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Has the Commission kicked its addiction to commitments decisions?

Dominique Costesec (Sidley Austin LLP) · Tuesday, June 28th, 2016

Since its entry into force in May 2004, the commitments procedure under Article 9 of Regulation 1/2003 has become *the* most prevalent enforcement mechanism used by the European Commission to address infringements of Article 102 and 101 TFEU (other than cartels). According to some statistics, more than 90% of non-cartel cases in the period between 2008 and early 2013 were resolved by way of commitments.[1] Abuse of dominance cases, in particular, have become prime candidates for commitments.

However, commitments decisions appear to have fallen out of favor with the Competition Commissioner. In March 2015, Margrethe Vestager told the *Financial Times* that it was "*very important not to make a habit out of settlement.*" She recognized the need to develop the case law by way of precedents – something that commitment procedures cannot generate – and noted that "*only our judges and going to court can do that*."

To a company, the advantages of offering commitments are obvious: fines are avoided and there is no finding of an infringement, making it harder for potential claimants to sue the infringer for damages. But the Commission too, it seems, has become "hooked" on the relative ease with which Article 9 decisions can be adopted, due to fewer procedural steps, more flexible remedies, and, in particular, a lower burden of proof.

But commitments decisions are facing increasing criticism for their failure to provide guidance by way of precedent, as, by nature, they do not find an infringement but merely point to the existence of "concerns".

Moreover, Article 9 has perhaps not proven as efficient as hoped or expected. Article 9 procedures have, on average, proven only marginally quicker than Article 7 (prohibition decision) procedures, and in some cases, there were no time savings at all. Even in fast-moving IT and online markets, the Commission has not always succeeded in significantly reducing the length of its investigations through the use of commitments: the Google Search investigation has been ongoing for nearly six years, and it took the Commission, respectively, 17, 24 and 28 months to conclude the *IBM*, *Microsoft* and *Rambus* cases.

Finally, it is difficult to challenge commitments decisions before the European Courts, resulting in an appalling lack of judicial review. Despite the popularity of commitments decisions, only *three* of them appear to have been challenged before the European Courts. This is partly because parties

that are not addressees of a decision find it difficult to establish standing before the ECJ.

In the first challenge, Alrosa appealed the *De Beers* decision, which had required De Beers to terminate its existing supplier relationship with Alrosa (Case C?441/07 P *Alrosa*). This is the only case that has so far resulted in an actual Court ruling – but the ECJ granted a wide deference to the Commission's "margin of appreciation," discouraging additional challenges. Second, Hynix, one of the complainants in the Commission's investigation against Rambus, appealed the *Rambus* Decision, arguing that the Commission should have opted for an Article 7 procedure. But Hynix withdrew its appeal following a settlement (Joined Cases T-148/10 and T-149/10 *Hynix*). Finally, Morningstar appealed the *RICs* Decision, accusing the Commission of having accepted commitments from Thompson Reuters that failed to address the competition concerns (Case T-76/14 *Morningstar*).

So has the Commission really kicked its "addiction" to commitments decisions?

So far, the record is mixed at best: since Ms. Vestager took office in November 2014, the Commission has adopted a grand total of *zero* Article 7 infringement decisions in non-cartel cases, but has adopted two Article 9 commitments decisions[2] and is market testing commitments in at least three cases.[3] One of those concerns the Pay-TV investigation, which deals with important questions around territorial restrictions. By accepting commitments, the Commission might be missing another opportunity to set a precedent which could be highly relevant to the current debate on e-commerce and geo-blocking (although the Commission is continuing to investigate Disney, NBCUniversal, Sony, 20th Century Fox, Warner Bros., and Sky).

In a number of other important cases, including the *Google* and *Gazprom* cases, the Commission still appears to be sitting on the fence. It remains to be seen whether the Commission will opt for an Article 7 infringement decision, or continue down the commitments path.

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