

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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Summary of Discussion on the Roundtable on Commitment Decisions in Antitrust Cases

**ANNEX TO THE SUMMARY RECORD OF THE 125th MEETING OF THE COMPETITION
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The draft summary of discussion of the roundtable on Commitment Decisions in Antitrust cases is circulated to delegates FOR APPROVAL UNDER WRITTEN PROCEDURE. Delegates are requested to submit any proposed changes by Friday 11 November 2016.

*More documentation related to this discussion can be found at
www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm*

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Summary of Discussion of the Roundtable on Commitment Decisions in Antitrust Cases

By the Secretariat

The Chair of the Competition Committee, Mr. Frederic Jenny, opened the roundtable on commitment decisions in antitrust cases with a short introduction and explained that the roundtable will explore the current state of commitment decisions and other types of negotiated remedies in antitrust in OECD and Participant jurisdictions. Delegates will discuss benefits and risks associated with the use of such commitment decisions, how competition authorities can use this enforcement instrument in an effective appropriate manner. The discussion benefited from a Secretariat background paper and presentations by the three external speakers.

The Chair noted that commitment decisions are relatively new enforcement tools for competition authorities and not all of agencies have the power to adopt such decisions. A variety of situations can be seen among OECD members in several aspects of commitment decisions, for example the requirements to be met before rendering commitment decisions, and the procedural steps that they need to follow. There are different views on which cases are suitable to commitment decisions in terms of type of infringement and industries. It is also disputed among competition authorities and academics whether the alleged benefits of commitment decisions, such procedural economy, can be effectively realised.

The Chair suggested that the discussion should cover the following issues: definition and types of commitment decisions, benefits and risks associated with the use of commitment decisions, decision-making between infringement decisions and commitment decisions, types of commitments, monitoring of compliance with binding commitments and sanctions in case of breach of commitments, and challenges for better use of commitment decisions.

The Chair introduced the three invited speakers: Professor Jean-François Bellis, Institute of European Studies of the University of Brussels and the managing partner of Van Bael & Bellis, Professor Tadashi Shiraishi, University of Tokyo Graduate Schools for Law and Politics, and Professor Joshua Wright, George Mason University School of Law.

1. Introduction

To set the scene, the Chair gave the floor to the Secretariat for a brief overview of the Background Paper.

The Secretariat first outlined the brief history and the availability of commitment decisions or other types of negotiated/consensual remedies as a means of enforcement in antitrust cases. The introduction of these tools is relatively recent in most jurisdictions, except in the US where the first consent decree was entered into more than one hundred years ago. Commitment procedures were formally introduced in the European Union in 2004 and now many jurisdictions are equipped with this instrument. There are, however, a few OECD jurisdictions that do not have these powers yet. Several common features are seen in the basic structure of commitment procedures, but at the same time there are differences in statutory requirements and procedural steps of commitment decisions in practice. Opinions are also divided whether or not commitment decisions are suitable for industry sectors such as IT and digital sectors. As for the types of commitments, both behavioural and structural commitments are possible in most jurisdictions, but in practice behavioural ones have been predominant so far.

The Chair then asked Professor Bellis to give some historical perspective of commitment decisions in the European Union.

Professor Bellis started with an explanation about informal settlements, which had been available long before the formal introduction of commitment decisions at the EU level in 2004. Under the previous regulation 17/62, the Commission had the power to terminate the procedure in case the parties offered commitments and the Commission found them acceptable. Professor Bellis explained the IBM case in 1984, a remarkable case in the sense that it was the only case where the details of the commitments (settlements) were published. There were other two types of settlements possible under the previous regulation: negative clearance and individual exemption decision for the agreement notified to the Commission. Before 2004, many of the cases involving restrictive agreements had been settled in these kinds of informal methods. These informal settlements would have included two major drawbacks, namely the absence of sanctions in case of non-compliance with the commitments and lack of transparency in terms of publication of the case.

There are several reasons why formal commitment decisions have been heavily adopted in the European Union. The first reason is the absence of fines, which is very attractive to the companies subject to the investigation because the amount of fines accompanied by infringement decisions has skyrocketed. Limited judicial review of commitment decisions, which would be preferable for the competition authority, is the second reason for their success. The absence of a finding of infringement in commitment decisions is viewed as another attractive feature for companies, because that mitigates the risk of private damages actions. Commitments are attractive for competition authority as well because they can go beyond what they can do through infringement decisions, namely imposing structural remedies in some cases and other kinds of behavioural remedies such as unbundling commitments.

There are, however, criticisms on the use of commitment decisions. The first criticism is that commitment decisions would marginalise the role of the judge, which is shown by the fact that the number of antitrust cases brought to the General Court of the European Union has decreased tremendously in recent years. The other criticism that has been brought against commitments is that decisions are less detailed and written in a sketchy manner. That said, there are some benefits from commitment decisions such as a quick and effective enforcement, so the careful balance should be struck and commitment decisions should apply to the cases where enforcement actions should be taken very rapidly.

The Chair thanked Professor Bellis for his presentation and asked him for clarifying the voluntary nature and bargaining power of the commitment negotiation. Professor Bellis pointed out that commitments are voluntarily offered by the companies, but they are not totally free and there is a gap in bargaining power. Commitments are generally submitted under the pressure derived from the threat of huge fines by the European Commission if the commitments are not acceptable to it.

2. Definition and types of commitment decisions and differences

The Chair closed the introductory part and opened the discussion on the definition and types of commitment decisions and differences existing among jurisdictions. He asked the delegate from Chile to explain the different types of commitment decisions available in Chile.

The delegate explained that **Chile** has three types of enforcement tools concerning commitments called judicial settlement, extrajudicial settlement and change of conduct. Judicial settlement is basically an agreement between a plaintiff and a defendant to settle the case and give a sort of award (i.e. reduction of fines claimed) to the defendant. Extrajudicial settlement is made between the prosecutor office and the company under investigation and must be approved by a court within a limited time (20 days). The court can either approve or reject the terms of the agreement but it cannot go change them. Extrajudicial settlement cannot apply to cartel cases. The third possibility is change of conduct, in which a commitment is offered by the investigated company and the investigation is terminated without intervention by the court. Both judicial and extrajudicial settlements are applicable to merger cases as well.

The Chair thanked Chile and turned to Russian Federation to explain the possibility of commitment or settlement under the Russian law.

The delegation of the **Russian Federation** reported that reliefs from liability based on the agreement among the parties at the stage of investigation of a case by the Federal Antimonopoly Service (FAS) on the violation of competition law are not allowed under the Russian law. FAS is not empowered to make any agreement including commitment at this stage. On the other hand, there is a settlement procedure during the process of appeal of a decision rendered by the FAS. In such settlement procedure, a company and the FAS can conclude a written agreement on the conditions to settle the case, which is then subject to approval by the court for execution. The role of the court is to guarantee the protection of the rights of the parties. This settlement procedure, firstly taken in 2002, has been applied to many cases, especially for large and important matters such as cement, caustic and gas industries. Recognition of guilty by the company is a precondition for settlement and in return the FAS offers a discount on the fines. FAS noted that this settlement at the appeal stage is effective, and at the same time ensures protection of rights of the parties.

The Chair thanked Russia and asked Lithuania to clarify the relationship between the commitment proposal and mitigating factor in the calculation of fines, and to explain the reason why the average duration of commitment decisions is not shorter than that of infringement decisions.

Lithuania took the floor and noted that commitment proposals can be considered as a mitigating factor in Lithuania, even if they are not enough for a competition authority to adopt commitment decisions, because that shows company's aim to improve competition. As for the average duration of a commitment procedure, it was not shorter than that of infringement decisions. This would be attributable to a number of reasons, such as the lack of clear guidance for commitment procedure, the fact that there are apparently a number of proposals of commitments which are not considered seriously, and the fact that proposals for commitments are submitted late in the process by companies. However, Lithuania acknowledged that it has not had enough cases to make definitive statements on the average duration of a commitment procedure yet.

3. Benefits and risks associated with the use of commitment decisions

The Chair moved to the third part of the discussion on benefits and risks associated with the use of commitment decisions. At first the Chair gave the floor to Professor Shiraishi to elaborate on the debate ongoing in Japan on the introduction of commitment decisions.

Professor **Shiraishi** first gave a brief overview of the historical background concerning enforcement tools similar to commitment decisions in Japan. These are recommendation decision and consent decision procedures, both of which were abolished in 2005. Under these frameworks, some big firms i.e. Intel and Seven Eleven accepted such orders for anticompetitive unilateral conducts by the Japan Fair Trade Commission (JFTC) without contesting the decision probably because there were not administrative fines for such conduct under the law and the decisions had no binding effects in private law suits. A change occurred after the amendments in 2009, that introduced administrative fines to such conducts, and in 2013, that exposes the decisions by the JFTC to direct judicial review, resulting in the increasing possibility of unilateral conducts orders being contested. Recently, the government of Japan, triggered by the Trans-Pacific Partnership (TPP), submitted an amendment bill to formally introduce commitment procedure.

The Chair thanked Professor Shiraishi and emphasised the importance of commitment decisions being sufficiently clear so that they have some value in terms of legal predictability. Professor Bellis asked Professor Shiraishi about the informal procedure in Japan, which was used before the amendments and

seem to be similar to the informal settlements in Europe before 2004, and the commitment procedure after the prospective amendment. Professor **Shiraishi** clarified that the JFTC could close an investigation by virtue of the commitment offered by the company (e.g. this happened in the Canon case before the amendments), but that was an informal arrangement and the commitment procedure will become a formal one after the enactment of the new legislation.

Professor **Bellis** added that commitment procedures should be used in situations where the law is clear and well-established. There are mixed views as to whether abuse of dominance cases should be approached in a formalistic and traditional way or in a more modern, economically sound way such as so-called effects based approach. This sort of uncertainty would be one reason why some competition authorities have heavily adopted commitment decisions in abuse of dominance cases.

The Chair thanked Professor Bellis and turned to Germany for its intervention. According to the delegate from **Germany** commitment decisions in Germany are similar to those in the EU and have been a very effective instrument because of their flexible in reacting swiftly to the problems in the market. Until now many commitment decisions have been adopted in formerly regulated sectors such as energy and telecom. The recent big case is Deutsche Bahn AG case, the incumbent railway company, in which the investigation was terminated on the basis of commitments offered to make various changes in the sale of passenger tickets. Experiences in Germany show that the overall advantages of commitment decisions outweigh the disadvantages. Germany also stressed that agencies should render well-reasoned commitment decisions for cases where new legal issues arise.

The Chair thanked Germany and invited the EU to react to the presentation by Professor Bellis on commitment decisions in the EU.

The delegate from the **European Union (EU)** mentioned the fact that the percentage of European Court of Justice approving or upholding the decisions by the European Commission has been relatively high. However, it should be taken into consideration when looking at this figure, that over the last 15 years the Commission has invested significantly in improving its internal decision-making process to ensure the better and solid decisions. On the argument as to whether commitment proposals are “imposed” by the Commission or made voluntarily by the company subject to the investigation, the EU is of the opinion that commitment procedures are completely voluntary proceedings and companies have full option to follow the infringement decision path if they feel that the EU does not have a strong case. In practice the Commission tries to use the commitment proceedings in appropriate cases where investigation should be ended swiftly or the law is clear and well-established.

The Chair thanked the EU and asked two questions to Italy: how much does a company know about the case when it offers commitments under the Italian regime which requires that the commitment proposal is made to the authority within three months from the initiation of the investigation? What are the reasons for the change in policy toward commitment decisions in Italy in recent years which has seen a more limited use of this tool?

The delegate from **Italy** responded that the formal opening decision by the Italian Competition Authority, which is promptly notified to the parties, contains a preliminary description of the competition concerns and qualification of the behaviour at stake, and therefore it is possible for the parties to rapidly propose commitments to resolve such concerns. This ensures due process requirements and the efficient use of limited resources. For the second issue, there are mainly three reasons for the recent policy change after the publication of guidelines on commitment decisions: more careful selection of the cases that should be resolved by commitment decisions, refocus on the commitments in sectors where a quicker response to a rapidly changing market is crucial, and consideration for the negative effect on private enforcement.

The Chair thanked Italy and asked the United Kingdom (UK) to expand on why the competition authority must have already a clear view of the potential breach before having a meaningful discussion of the commitments, as well as its two-part test on acceptance of commitments stipulated in its Guidance document.

The **UK** delegate observed that, for the first question, it is important that the decision to accept commitments, as with any type of decision, is based on sufficiently strong evidence. Commitment decisions should not be used as a shortcut to close a case for lack of strong evidence. As to the second questions, the two-part test asks: (i) is the case at hand the case right for commitments? and (ii) are the commitments offered right for the case at hand. The test forces the Competition and Markets Authority (CMA) to consider the benefits and risks of commitment decisions in a specific case. The benefits are procedural efficiency derived from resolving competition concerns efficiently and quickly, and saving resources. The risks are lack of deterrence, lack of legal certainty and lack of precedent. The UK delegate referred to the Skyscanner case, in which the UK courts recognised that commitment decisions are not generally instances where complex economic analysis and evidence is needed, and the CMA must consider that if the case requires a lot of analysis, it might not be an appropriate case for commitments. The UK delegate further pointed out that it is important that remedies in the form of commitments are effectively and easily monitored by the authority and by the market.

The Chair thanked the UK and invited Australia to explain its how its undertakings work in Australia. The Chair also asked the Australian delegation to describe the recent Coles and Woolworth case.

The delegate from **Australia** explained that how much detail is required in an “enforceable undertaking” is a matter of negotiation between the Australian Competition and Consumer Commission (ACCC) and the parties. At the same time, the ACCC considers transparency of the enforceable undertakings to be significant and they are always published. On the Coles and Woolworth case, the two largest supermarket operators in Australia submitted a set of undertakings, namely ending restrictive covenants in lease agreements between the shopping centres and the supermarket operators, and offering some fuel discounts. The ACCC succeeded in one case in court but lost the other, which reminds of the importance of crafting commitments in a very clear and precise way.

The Chair thanked the Australian delegation and moved on to the issue associated with market testing. The Chair pointed out that in some cases the public is not interested in giving its opinion to the market test and competition authorities had received only a few or any response. The Chair asked the delegate from Romania to report on how to make sure that the Romanian competition authority is not instrumentalised and misled by the competitors of the firms subject to the investigation and that the market testing works well.

Romania explained that the Romanian competition authority can retain external experts in cases where there are very few responses from the market test. It can also take into account similar cases from other jurisdictions and informal opinions by the third parties.

The Chair thanked the Romanian delegate and then asked Portugal for the explanation of the challenges the Portuguese competition authority experienced with regard to market testing.

Portugal took the floor to explain that it formally introduced commitment decisions in 2012, quite similarly to the European Commission, and has issued 6 commitment decisions since then. In such experience, there has been a low level of responses in the market testing, regardless of the wide publication of the market test through competition authority’s website and two national newspapers. It noted that can be partially explained by the fact that the competition concerns in the cases so far were not so controversial and the commitments proposed were relatively straightforward.

Professor **Bellis** underlined the significance of the market test to check the reality, referring to a case in which the commitments offered by a trade association were withdrawn as a result of the market test during which some of the members showed serious objections to them.

The Chair thanked the Portuguese delegate and invited BIAC to share its concerns on the current use of commitment decisions from a business perspective.

BIAC pointed out several concerns that might arise from the use of commitment decisions, namely, adoption of commitment decisions in area without established legal precedent, dependence of competition authorities on commitment decisions and less prohibition decisions, and the absence of procedural guarantee for the companies. BIAC observed that full and adequate access to the file for companies would be very important, since there is only limited judicial review of commitment decisions and the competition authorities have strong bargaining power with very high fines in case of infringement decisions. Suggestions by BIAC for future work that can help to improve the use of commitment decisions included, for instance, an analysis of the current use of commitment decisions, *ex-post* evaluation of commitment decisions, further discussion on procedural rights in commitment procedure, and enhanced consultation mechanisms to reduce divergences of commitment procedure in practice.

The Chair further asked BIAC whether or not commitments should be discussed only after a formal statement of objection is issued. BIAC answered that the issuance of a statement of objections prior to the initiation of commitment negotiation is not indispensable, but it is quite important to have something to fully inform the company of the competition concerns and the evidence within the competition authority.

Following the comments by BIAC, the **UK** commented on the need for a full access to the competition authority's file in a commitment procedure. It underlined that, while it is important that the competition authority has sufficient evidence on competition concerns and it would be possible that competition concerns are explained through a statement of objections even in case of commitment decisions, one of the benefits of this process would reside in procedural efficiency and resource saving and access to file is something that should be required in a more rigorous and adversary process, not in this type of consensual process.

Germany echoed the comments from the UK and said that commitment procedure is a way of shortening procedures and commitment decisions are a way of addressing the harm in a better negotiated way. Germany further stressed that the company has the choice to revert to contentious infringement procedure. The delegate from **Australia** also echoed the Germany opinion from a prosecution perspective and stated that the parties can choose to have the matter tested in court if they do not want to follow the shortcut procedure.

The **EU** highlighted that, although the European Commission does not exclude the possibility that commitments take place after the sending of the Statement of Objections, it would limit that to very specific cases for the sake of resource savings. As for the timing of initiating commitment negotiations, it should be early in the proceeding but should not be too early, because the competition authority should have a concrete enough idea about both the facts and the assessment of the conduct.

4. Infringement decisions vs. commitment decisions

The Chair then moved on to the issue of the choice between pursuing an infringement decision or a commitment decision. The Chair asked Professor Wright to kick off this part of the roundtable with a presentation on the use of consent decrees in the US and their possible abuses and misuses.

Professor **Wright** started his presentation by pointing out a shift from law enforcement model to a regulatory model in the US. Looking at the US agencies practice from 1950s to present, there has been a significant shift from settlements being entered in about 50% of the cases in the 1950s to around 90% today. The consequences of this shift was a new culture of consent within the agency, namely institutional incentives tending to pursue cases that have the best prospect for settlement, and move the focus to remedies and conditions that will be imposed on the consensual decisions. The shift also has the effect of subjecting the private parties to more regulatory approach by the enforcement agency.

Another cost would be the risk of creating materially adverse welfare effects, in particular when the focus is seeking out remedial conditions. Consent decrees go often well beyond the equitable relief one could get in court and run the risk of undermining the competitive value of consent decrees. Examples are abound: restrictions on merging firms' employment decisions, requiring donations to unrelated victim compensations, extractions unrelated from antitrust concerns, prohibition on conduct that parties have not engaged in. The other cost is the fact that agencies across the globe increasingly make this shift together and depend on the consensual remedies. Professor Wright emphasised that the shift runs the risk of distorting the development of the common law in antitrust, because the large part of it in the US has been obtained through the litigation. An absence of the agencies in specific types of litigation, especially litigations in areas where the law is uncertain, is a real social cost of that move. More explanation on economic analysis and economic evidence underlying the case would mitigate some of the costs, but the suppression of such analysis is another cost of the shift.

The Chair asked Professor Wright about how competition authorities can strike the right balance on the use of consent decrees or commitment decisions and infringement decisions on a practical level. Professor Wright mentioned two points: the first idea is to tap into *ex-post* review of consent decrees by agencies, by outside economists and by academics, using empirical evidence: the second idea is to ensure transparency in the consent decree process with respect to the theories of harm and economic analysis and underlying the logic of the consent decree.

The Chair turned to the **United States (US)** to invite comments in response to the presentation by Professor Wright. The delegate from the US Department of Justice (DOJ) first explained how consent decree system works. A proposed consent decree is deemed appropriate if it addresses the anticompetitive conduct in a way that eliminates the harm and prevents the reoccurrence of the infringement. The US DOJ tries to set out in a clear language the theory of harm including the economic analysis in a competitive impact statement. This is open for public comment for 60 days, and private parties can file an amicus brief. The court must approve the settlement at the end and the vast majority of settlements are approved. As for the concerns about the lack of creation of precedent, the US DOJ observes that it has tried to push some boundaries in areas where the law needs to be developed, and it has been successful in creating some positive precedent recently such as e-books and American express.

The delegate from the US Fair Trade Commission (FTC) reported that the agency resolves a large majority of its investigations through consent agreements. Consent agreements aim to resolve cases effectively, quickly and thoroughly and the relief should eliminate the harm and prevent its recurrence. It observed that the FTC does not hesitate to take the matter to litigation if these objectives are not likely to be accomplished and the benefits from settling would not outweigh the risks. The FTC does not bring cases only with an eye to settlement. Finally, the settlement process at the US FTC is functioning well, to the benefit of the agency, investigated parties and consumers alike.

The Chair thanked the US delegates and asked France to describe its experience with commitment decisions, as well as the safeguards available for the parties.

The delegation from **France** underlined that competition authorities should strike a right balance between the robustness of the preliminary assessment to identify the concerns and the saving of resources, at the same time bearing the interests and rights of the private parties in mind. In order to safeguard the rights of the private parties under the investigation, they should have the full access to the file in the commitment procedure in France. In addition, the market test ensures that commitments are acceptable to the business community; commitments are also discussed in a hearing before the Board on the basis of results of the market test before they are finalised.

The Chair thanked France and invited the Netherlands to elaborate on the Dutch mobile operator case in 2013 and the reasons for having chosen to close the case with a commitment decision.

The delegate from **Netherlands** explained that through commitments the ACM could resolve the case more effectively, in the sense that the commitments included not only refraining from unilateral announcements in the public domain concerning future prices but also introducing this as part of the compliance programmes for senior management, which is something that cannot be achieved through an infringement procedure. Concerning the lack of precedential value of the commitment decision, the ACM decided to publish the decision with as much detail as possible.

The Chair thanked the Netherland and asked Mexico to explain its commitment decision system and the criteria it uses to choose between a commitment decision and an infringement decision.

The **Mexican** delegation explained that commitment decisions were introduced in 2014 and they are available only for mergers and abuse of dominance cases. There have been only two abuse of dominance cases terminated by commitments since 2014. For the two cases, the agency chose commitment decisions because they allowed for effective case resolution and because the remedies offered by the parties were reasonable to address the concerns. COFECE is mindful that commitment decisions should be carefully used and not be considered as a substitute of regulatory enforcement actions.

The Chair thanked the delegate from Mexico and invited Singapore to elaborate on its enforcement practice for commitment decisions in cartel cases.

The delegate from **Singapore** explained that it can accept non-binding commitments for cartels. Commitments can be also useful in cartel cases for the following reasons: there are cartels by very small companies in Singapore, with very small anticompetitive harm and it would be better to accept commitments and correct the behaviour, rather than to conduct full-fledged investigation on all such cases. The CSS has accepted some commitments for horizontal agreements which gave rise to benefits and efficiencies, for instance cooperative arrangement in airline alliances. Commitments would allow the authority to reap the benefits of procedural economies, simultaneously addressing the competition concerns in such cases.

The Chair thanked the delegate from Singapore and asked South Africa to describe how its Fast Track settlement mechanism in the construction cartels works.

The **South African** delegation reported that after the soccer World Cup in 2010 there were 65 leniency applications concerning 101 projects in the construction industry. It set up a Fast Track settlement mechanism in the constructions cartels, which took the unusual approach to invite the companies to voluntarily settle the cases in return for reductions of the sanction. According to an internal calculation, the saving in terms of costs and resources was massive and equivalent to around 1.6% of the original costs, had it resolved all the cases through the infringement decisions.

5. Types of commitments

The Chair then moved to the discussion of the types of commitments that agencies can accept, i.e. behavioural, structural and other remedies. The Chair pointed out that in practice there seems to be a preference for behavioural remedies regardless of the possible monitoring issues.

The Chair asked the Korean delegation to elaborate on the Naver-Daum case, with a focus on the remedies and compensations for the victims.

The **Korean** delegation explained that in the Naver-Daum case, there were mainly two types of remedies proposed: remedies to reinstate effective competition in the market and remedies to actively improve future transaction and enhance consumer welfare. The latter remedies aimed at favouring future business by establishing non-profit foundations for dispute settlements related to Internet search industry and supported 100 billion Korean Won project by directly managing a mutual-growth support project. The company at stake further came up with damage relief measures such as supporting about 4 billion Korean Won project by contributing damage relief funds and supporting online ecosystem so that actual benefits could be shared among consumers and relevant small-and-medium-sized enterprises.

6. Monitoring compliance with commitments and sanctions

The Chair continued the discussion focussing on monitoring compliance with commitments and the possible sanctions against the breach of a commitment decision. The Chair invited Israel to explain the difficulties that the Israeli competition authority faced in monitoring compliance with binding commitments.

The delegate from **Israel** explained that in early 2000s the vast majority of consent decrees in Israel contained detailed behavioural commitments, which raised difficulties in monitoring compliance. The Israeli Antitrust Authority (IAA) applied various methods to oversee compliance, for instance it included clauses obliging the acquiring company to comply with the consent decrees in case of the change of control and the inclusion of an obligation to report periodically on the actions undertaken to comply with the commitments. The IAA further operated a monitoring unit within its organisation. However, it found that these oversight efforts were costly and not very effective, and presently monitoring is left to the market mainly through complaints by the interested third parties knowledgeable about the industry.

The Chair thanked the delegate from Israel and asked Sweden about its approach toward monitoring of compliance with commitments.

The **Swedish** delegation underlined the significance of the monitoring in that it can safeguard the efficiency of commitment decisions in effectively resolving competition concerns. It discussed two taxonomies of the monitoring methods called “self-monitoring” and “soft-monitoring”. In self-monitoring, the company undertakes to regularly submit reports on the compliance to the authority, which would save authority’s resources but may be burdensome and costly for the company. Soft-monitoring is a monitoring method that relies on the report from the third parties in case of breach of the commitments. Soft-monitoring works well because of the transparent nature of commitment procedure and the voluntary nature of commitments. Which monitoring method works better depends on the circumstances of the case and on the types of commitments at stake.

7. Challenges to achieve a better use of commitments

The Chair moved to the last main part of the discussion on the challenges for competition authorities with respect to commitment decisions and how Guidelines can help with these challenges. The Chair invited Greece to comment on its notice on commitment decisions and its practical effect afterwards.

Greece explained that the Hellenic Competition Commission (HCC) has issued a Notice on commitment proceedings in 2014, which stipulates procedural steps and possible outcomes, aiming to achieve procedural efficiency and a more expedite solution of competition problems. The Notice also sets out when it considers commitments to be appropriate, while preserving a wide margin of discretion for the agency in initiating a commitment procedure and in accepting commitments. Since the publication of the Notice, the number of commitment decisions has increased, possibly due to the fact that the HCC has enough experience in applying commitment decisions and to the fact that the Notice gives predictability and transparency to companies, resulting in more commitment proposals.

The Chair thanked Greece and turned to Spain to explain its self-binding Notice on commitment decisions and the practical change afterwards.

The **Spanish** delegation explained that, after the publication of the Notice with regard to commitment decisions in 2011, the proportion of accepted requests for opening commitment procedure has fallen from 61% to 36%, whereas the proportion of successful commitments decisions has slightly risen from 77% to 80%. The Notice sets out clear and effective criteria to be followed when accepting the proposed commitments, as well as the practical steps for the commitment procedure. The issuance of the Notice has resulted in the effective use of commitment procedure, the slight improvement of transparency and predictability.

The Chair thanked Spain and asked Finland to share its view on self-binding guideline on commitment procedure.

Finland explained that the Finnish Competition and Consumer Authority (FCCA) does not currently have the self-binding guidelines on commitment decisions. That said, it values transparency of enforcement procedure and would have to consider the necessity of the guidance when there will be more experience with commitment decisions in Finland.

8. Chair's closing remarks

The **Chair** underlined the importance of increasing transparency of commitment procedure either in the commitment decision, or in the self-binding guideline on commitments. The Chair also stressed that competition authorities would need to see how *ex-post* evaluation of commitment decisions, a novel exercise to competition authorities, would work. The Chair thanked all the participants in the roundtable and emphasised that papers submitted by the participants were very useful to frame the discussion which made the roundtable lively and productive.