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To commit or not to commit, that is the question

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

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Ladies and gentlemen,

In his monologue in Shakespeare's famous play, the young Danish prince Hamlet faces agonising decisions. 'To be, or not to be,' he asks himself, and carefully weighs the merits of life and death. He chooses life, but for negative reasons: only because he fears the alternative may be worse.

Businesses we investigate for anti-trust violations also face a difficult decision: to commit or not to commit. Should they submit to the investigation, and risk a fine? Or should they try to play an active role themselves, and approach the Commission with commitments that redress the competition concerns?

We are not required to accept commitments. But, of course, we do consider them, and then we face a decision of our own: to accept, or not to accept. Shall we punish anti-competitive behaviour outright, or shall we accept the commitments offered?

The dilemma is not quite as dramatic as the one faced by Hamlet. But the question is very real.

Before I discuss this in detail, let me already now reveal that our decision in part depends on the quality of the commitments offered.

In a nutshell, we are more likely to accept commitments that are quick, sufficient and sensible.

They should be quick. They should be offered promptly, at the first opportunity, not at the end of the procedure.

They should be sufficient. The commitments should effectively redress the competition concerns that we have uncovered.

They should be sensible. Good commitments are not more complicated than necessary. They should not be difficult to implement and to monitor. These are not the only factors influencing our decision. But these are factors that companies can shape themselves, as they are the ones who draft the commitments.

So, how do we decide between outright prohibiting and fining of anti-competitive behaviour, and accepting commitments offered by companies?

Decisions, decisions

A prohibition decision under Article 7 is a straightforward ban of anti-competitive behaviour based on the finding of an infringement. The advantage of prohibition decisions is that they create legal precedent once confirmed by the courts. They also form a strong deterrent, especially in combination with a fine.

In a commitment decision under Article 9 the Commission accepts commitments offered by companies. The Commission expresses concerns, and does not find an infringement. Thanks to procedural efficiencies, commitment decisions have quick market impact, lead to a swift resolution of concerns, and involve fewer resources.

Although informal commitments existed earlier in anti-trust proceedings, they became enforceable with the adoption of Regulation 1/2003. Commitment decisions are indeed becoming increasingly frequent. But they are an option, not an acquired right.

In fact, in cases other than cartels, commitment decisions already outnumber prohibition decisions. Since May 2004, the Commission has adopted thirty-two commitment decisions under Article 9 and seventeen prohibition decisions under Article 7. But I repeat: they are an option, not an acquired right.

In the same period we took sixty decisions in cartel cases. These were all prohibition decisions accompanied by fines.

Before I explain how we decide ourselves between Article 7 and Article 9, let me look at the choices that confront businesses.

Hamlet faced a very difficult decision. For companies under investigation, the decision whether to commit or not to commit seems easy. The advantages at first sight appear obvious. Companies can avoid paying fines and escape entanglement in long drawn out legal procedures.

Because the Commission only finds concerns, companies can limit the reputational damage that goes with the finding of an infringement. Companies may also have more positive reasons to offer commitments. As they design the commitments themselves, they can offer tailor made solutions to competition concerns.

Although advantages for companies to offer commitments are clear, the decision to commit or not to commit is not completely straightforward. In a procedure under Article 7, companies can still try to convince the Commission to drop the case. This angle of attack is lost if they offer commitments. Under Article 7 they can turn to the courts to overturn the Commission's prohibition decision. Under Article 9, appeals are rare in practice.

From the Commission's perspective, the situation is different. We launch an investigation based on preliminary evidence of wrongdoing. If we do not drop the case and continue the investigation, this means we think we have a convincing case, and are heading towards a prohibition decision.

Whether we chose Article 9 or not at this stage does not depend on the strength of our case.

It depends on two things: whether companies under investigation offer commitments, and whether we accept them.

So, let me explain now on what basis we decide.

When not to commit (Article 7)

In brief, we opt for Article 7 in order to punish, to deter, and to set a precedent.

First, we are more likely to opt for a prohibition decision when the importance of deterrence and punishment is paramount.

Especially cartels are a very serious infringement where punishment and deterrence are in order. Commitments cannot be offered in the case of cartels.

Take the LIBOR and EURIBOR investigations. Earlier this month we fined eight international financial institutions €1.7 billion for participating in cartels relating to interest rate derivatives denominated in euro and yen. This was a very serious infringement of competition rules, and the only fitting response was a prohibition decision and a fine. There are no other appropriate solutions. Such a serious infringement cannot go unpunished, as this would seriously undermine deterrence.

Second, we are more likely to opt for a prohibition decision if it is important to set a precedent. Prohibition decisions are usually reasoned in greater detail, and explain the Commission's theory of harm more exhaustively, thereby giving more guidance to market players than Article 9 decisions. Prohibition decisions are also frequently challenged before the court, which gives judges the opportunity to clarify the law and confirm the legal precedent.

A good example is the Lundbeck case. In June this year we fined Danish pharmaceutical company Lundbeck and several competitors for colluding in a 'pay for delay' deal. Lundbeck had paid these companies to keep their cheaper, generic medicine off the market. We saw a need to send a very clear message on such reverse payment agreements. This is one of the reasons why we opted for proceedings under Article 7 in this case. And indeed, the case is now under appeal before the General Court.

For the same reason, just yesterday we fined two pharmaceutical companies, Johnson & Johnson and Novartis, for delaying entry into the Dutch market of a generic version of the painkiller fentanyl. Using the form of a so-called 'co-promotion agreement', J&J offered monthly payments to its generic competitor, who delayed entry into the market of cheaper medication for seventeen months. This was first time we came across a pay for delay deal in a co-promotion agreement, so again we felt the need to send a clear message to the market.

That being said, I do not want to discount the importance of precedents in Article 9 decisions. Commitment decisions are also based on a solid theory of harm and are also clearly motivated, and so can also offer guidance to companies for self-assessment, in order to avoid a case being taken on by the Commission.

Finally, we are more likely to opt for a prohibition decision when the only commitment that is or can be offered is to cease the anti-competitive behaviour, in other words, to comply with the law in the future.

Take Polish Telecom for example. In 2011 we fined Polish Telecom €127 million for abusing its dominant position in the Polish market. Polish Telecom refused to allow alternative operators access to its network and broadband services. The Commission's decision required Polish Telecom to put an end to such conduct.

When to commit (Article 9)

So, if there is no other commitment on offer than to cease and desist, companies will not be able to convince us to opt for an Article 9 decision. But in reality of course, there are situations where good alternatives are available. This is when we can start to consider commitments under Article 9. Let me look at a couple of cases.

One World was a proposed joint venture between airline companies on all routes between the EU and US. The joint venture made it very difficult for new companies to enter the market on six key routes.

A simple cease and desist order was not the only way to restore competition. A prohibition decision could have endangered the entire joint venture, together with any efficiencies it brought along with it.

The joint venture offered several commitments: It would allow newcomers one slot on airports, and give them access to all-important transit passengers. Passengers of start-ups would also be allowed to book a return flight with one of the participants in the joint venture.

These commitments put an end to our concerns, so we accepted them. That they were appropriate is shown by the fact that new companies are already operating on these routes.

Alternatives to outright prohibition were also present in our investigation of Visa's multilateral interchange fees (MIF) for debit cards, concluded in 2010. These fees for transactions between banks artificially restricted competition, and raised prices for consumers.

Visa Europe offered to reduce its fees to 0.2 per cent for cross-border transactions and transactions in nine Member States for debit cards. Visa also promised to provide more transparency of merchant fees and vowed to register and publish all MIF rates.

The Commission accepted these commitments in 2010, because the new rates proposed by Visa Europe effectively removed the anti-competitive effects caused by the interchange fees in the first place.

Advantages of commitment decisions

From the examples I have just given, I think it is clear that commitment decisions offer advantages not just to the businesses we are investigating, but also to market players who are suffering from anticompetitive behaviour, to tax payers, consumers and the economy in general.

There are basically two key advantages to commitment decisions:

First of all, they can offer sound, tailor made solutions to competition concerns. Second, such concerns can be solved more quickly using commitment decisions than prohibition decisions.

Let me look at the quality of commitments first, before I discuss their speed.

Commitments enable companies to offer remedies that redress our concerns. Although we can impose remedies under Article 7, under Article 9 companies design the commitments themselves, so they can use their expert know-how to adapt them to the market. Once agreed, commitments are market tested. The commitments can be implemented more swiftly under Article 9 than under Article 7. Under Article 7, measures could be delayed by court appeals, which could postpone implementation of measures by many years. This is in particular the case for structural remedies.

The GDF Suez case offers an example of well-designed remedies that rapidly resolved competition concerns. The Commission investigated GDF's long-term reservation of gas transport capacity and network of import agreements, which gave GDF a dominant position in the market.

GDF Suez offered to drastically reduce its share of long term capacity reservations, beginning with ten per cent, increasing to below fifty per cent in 2014.

Designed by GDF themselves, these remedies were structural in nature, improving market access in the long term, and attuned to the market. We accepted these commitments because they enabled a rapid conclusion of the case with an immediate effect on the market. Competitors could enter the French gas market right away, rather than having to wait perhaps ten years for the conclusion of a full investigation.

The swiftness of providing a solution in the GDF case points to a second advantage of commitment decisions. Thanks to procedural efficiencies, commitments have a quick impact on the market. The procedure for Article 9 decisions is less burdensome, certainly if commitments are introduced early. Lengthy oral and written discussion between the parties can be avoided. The decision can also be handled much more quickly by the Commission internally.

Especially our e-books decision illustrates the advantages of speedy action, in this case in the up-and-coming, fast-moving electronic book market.

The Commission had concerns about the switch from a wholesale model of sales to an agency model by Apple and five international publishers. This switch in itself was not the problem. The problem in our view was that Apple and the publishers had seemingly coordinated this switch with the aim of raising retail prices for e-books. We believed this was a response to Amazon's pricing policy, which was selling e-book bestsellers below wholesale prices.

As a result of the alleged concerted practice there was a high risk that the entire e-book market could have derailed into an uncompetitive market with higher e-book prices as a result.

We were able to stop this development in its tracks. The Commission opened investigations in December 2011, and accepted commitments in all but one of the cases within a year, by December 2012.

The crucial advantage of using commitment decisions in this case was that we were able to not only cease the alleged infringement but also induce a reset in the e-book market at an early stage of its development, ensuring that E-book publishers operate in a more competitive way. This would not have been possible to the same extent with a prohibition decision, where appeals could have caused delays. What if by the time the case had been closed under Article 7, e-books had been replaced by another radical new technology?

Just before Christmas it is nice to realise that in the US and UK, e-book prices have been showing a downward trend in 2012 and 2013. I would like to think that this is at least in part due to our speedy decision.

Incidentally, I noticed Hamlet is available as an e-book for only €0.50.

How to commit

Now to come back to my question: 'to commit or not to commit'. I have tried to make it clear why companies may want to offer commitments.

I have also tried to point out under which circumstances we might accept them.

To summarise: deterrence, punishment, and precedent argue in favour of Article 7, as does the lack of viable solutions to competition concerns. Speedy and viable solutions, on the other hand, may convince us to accept commitments under Article 9.

There is no one single answer to the question 'to commit or not to commit.' Whether we opt for a prohibition decision or choose to accept commitments depends on the circumstances. It depends very much on the quality of the commitments offered.

This suggests that the real question is perhaps not whether to offer commitments, but how to offer commitments.

So let me dedicate a few minutes to some practical advice: what do good commitments look like?

As I said in the beginning: they should be quick, sufficient and sensible.

Commitments should be offered quickly. The sooner parties introduce commitments, the better. Procedural efficiency can be improved if commitments are offered before we have drafted our statement of objections and given access to the file. Conversely, commitments offered after an oral hearing are likely to delay the completion of the case rather than to speed it up.

Speedy restoration of competition is one of the main advantages of commitment decisions.

This advantage disappears if the commitments are offered very late in the process. The later commitments are offered, the less useful they are. Commitments should preferably be offered in the earlier stages of an investigation, not by the time we have completed our investigation and have drafted our statement of objections.

We will of course consider commitments at any point, but if commitments are offered late in the proceedings it may be faster to proceed to a prohibition decision than to a commitment decision.

For the same reason, once companies have offered commitments, they should not drag their feet during our discussions. This can eliminate any advantages offered by commitment decisions in terms of speed.

Just because we are considering commitments, this does not mean we will accept them. We can and will at any time revert back to an ordinary investigation under Article 7 if we feel that is required.

The commitments should not only be offered quickly, but they should also be sufficient to appropriately address our concerns, and offer sound solutions and achieve real change in the markets. The commitments in the VISA, E-Books and GDF cases that I have discussed are but a few examples.

The behaviour of the companies themselves should also be sufficient. Once commitments have been agreed on, companies should comply with them. If they don't, the Commission is ready to take action, as is illustrated by our fine against Microsoft this year.

Commitments should also be sensible. The advantage of speed may also be lost if the commitments are difficult to carry out, which will require close monitoring and lead to extensive delays in implementation.

We learned this lesson in the Repsol case, in which it took six years to implement the commitment decision.

Repsol had concluded hundreds of long terms fuel distribution contracts with landowners and petrol station operators, which bound them to exclusively use Repsol as a supplier for 20, 30 and even 40 years.

Repsol committed to allow petrol stations to terminate their contracts. But the need to examine a large number of contracts in great detail caused delays. In many cases, Repsol had constructed or refurbished petrol stations. Repsol was entitled to compensation, which was complicated to calculate. All of the contracts also had to be examined on an individual basis for other competition concerns – for instance resale price maintenance.

The implementation of these commitments required a significant investment of Commission resources over a period of years.
We do not intend to repeat this exercise.

Commitments should not be conditional: commitments should offer clear cut solutions that can be implemented without undue delay and which preferably do not require lengthy monitoring.

On a final note, I would like to add that companies can also find some inspiration in the guidance notice we have published on commitments in merger cases.¹

This notice on merger remedies stipulates that any commitments must be capable of being implemented, and must eliminate the competition concerns entirely. It also should be possible to carry them out quickly.

The Commission must also be sure that there are no risks that threaten the implementation of structural commitments, such as difficulties in finding a third party purchaser, or conditions attached to divesting part of the business.

Conclusion

By way of conclusion, let me return to Hamlet. In answering the question 'To be or, not to be', the choice between life and death, Hamlet ultimately chose life.

His monologue comes at a dramatic moment of the play.

I have just presented a monologue of my own.

My monologue was less dramatic, less tragic and certainly less poetic. But then, the subject matter is not as spectacular as 'murder most foul.'

Unlike Hamlet, unfortunately, I can't give a straightforward answer to the question 'to commit or not to commit.'

Imagine that Hamlet had answered the question 'to be or not to be' by saying: 'It depends on the facts of the case.'

I doubt the play would have had the same amount of success. But in our case, on the other hand, commitment decisions have been a successful addition to our repertoire

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:267:0001:0027:EN:PDF>

precisely because of their versatility, precisely because they have made it possible to move beyond “yes” and “no”.

How well our play will perform in the end, depends not only on the director, but also on the actors.