



EUROPEAN COMMISSION

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Remedies, commitments and settlements in antitrust

Check Against Delivery
Seul le texte prononcé fait foi
Es gilt das gesprochene Wort

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Ladies and Gentlemen,

I would like to thank Frank Montag for his invitation to speak at your conference today.

A highly regarded association of competition lawyers is the perfect audience for discussing a topic I have been reflecting upon for some time.

Today I would like to discuss with you my views on the range of instruments that the European Commission can use to sanction, terminate, and prevent business practices that go against articles 101 and 102 of the Treaty.

I will talk about the fines, remedies and commitments we can use in antitrust and I will make reference to the decision the Commission adopted two days ago in the Microsoft case.

I will also talk about the settlement procedures that are now available to companies in the context of cartel enforcement.

But before we plunge into these topics, let me wish a happy International Women's Day to the women in the room and to all the women these words will reach through the web and the other media.

I am convinced that our societies and economies will profit immensely from a fairer gender balance.

And the same goes for the competition-policy community – including the legal profession. I hope the future will bring more women in our community and, especially, more women in senior positions.

I will start with the two types of decision we can take in antitrust.

When the EU competition authority decides to pursue an antitrust case, it can follow one of two main paths: a prohibition decision under article 7 of Regulation 1/2003 or a commitment decision under article 9. This is well known.

In the former case, when our investigation concludes that a company has broken the rules, we require that it stops the infringement and we impose a fine and possibly other remedies.

In the latter, a company under investigation can offer commitments before we establish an infringement. If the pledges are strong enough to allay our concerns, we stop the investigation and make them legally binding through an article 9 decision.

These two paths have something important in common.

Both types of decisions are supported by solid evidence and theories of harm. And both are intended to put an end to our antitrust concerns. Apart from this, several important differences emerge.

Firstly, as required by the Court of Justice, our analysis must be more extensive for a prohibition decision than for a commitment decision.

Another important difference is that fines and other remedies are imposed by the Commission; whereas commitments are offered voluntarily by the company.

This means that commitments invite a cooperative attitude on the part of the companies, which I always regard as a good thing.

What is the record in the ten years since 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.

Some article 9 decisions are well-known to German lawyers such as those involving E.ON and RWE.

As a matter of fact, going through the list of decisions taken over the past few years, one can find many cases in the energy markets.

These include decisions that have reinforced competition in gas and electricity markets in five Member States. The latest decision in this list was the Siemens/Areva case in the nuclear technology sector.

In other areas, such as air transport, finance, payments and information technology, our article 9 decisions have had a positive and rapid impact on the structure of the respective markets.

Over the same period we have also taken article 7 decisions, some of them in well-known cases such as the AstraZeneca case in the pharmaceutical sector in 2005, the Intel case in 2009, and recently two telecom industry cases that I will comment later.

These facts and figures lead to two interesting questions. The first is why we accept to close some cases without finding an infringement. The second is why companies offer commitments if they claim they have done nothing wrong.

Let's start from the companies.

Our experience shows that most companies implicated in anti-competitive practices go for the solution that can best protect their interests and reputation.

When companies offer commitments, they will not pay fines – although the pledges they take with us can cost them quite a bit.

They choose this option also because they can close the case faster and – importantly – before we formally find that they have broken the law.

Offering commitments without any acceptance of wrongdoing is much easier to justify than receiving a fine.

This much for the companies, but I have more to say on the other question. Why do we take many article 9 decisions?

One reason is that we too prefer to conclude cases swiftly when this brings the most benefits to the markets. In certain industries – such as high-tech and fast-moving markets – it is important that competition is restored quickly and effectively.

Take for example the commitments we accepted from IBM at the end of 2011.

In that case, the company pledged to make spare parts and technical information available to competitors in the mainframe-maintenance business swiftly and in reasonable and non-discriminatory terms.

You will agree that users, competitors, and business customers were better off this way, even if we did not impose a large fine.

Another example is the e-books decision that the Commission took last December. In this case, we accepted commitments in a nascent and extremely dynamic market which called for quick and decisive action.

Obviously, not all cases are suitable for commitment decisions. At times I see cases that simply call for a fine.

The typical situation is when we deal with anti-competitive behaviour that mostly occurred in the past or when we consider that the most appropriate action is to simply stop the practice and deter similar practices from occurring again through fines.

In addition, prohibition decisions set a stronger precedent for future cases, and this should not be underestimated.

The few examples of article 7 decisions I recalled earlier make these points well. More recent examples are the prohibition decisions involving Telefónica and Portugal Telecom for a non-compete clause and the one last year involving Polska Telecom for abuse of dominant position.

But when we do take the commitment path, we never do it lightly.

To start with, we have a wide margin of discretion before an article 9 decision is taken. If we see that cooperation with the companies is not satisfactory, we can always revert to the prohibition path.

Secondly, we make sure that the commitments are tailored to the competition problem at hand at all times.

That is why we market-test the proposed commitments with all stakeholders before taking a final decision to make sure that it is a good outcome for the market and that no issue is overlooked.

In this respect, our practice taught us that – in many cases – structural commitments are more effective than behavioural ones because they can have a long-lasting impact in the markets. The same conclusion can be drawn from our experience in merger control.

Finally, commitments must be crystal clear and self-executing. When we accept them, we take a legally binding decision – and we take compliance with our decisions very seriously.

We have several ways to monitor that companies keep their pledges. The starting points are often the companies' reporting obligations and the vigilance of other market players. When needed, we can also use an independent trustee to help us verify that the companies keep their word.

Only two days ago we saw what can happen when they don't. On March 6, the Commission imposed a €561 million fine on Microsoft for not complying with the commitments we accepted back in 2009.

You have read the story in the papers. Microsoft promised that it would let users pick their preferred browsers through a choice screen until 2014.

At first, the company complied and users responded well. Between March and November 2010, as many as 84 million browsers were downloaded through the choice screen.

I believe that this solution was one important element which improved competitive conditions in the browser market. Today it is easier for us to pick the application we like best, download it, and install it on our machines.

But then, between May 2011 and July 2012, the screen disappeared in one of the versions of Windows. In this period, over 15 million users were deprived of the choice and ease-of-use it offered.

Since, as I said, we take compliance with our decisions very seriously, when we noticed that the screen was no longer there we immediately re-opened a formal investigation, which concluded that Microsoft had breached its commitments.

Let me add a couple of comments.

First, this incident taught us that we should monitor companies more closely after we accept their commitments.

In this case, because the commitment was straightforward, the monitoring was entrusted to the company itself, which was obliged to report on the implementation of the commitments. It did so, but erroneously. In the future we will be stricter in the design of our monitoring tools. An incident like this must not happen again.

Second, when the matter emerged the company immediately owned up to the facts. It explained that it was due to a technical problem, and was helpful and forthcoming during the investigations. I want to acknowledge their cooperative attitude.

However, intentional or otherwise, the matter remains very serious. This was the first time the Commission had to sanction a breach of legally binding commitments.

We have seen that article 9 decisions have been an excellent tool to keep good competitive conditions in the Single Market and that they are a favourite option among companies. It was simply our duty to preserve the integrity and credibility of the system.

The fine sends a signal to every company that has offered or will offer commitments. It tells them that they must keep their obligations with the European Commission in point of principle and must do all is needed to ensure their strict compliance in actual practice.

Ladies and Gentlemen:

Let me now turn to the other topic I announced at the start; the use of settlements in cartel proceedings.

Settlements were introduced five years ago and have given companies that had participated in a cartel a new and faster way to turn the page.

The procedure is an option they have, not a right. As with commitment decisions, if we see that matters do not progress well, we can call off the discussions at any time.

I would like to stress that the procedure is different from the article 9 decisions we've seen earlier.

In commitment decisions there is no finding of an infringement and no fines are imposed, whereas companies that settle a cartel case admit responsibility and receive fines.

Settlements are also different from plea bargaining in the US. This is both an investigation tool and an instrument that rewards the cooperation of companies which did not obtain immunity from fines – a bit like our leniency.

Another difference is that plea bargains can be concluded with one company at the time, while in our settlements we conduct discussions with all the companies involved in a cartel at the same time.

This is important, because it explains why jurisdictions that use that system can close cases with individual companies faster than we do even when we investigate the same conducts.

For example, it explains why US, British and Swiss authorities have already closed their cases with three large European banks in the so-called Libor scandal.

We also investigate this case as a suspected cartel involving a larger number of banks and brokers and our results will be announced in due time.

But let us not forget that closing a case against all the companies involved may last longer on the other side of the Atlantic than on this side.

Companies seem to have embraced settlements. Since 2010, when the new procedure was first implemented, we have taken six settlement and ten non-settlement decisions.

The earliest companies to settle were those involved in the DRAMs and Animal Feed Phosphates cases.

In 2011, the Commission took three settlement decisions in the Consumer Detergents, CRT Glass, and Refrigeration Compressors cartels.

The most recent settlement was concluded in June last year in the Water Management Products case.

These cases have involved thirty companies or groups of companies, 24 of which have been fined for a total of over one billion euro.

Only one company so far has decided not to finalise the settlement and to return to the normal procedure.

I can also report a growing interest among the companies that are involved in on-going cases.

I dare make a prediction: around half of our cartel cases may be concluded with settlements in the coming years – which seems to me a good balance between the different procedural tools.

Again, as with commitment decisions, many companies are keen to settle not only because they can obtain a 10% discount on their fines, but above all because they want to put unacceptable business practices behind their backs as fast as possible.

All this shows that, although still young, settlements in cartel decisions are becoming an established practice and I am determined to build on their good record.

The cases concluded over the past two years have allowed us to streamline the process and set procedural standards for the future. The practice is evolving thanks to the experience we gain with each new case.

For instance, we have learned to assess cases at an early stage to see which are more suitable for a settlement.

We look at a number of factors, including the parties' cooperative attitude, their genuine interest to participate in settlement discussions, and their positions on our assessment.

This screening allows us to fully exploit the potential of the process, above all in terms of speed.

In comparison to the cases handled using the standard procedure, which take at least five years on average, the most recent settlement cases were concluded in about three years from immunity application to the final decision.

However, as they say, it takes two to tango. A speedy procedure depends as much on the Commission as on the approach that the companies bring to the process, especially in the discussion stage.

I would encourage the companies that are genuinely interested to settle to adopt a proactive and cooperative attitude. In particular, the management that will take the final decisions should be involved at an early stage.

In present company, I would also extend my encouragement to their legal representatives, who need to fully commit to the process as well. This settlement attitude is essential to push cases forward.

Ladies and Gentlemen:

Today I have talked about the different ways in which the companies that are suspected to break EU competition law can deal with the European Commission to restore good competitive conditions in the markets or be sanctioned for the harm done.

My presentation has even examined some procedural details, but I hope you have not lost sight of the most important message I want to convey.

The best way to protect a company's interests, its reputation among consumers and business partners, and its standing in the community is to stay on the right side of the law at all times.

The ultimate goal of our action – including our systems that govern fines, remedies, commitments and settlements – is to instil a culture of compliance in every company that does business in Europe.

Especially in these difficult times for our economies and societies, playing by the rules of the Single Market is the highest expression of corporate responsibility.

Thank you.