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

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**Executive Summary of the Roundtable on Commitment Decisions in Antitrust Cases held at the 125th meeting of the Competition Committee of the OECD**

**15-17 June 2016**

*This Executive Summary by the OECD Secretariat contains the key findings from the discussion held under Item 9 of the 125th Meeting of the Competition Committee on 15-17 June 2016.*

*More documents related to this discussion can be found at  
[www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm](http://www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm)*

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## **Executive Summary of the Roundtable on Commitment Decisions in Antitrust Cases**

*By the Secretariat\**

Considering the discussion at the roundtable on commitment decisions in non-merger cases, held by the Competition Committee on 17 June 2016, the Secretariat's background paper, the delegates' written submissions and presentations by the speakers, several key points emerged:

***1. Most competition authorities have the power to adopt commitment decisions or other negotiated remedies in antitrust cases.***

Commitment decisions and other types of negotiated or consensual remedies in antitrust cases are enforcement tools whereby a competition authority can terminate the investigation by accepting remedies or commitments voluntarily proposed by the parties to address the initial concerns identified by the agency.

Commitment decisions are relatively new enforcement tools for most of competition authorities, except for the US where the first consent decree was entered into in 1906. It was 2004 when the European Commission formally introduced commitment procedure in antitrust cases. Today most (but not all) competition authorities in OECD jurisdictions have the power to adopt commitment decisions in antitrust cases and many of them have in fact rendered numerous commitment decisions so far.

***2. Although there are common features that can be found in the basic elements of commitment procedures of different jurisdictions, there are still divergences in legal regimes and practices by different agencies.***

There are some common features in the procedures used by different jurisdictions to adopt commitment decisions and other negotiated remedies: the need for an initial assessment or analysis of competition concerns by the agency, the voluntary nature of the proposal of commitments by the parties to address such concerns, a market test or public consultation of the proposed commitments and the adoption of legally binding commitment decisions without sanctions.

At the same time, differences can be found in the legal regimes and the practice of commitment decisions among jurisdictions, for instance, concerning the terminology used for such negotiated remedies (i.e. commitment decision, consent decree, consent order and undertaking), the different degree of reliance of agencies on commitment decisions, the discretion that agencies enjoy when accepting commitments, the requirements to be met before rendering a commitment decision, the procedural steps and the procedural rights of the parties, the coverage of commitment decisions (i.e. some competition authorities use commitment decisions even in cartels or horizontal anticompetitive agreements), and the power to directly and instantly impose sanctions in case of breach of commitments. Informal commitment procedures without legally binding effects and a mixture of commitment procedures and settlement procedures for cartels can also be seen in some jurisdictions.

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\* This executive summary does not necessarily represent the consensus view of the Competition Committee. It does, however, encapsulate key points from the discussion at the roundtable, the delegates' written submissions and the Background Paper by the Secretariat.

**3. *Commitment decisions in antitrust cases generate benefits that make them more appealing to competition authorities than infringement decisions.***

Case resolution by way of commitment decisions has some benefits for competition authorities, the parties and the public, which have led to the success of commitment decisions in many jurisdictions. The absence of fines and of the finding of an infringement are attractive features for companies subject to the investigation. For competition authorities, commitment procedures enable to save resources and lead to swifter resolution of cases. Limited and light-touch judicial review of commitment decisions allows competition authorities to obtain the ‘finality’ of the decisions faster than infringement decisions which are more prone to appeals by the parties. In a negotiated remedy procedure, commitments can go beyond what agencies can obtain in an infringement procedure, including structural remedies and various kinds of proactive and tailor-made behavioural remedies. Market testing or public consultation of the proposed commitments ensures that remedies are aligned to the reality of markets and more acceptable to the business community. Speedier restoration of effective competition is welcomed by the public as well.

**4. *However, it is generally acknowledged that there are risks associated with the extensive use of commitment decisions or of other types of negotiated remedies in antitrust cases.***

The Roundtable discussion emphasised that there are several downsides with the use (in particular with the extensive use) of commitment decisions, and therefore competition authorities should be mindful of them when relying on this instrument. These include:

- An extensive use of commitment decisions could shift competition authority from the classic *ex post* review of past behaviour through infringement decisions to a forward-looking *ex ante* regulatory approach to change market structures.
- The absence of fines could lead to a weakening of the deterrent effects of enforcement actions by agencies.
- Since commitment decisions do not usually find an infringement of competition law or are not reviewed by courts, their value as legal precedent is weaker, resulting in less legal certainty and slowing the development of competition law.
- An absence of a finding of infringement would also have negative effects on follow-on private damages actions.
- Because commitment procedures aim at achieving procedural economies, they may raise concerns about weakening of the due process and procedural rights of the parties.
- A market test in commitment procedure might not necessarily be effective because competition authorities may be misled by the observations of competitors of the parties subject to investigation.

Several solutions have been suggested to deal with such concerns: for lack of legal precedent and legal clarity, commitment decisions should apply only in cases where the law is well-established. When agencies rely on commitment decisions they should describe the concerns and the commitments in a detailed and clear manner. Some competition authorities emphasised the significance of granting the parties full and adequate access to the file within the authority, or issuing the Statement of Objections prior to the initiation of the commitment procedure, while others indicated that these would lessen the efficiency gains and should be required in adversary infringement procedure only. The discussion concluded that competition authorities should have sound and sufficient evidence of the competition concerns addressed

to the parties. More generally, competition authorities should strike the right balance between the robustness of the initial assessment and procedural speed and the saving of resources.

**5. *Competition authorities should be mindful of the benefits and risks of each procedure when deciding whether to pursue a commitment procedure as opposed to an infringement procedure.***

The discussion emphasised that commitment decisions and other negotiated remedies in antitrust cases should apply only in appropriate cases and that agencies should continue to adopt infringement decisions for purposes of fostering deterrence and establishing legal precedents. Case resolution through commitment decisions is more appropriate in cases where the benefits from this procedure outweigh the potential risks: more specifically, where the investigation can be closed quickly, effective competition can be restored swiftly through the commitments, and the law is already well-established.

**6. *There seems to be a strong preference for behavioural commitments in the practice of most agencies, regardless of possible difficulties with the monitoring of compliance with such commitments.***

In theory, structural remedies have the advantage that they are usually one-off in nature and do not require competition authorities to continuously monitor compliance. Most of the commitment decisions and other negotiated remedies adopted so far are, however, of a behavioural nature. This raises the problem that competition authority must monitor the parties' compliance with the commitments.

Some competition authorities actively monitor compliance with the binding commitments, for instance by establishing a monitoring unit within the agency, but that can be expensive and according to some even ineffective. Competition authorities often mandate the parties to periodically submit a report to the competition authority on the measures taken to implement the commitments. This saves costs and resources of the agency, but can be burdensome for the parties. It also raises a question of credibility of these reports because of their self-reporting nature. Some competition authorities depend on reports and complaints by third parties who have knowledge of the market and of the conduct at issue. The choice of the monitoring method should be made on a case by case basis, taking into account the types of commitments and the characteristics of the market.

**7. *Some competition authorities have published self-binding guidelines or guidance with regards to commitment decisions to enhance transparency and predictability of such procedures.***

In order to adopt a commitment decision in a more effective and sound way, several competition authorities have issued self-binding guidelines or provided businesses with procedural guidance. Such guideline or guidance typically sets out procedural steps and the possible outcomes of a commitment procedure, as well as the factors or criteria that the competition authority considers when deciding whether to accept a commitment proposal. The roundtable highlighted that when already in place, such guidelines or guidance have led to improvements of transparency and predictability of commitment procedures.