfort' to its addressee and rapidly restore competition in a given instance, it may provide less clarity and thus legal certainty for other actors than infringement decisions, which provide a more effective legal road map.

Moreover, the Commission itself has acknowledged its increasing propensity to adopt commitment rather than infringement decisions. Indeed, aside from hard-core cartel cases, commitment decisions outstrip infringement decisions.[10] Commitment decisions also tend to target particular sectors that may compound the disadvantages associated with their use, in particular, their lack of precedential value. The relative number of commitment decisions to date in the energy sector is particularly striking.[11]

Despite the fact that specific commitment decisions are not readily challenged or challengeable directly before the General Court and on appeal before the Court of Justice, this does not necessarily entail that the areas of competition law in question are fenced off and do not come before the Court of Justice, for example, following a preliminary reference pursuant to Article 263 TFEU. In that regard, I would note that on 29 April 2014 the Commission adopted a commitment decision relating to proceedings under Article 102 TFEU concerning the licensing of standard essential patents ('SEPs')[12] and on the same date an infringement decision in that field.[13] These decisions were not challenged before the General Court. However, in parallel, a great deal of litigation in relation to the licensing of SEPs has arisen before the courts of the Member States,[14] and in one instance,

negotiated nature of commitment decisions. The history behind the adoption of the US Tunney Act (Antitrust Procedures and Penalties Act, 15 USC 16) may favour the latter interpretation.

6 While commitment proceedings are not on average significantly shorter than infringement proceedings, the fact that they are not regularly challenged before the General Court and the Court of Justice ensures that the result achieved through the former proceedings is de facto more predictable, rapid and less costly for the Commission and the undertakings offering commitments.

7 For a case that would disavow such a truism, see by analogy the facts in the judgment *Cementbouw Handel & Industrie v Commission* (T-282/02, ECLI:EU:T:2006:64), which was upheld on appeal in judgment *Handel & Industrie v Commission* (C-202/06 P, ECLI:EU:C:2007:814). The case concerned a Commission decision declaring a merger compatible with the common market following a series of commitments offered inter alia by the appellant that subsequently challenged their proportionality.

8 Judgment in *Commission v Alrosa* (C-441/07 P, ECLI:EU:C:2010:377, para. 42).

9 This can increase the evidentiary burden, for example, on private litigants in follow-on actions for damages.

10 The Commission looked at the 10-year period from January 2004 to December 2013. See Commission Staff Working Document, Ten Years of Antitrust Enforcement under Regulation 1/2003 (SWD (2014) 230 final), paras 184–189, accompanying the document, Communication from the Commission to the European Parliament and the Council, Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives (COM(2014) 453 final).

11 The Commission adopted 11 commitment decisions (Article 9) when compared with two infringement decisions (Article 7) in that sector during the 10-year period from January 2004 to December 2013. I would, however, add that in 2014, the Commission adopted two decisions pursuant to Article 7 of Regulation No. 1/2003. Firstly, Commission Decision of 5 March 2014 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.39952—Power Exchanges) (C(2014) 1204 final), which concerned a cartel. Secondly, Commission Decision of 5 March 2014 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (Case AT.39984—OPCOM/Romanian Power exchange) (C(2014) 1342 final) on abuse of dominance.

12 The Commission adopted a decision pursuant to Article 9 of Regulation No. 1/2003 in relation to Samsung Electronics and Others following commitments given by them. See Commission Decision of 29 April 2014 relating to a proceeding under Article 102 of the Treaty on the functioning of the European Union and Article 54 of the EEA Agreement (Case AT.39939—Samsung—Enforcement of UMTS standard essential patents) (C(2014) 2891 final).

13 The Commission adopted a decision pursuant to Article 7 of Regulation No. 1/2003, directed against Motorola Mobility LLC ('Motorola'), finding, in particular, that Motorola had infringed Article 102 TFEU by bringing an action for a prohibitory injunction against Apple, Inc. and Others before a German court on the basis of an SEP which Motorola had pledged to license on FRAND (fair, reasonable, and non-discriminatory) terms. See Commission Decision of 29 April 2014 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.39985—Motorola—Enforcement of GPRS standard essential patents) (C(2014) 2892 final).

14 And third States.

this gave rise to a preliminary reference to the Court of Justice in Case C-170/13, Huawei Technologies.[15] The judgment was handed down on 16 July 2015.

Thus, while the paucity of precedent may be overstated, in my view, commitment decisions are a quick-fix solution the excessive recourse to which may become undesirable over time, particularly if they are not interspersed with infringement decisions or if the Court of Justice has not had the opportunity to rule on related competition law questions.

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15 See my opinion in this case delivered on 20 November 2014, Huawei Technologies (C-170/13, ECLI:EU:C:2014:2391).