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The Google commitments and the transformation of EU antitrust enforcement

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The proceedings brought by the European Commission against Google are nearing a – provisional – end with the prospect of a decision making binding on Google a revised set of commitments (see here for the Commission statement and here for the full text of the proposed commitments). Independently of their merits in addressing the Commission's concerns, the Google commitments testify of a more **general transformation in EU antitrust enforcement** prompted by the multi-faceted "modernization" process associated with the entry into force of Regulation 1/2003, close to 10 years ago. This is first of all because commitments constitute a distinctive feature of "procedural modernization", *i.e.*, the emergence of and increasing reliance on negotiated procedures in the enforcement of EU competition law. Yet, they also constitute the enforcement mechanism of choice to implement the "substantive modernization" program, *i.e.*, the turn toward a welfare-based approach to the definition of harm to competition, for the Commission now closes more than 75% of its antitrust probes by means of commitments. Together with the institutional move toward a network enforcement framework, both the procedural and substantive modernization initiatives have been essentially guided by effectiveness considerations understood as a willingness to maximize the societal impact of competition policy at a time when markets have become increasingly dynamic.

In a recent paper (available here), I observe that the three dimensions of the modernization process have profoundly altered the respective incentives of enforcement authorities and firms and, as a result, the inner rationality of EU competition law enforcement. In particular, the increasing reliance on commitments has moved the "negotiation" of remedies to the center of the enforcement process, to the point of conflating in practice with the determination of the underlying theory of harm. In turn, modernization has modified the core function of remedies inasmuch as they are now less designed to correct a wrong (corrective) than to alter prevailing market structures with a view to alleviating concerns (prescriptive/prospective). Hence, similarly to the evolution associated in the US with the growing reliance on consent decrees, **antitrust enforcement in the EU has become over the past 10 years increasingly "regulatory" in nature**. As illustrated by the Google case, that regulatory approach entails a tendency to go beyond established antitrust standards and an ambition to recast market equilibriums in accordance with policy objectives inspired by (sometimes loose) welfare-based theories.

The move toward a regulatory approach to antitrust enforcement is not without consequences. In particular, **it raises a fundamental tension between effectiveness and efficiency** (and therefore between the objectives underlying the procedural and substantive aspects of the modernization

process) in the sense that the willingness of maximizing enforcement resources by resorting to negotiated solutions does not square with the maximization of welfare. As a corollary, the promotion of enforcement effectiveness may also lead to a loss in the substantive effectiveness of norms, *i.e.*, the predictability of antitrust principles. In turn, **aligning effectiveness and efficiency is largely a function of the design of the applicable law enforcement framework**. However, the framework currently in place at EU level, notably as it is governed by the Alrosa judgment of the EU Court of Justice, does not display the necessary features to ensure the optimal character of negotiated outcomes. Put otherwise, addressing the tension between effectiveness and efficiency is nowadays overly dependent on the Commission's self-discipline.

The sources of that systemic deficit are essentially three-fold: (i) the **reduced voluntariness of commitments** resulting from firms' lack of alternative to negotiated proceedings in view of the continuing escalation in the amount of fines and the lack of full appellate review over Commission's infringement decisions (*contra* the US system, where there is a real alternative to negotiated procedures); (ii) the relaxed interpretation and **hardly justiciable nature of proportionality requirements**; and (iii) a **due process deficit** rooted in the lack of clear sequence in commitment proceedings, with specific procedural rights associated with each step in the process leading to the adoption of the decision and defined implications for committing firms. To be sure, the Commission has endeavored to address shortcomings (ii) and (iii), for example by rejecting certain requests formulated by third-parties as disproportionate, by limiting the duration of commitments, or by giving firms access to a non-confidential version of the responses filed by third-parties in response to the market-test. However, it has mainly done so out of its own volition and inconsistently.

10 years after the entry into force of Regulation 1/2003 and more than 30 commitment decisions later, **time has come to tighten the legal framework applicable to commitment proceedings** and to rebalance the respective incentives of the Commission and firms, in order to ensure the optimal character of negotiated outcomes and the lasting legitimacy of the modernization process. The following steps could usefully contribute to achieving that objective:

• Firstly, the **systematic communication to committing firms of a full non-confidential version of the observations submitted by third parties in response to the market-test**, as is already the case in some Member States' system and was done in some EU cases in the past.

• Secondly, a **duty to give (even succinct) reasons for rejecting market-tested commitments**, inasmuch as such a rejection is liable to fundamentally affect the interests of committing firms. Again, the EU Commission has done so in some cases in the past, but not in a consistent way.

• Thirdly, to restore the voluntary nature of commitments as a guarantee of proportionality, **recital 13 of Regulation 1/2003 should be taken seriously inasmuch as it provides that "[c]*ommitment decisions are not appropriate in cases where the Commission intends to impose a fine*"**. In other words, the Commission should be deemed to have forfeited the right of imposing fines upon the issuance of a "preliminary assessment" within the meaning of Article 9 of Regulation 1/2003, even if it were to later revert to infringement proceedings. If a statement of objections has already been issued, the same consequence should attach to the market-testing of proposed commitments, *i.e.*, to the publication of an Article 27(4) notice. Interestingly, in the only case so far where the Commission did return to the infringement procedure after an inconclusive market-test (CISAC), it refrained from imposing fines.

Though they imply a departure from the *Alrosa* case law and should ideally be accompanied by a broadening of the judicial review of infringement decisions, these steps would already go a long way in **turning commitment proceedings into a genuine collaborative process capable of delivering optimal outcomes both from an effectiveness and an efficiency point of view**. *To be discussed.*

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