

Kluwer Competition Law Blog

Committed to not Commit

Jeffrey Senduk (Sidley Austin LLP) · Thursday, June 20th, 2013

Introduction

Asking for directions is passé. Nowadays, a digital map will tell you where you are going making it quite clear that you are edging ever closer to your final destination, whatever that may be. Gone is that sense of adventure and romance that went with the discovery of new and uncharted territory. Then again, there is something to be said for knowing where you are going, and knowing how to get there efficiently. Whether your time and resources are being used in an efficient manner however, largely depends on whether you can determine the destination or not.

Undertakings spend vast amounts of their resources every year to try and comply with the range of competition regulations and directives that the Commission imposes on them. In their attempts to avoid fines and negative publicity that so often accompanies being named in an investigation, undertakings generally do their best to adhere to the rules. When interpreting these rules however, we see that the road to compliance is seldom clear. Particularly in areas where new technological, legal, or economical issues are concerned, rules that pre-date those issues may be difficult to apply. In such instances, guidance, or a roadmap to compliance if you will, is of great importance.

Efficiency is key – for some

So where does guidance come from? A decision, for better or for worse, provides the best indication of how the Commission assesses a certain situation. Precedent is thus a valuable tool to navigate your way to a predictable outcome.

Aside from a full investigation and decision, the Commission has several instruments at its disposal to bring cases to a more rapid conclusion. These instruments are: leniency; settlements; and commitments. All have been used with increasing frequency over the past years. Leniency serves to quickly and efficiently establish the existence of a cartel and evidence against its members in return for immunity from fines or a significant reduction in fines. The main purpose of the settlement procedure is to speed up the completion of a cartel investigation. Due to the nature of the settlement though, procedural economy can only be reached if it is negotiated with all parties involved in the cartel.

Commitments are voluntarily provided by an undertaking under investigation to meet the concerns the Commission may have encountered during the course of an investigation. The undertaking agrees to take measures to meet these concerns so as to restore market competition. An undertaking may want to do so in order to avoid financial and reputational damage caused by protracted

infringement proceedings. Thus before any infringement is established or proven, parties agree to implement measures to restore competition in the market. In exchange for these measures, the investigation will be terminated. The Commission will adopt a summary decision which renders the commitments that were agreed upon binding, and will then proceed to conclude that there are no longer grounds for action.

Committed to what?

If we take a closer look at the commitment procedure, we immediately notice that this concerns cases where there is no infringement yet, instead it only refers to concerns expressed by the Commission. As such a commitment is not appropriate in cases where the very nature of the infringement necessitates a fine.

This raises two interesting points. Firstly, as commitments often concern investigations that would have required much manpower over an extended period of time, behavior that might have been considered an infringement had the investigation been concluded, will go unpunished. Past behavior is forgotten in return for future commitments. Secondly, as there is no infringement and thus no detailed fining decision, a commitment will not provide much guidance on often novel issues, leaving other market participants uncertain as to what the actual rules are. Indeed, the Commission seems to use its discretion to commit the undertaking, but to remain uncommitted itself as to how it would deal with a similar problem in the future.

Conclusion

In accepting commitments the Commission, in some instances, is missing an important opportunity to create precedent. Indeed it seems to use this instrument in order not to commit itself to one particular interpretation of the rules. In doing so, the Commission is leaving much uncharted territory for those seeking a more predictable outcome. Then again, that may very well be its intention.

1. Ken Daly, A Plea for Plea Bargaining – Closing the Gaps Between the EU’s Leniency, Settlement, and Commitments procedures, CPI Antitrust Chronicle, March 2013 (3)
2. Nicola Petit, Public and Private Enforcement of EU Competition Law, presentation at Ghent University, 28 March 2013
3. Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 16 December 2002

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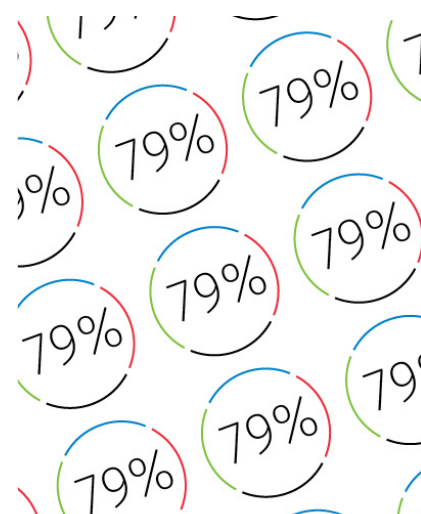
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