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

COMMITMENT DECISIONS IN ANTITRUST CASES

-- Note by the BIAC --

15-17 June 2016

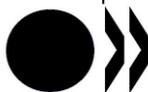
This document reproduces a written contribution from the BIAC submitted for Item 9 of the 125th meeting of the OECD Competition Committee on 15-17 June 2016.

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

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1. Introduction

1. BIAC notes the increased use by competition agencies of legislative powers to accept remedies from market participants to resolve anti-competitive concerns. Indeed, while the power to settle antitrust investigations by “consent decrees”, or “consent orders” has been widely used in the US for many decades, the use of commitment procedures is a relatively new phenomenon in many jurisdictions outside the US. For example, commitment procedures were only introduced in the majority of European jurisdictions after 2004, following the adoption of Regulation 1/2003 which established a clearer legislative framework under Article 9 for commitment decisions involving European competition law. Moreover, in recent years important non-European competition agencies, such as China, Taiwan and Korea, increasingly resort to the use of “negotiated settlements” as a means of enforcing competition law.

2. While an increasing number of competition enforcement agencies have obtained the authority to adopt commitment decisions, it is striking that the number of commitment decisions taken by those agencies appears to also steeply increasing. Indeed, as noted by the Secretariat’s Background paper, since 2004 over 150 commitment decisions have been adopted, representing approximately 23% of all decisions by national competition authorities. Importantly, commitment procedures are particularly popular with some of the major European agencies, including the French, Italian, German and Polish competition enforcement agencies.¹

3. It is equally striking that commitment procedures appear to be used particularly extensively for abuse of dominance cases, conduct involving newly liberalised markets, such as the EU energy markets, and other cases which raise particularly sensitive and often novel issues of policy and law, such as online hotel booking platforms,² online sales³ and the enforcement of standard essential patents.⁴ The commitment procedure may in addition have benefits for agencies in exploitative abuse cases that may present particular evidentiary challenges or in cases where the agency considers that price regulation is necessary.⁵ The European Commission has also explored the possibility to close its investigation of Google’s internet search services by means of a commitment decision.⁶

4. As a result, in recent years “negotiated enforcement” of competition law has not only become a very significant phenomenon in terms of the number of cases that competition agencies deal

¹ See Commitment Decisions in Antitrust Cases, Background paper by the Secretariat, page 9.

² A number of European competition enforcement agencies, in particular the French, Swedish and Italian agencies, have taken commitment decisions in relation to Booking.com’s (wide) MFN clauses included in agreements with hotels. The UK, Dutch, Danish and Greek agencies have endorsed the commitments and Booking.com has applied the commitments in all EU Member States. The German agency is challenging Booking.com (narrow) MFN clauses. See Hearing on Across Platform Agreements, Competition Committee, 27-28 October 2015.

³ Bundeskartellamt, press release, 2 July 2014 (“*Adidas abandons ban on sales via online market places.*”)

⁴ Case AT.39939 -Samsung - Enforcement of UMTS standard essential patents, 27 April 2014.

⁵ See Background Paper, supra note 1, page 12.

⁶ See for instance http://europa.eu/rapid/press-release_IP-13-371_en.htm

with, but has also become a prime enforcement tool in relation to industry sectors and practices that are of key importance to the future development of competition law and indeed the economy. Indeed, in many of these areas no or only few precedents are available, while additional guidance is often much needed.

5. While negotiated enforcement is on the rise in many parts of the world, including in areas where competition law enforcement is relatively new and where competition enforcement agencies may not yet have significant experience, BIAC notes that the scope for diverging procedures and substantive outcomes among competition agencies is significant and may well increase even further in the years to come.

6. BIAC is very much aware of the potential benefits of concluding formal, intrusive and expensive investigations into suspected anti-competitive by means of commitment decisions, both for competition agencies and for the business community. In many cases those benefits consist in more efficient and sometimes quicker decision-making, as well as -for the agency- the possibility to prescribe conduct that is particularly well-suited to address specific competition problems and that cannot be imposed by prohibition decisions.⁷

7. However, the increased use of commitment procedures also raises a number of very serious concerns. These concerns can be grouped into two categories. First, these concerns relate to the legitimacy and enforcement of competition law generally. Second, BIAC is deeply concerned about the wide discretionary powers of competition agencies to impose commitment decisions, coupled with a lack of transparency, adequate procedural guarantees, due process rights and other safeguards for the parties that are under investigation (as well as affected third parties) that tend to characterize the use of commitment procedures, as well as the absence of meaningful judicial oversight and review.

8. BIAC believes that the OECD Competition Committee is ideally placed to discuss the benefits and both categories of concerns associated with negotiated settlements and urges the Competition Committee to actively explore whether identified concerns can be effectively addressed and, if so, which ways and means are best suited. Below, BIAC will suggest a number of possible avenues for further and much needed work in the area of negotiated settlements.

9. As alluded to above in paragraph 7, BIAC is of the opinion that the increased use of commitment procedures risk negatively affecting the legitimacy and enforcement and competition law generally.

10. First, as has been observed elsewhere, the increased use of commitment procedures risks changing the nature of the competition law enforcement from a system of predominantly ex-post control of market behaviour to a regime of ex-ante, quasi regulatory system.⁸ Indeed, as the Secretariat Background paper notes, “[c]ommitment decisions allow agencies to soft regulate markets and influence market structures and companies’ behaviour in a way which would not be possible (or would be possible under stricter conditions) in infringement procedures.” This variation of “regulatory creep” is at odds with the concept that competition law enforcement is primarily intended to eliminate anti-competitive conduct, instead of imposing desirable conduct by means of positive decisions.⁹

⁷ Lugard and Mollmann, *The European Commission’s Practice Under Article 9 Regulation 1/2003: A Commitment a Day Keeps the Court Away?*, CPI Antitrust Chronicle, October 2-13(1).

⁸ See Gerard, *Negotiated Remedies in the Modernization Era: The Limits of Effectiveness*, “ Ph. Lowe and M. Marquis (eds.), *European Competition Law Annual 2013: Effectiveness and Legitimate Enforcement*.

⁹ The quasi- regulation of economic conduct by means of commitment decisions is not subject by the usual safeguards that generally apply to government regulation.

11. As BIAC has frequently stated, it is strongly in favour of a competition law regime that ensures a level playing field for the international business community and that provides for clear, rational and transparent rules for companies. As a result, BIAC is concerned that an excessive and ill-controlled use of commitment procedures may compromise the very texture of competition law enforcement globally, which may in turn lead to suboptimal levels of both competition law compliance and enforcement. In this context it can also be noted that the (liberal) use of commitment decisions may weaken the deterrent effect of sanctions for violating competition rules and weaken leniency programmes. BIAC also appreciates that, while important as a guiding principle, the integrity of the system of competition law enforcement likely does not, in and of itself, carry sufficient weight to guide competition agencies in actual, real cases.

12. Second, the increased frequency of commitment decisions is reflective of a paradigm shift from an “adversarial” to a more “negotiated” approach.¹⁰ Aside from the system-integrity concerns, this trend may not raise fundamental concerns, provided of course that more “negotiated enforcement” goes hand in hand with adequate procedural guarantees that are tailored to this new form of competition law enforcement. Unfortunately, however, this is not the case. On the contrary, it seems that many of the procedural safeguards -such as clearly articulated objections and theories of harm, full access to the file and third party observations - that are common in adversarial procedures are absent in commitment procedures. While it may be argued that companies who propose commitments to voluntarily settle a dispute waive some procedural rights -such as well-defined rights of appeal -, BIAC is of the firm position that this rationale does not justify any limitation of procedural guarantees and rights of defense that are intended to inform the investigated parties of the allegations against them and to defend themselves.

13. Below, BIAC will provide its views on the benefits of the commitment decisions as a means of negotiated enforcement, followed by a discussion of the main points of criticism against the use commitment procedure and suggestions for possible improvements and further OECD work in this area.

2. Benefits of commitment decisions as a means of negotiated enforcement mechanism

14. The benefits of commitment decisions as a means of negotiated enforcement have been well-documented. In most cases, these benefits are reported to relate to procedural and (personnel) cost efficiencies, as well as to the possibility to tailor remedies to the specific perceived anti-competitive concerns, something that often may not be obtained by means of a prohibition decision. Indeed, commitment proceedings generally allow agencies to seek flexible, forward-looking and positive obligations on market participants with a view to maintaining or introducing competition in specific markets. For instance, commitments may involve divestments, obligations aimed at providing competitors access to fixed infrastructures, or specific licensing or pricing terms.

15. BIAC does not in principle disagree with any of the efficiency claims made in relation to commitment procedures. However, it notes that, while those positive effects may be present generally, the real question is whether they occur in the specific case at hand. In this respect, a review of individual commitment decisions taken by the European Commission and a comparison with the average duration of proceedings involving prohibition decisions makes clear that commitment proceedings often do not result in significant time saving. This then raises the question whether competition agencies should be permitted to have a large measure of discretion to “freely take the commitment route,” which allows for fewer procedural guarantees and more limited judicial review than the “prohibition route.”

16. A more general observation is that the efficiency argument in relation to commitment proceedings does not have any meaningful normative value. Indeed, investigated companies are

¹⁰ See note 7 above.

unable to effectively claim that the agency should impose a specific commitment, rather than taking a prohibition decision.

17. Undoubtedly, in many cases companies would prefer the investigations in which they are involved to end with a commitment decision, rather than a decision imposing a fine with a higher likelihood of successful civil follow-on actions.¹¹ In addition, the non-finding of an infringement may be attractive for companies, as it helps limiting reputational damage typically associated with prohibition decisions and may be helpful in follow-on litigation. Moreover, commitment decisions may shield a company from further antitrust review and may sometimes serve as a quasi-exemption. But that “preference” is generally based on the prospect of potentially very significant pecuniary sanctions in a prohibition proceedings and a lack of transparency and procedural guarantees in commitment procedures.

3. Controversial side-effects and concerns

18. As mentioned above, the use of commitment decisions and other methods of negotiated enforcement mechanisms raises a number of controversial side-effects and concerns. In addition to the general negative effects mentioned above, BIAC points in particular to concerns regarding (i) the discretion of competition enforcement agencies to deal - or not deal - with matters under the commitment procedure, (ii) the risk that the scope of “voluntarily accepted” commitments exceeds what would be possible and permissible in the context of conventional enforcement mechanisms, (iii) judicial review and (iv) due process rights.

3.1 *Wide discretion to deal with matters under commitment procedures*

19. While some agencies have limited their discretion by guidelines, the majority of competition enforcement agencies typically have wide powers to deal with potentially anti-competitive matters by means of commitments. That discretion may have a number of (unintended) effects. First, it may result in differential treatment of similar cases, for instance where agencies would for policy reasons be tempted to first set an example of desired conduct in the form of a commitment, followed by more conventional enforcement action in relation to other cases. Similar complications may arise if an agency considers a matter suitable for a commitment decision -thereby suggesting that the conduct does not merit (significant) penalties, but then seeks to impose such sanctions in a subsequent prohibition decision. Second, as commitment decisions are generally less well suited to provide guidance on the law, there is an enhanced risk that enforcement policies regarding the same conduct in different jurisdictions will diverge, leading to a fragmentation of enforcement efforts.

3.2 *Overreaching remedies*

20. It is frequently noted that competition enforcement agencies have significant bargaining power over investigated parties that enable them to persuade companies to accept far-reaching commitments regarding their future conduct. Therefore, BIAC is of the position that commitments may often not be submitted entirely “voluntarily” and that there is a risk that companies may be forced to accept commitments that agencies would either not be able to impose on the basis of their competition law, or that would be disproportionate to the illegal conduct. An example of the first category would be a “commitment” to abstain from certain conduct outside the jurisdiction of the investigating agency that does not have any effect within that jurisdiction. An example of the second category would be a prohibition of certain conduct -eg the use of certain exclusivity arrangements generally - while the allegedly harmful conduct only related to certain categories of market participants.

¹¹ However, it appears that national courts in some (European) countries may increasingly treat commitment decisions and infringement decisions in follow-on damages proceedings. This may create a disincentive for companies to accept commitments.

21. BIAC is particularly concerned about the potential for unwanted extra-territorial effects as a result of “voluntary” commitment decisions.

22. The risks of disproportionate or overreaching remedies is exacerbated by the truncated nature of the analysis and the lack of effective judicial control and due process rights.

3.3 *Limited judicial review*

23. Typically, judicial review of commitment decisions is limited, if not virtual non-existent. This implies that the conventional correction mechanism to weed out inadequate or disproportionate agency decisions is generally absent. This situation exists in particular in Europe, where, based on the Alrosa judgment, Community courts’ control of the proportionality is severely limited.¹² In practical terms, commitment decisions can in general not be appealed by the parties that have agreed to the commitment, while the position of affected third parties is generally limited.

24. While BIAC acknowledges that parties that have voluntarily agreed to certain conduct may be expected not to appeal the decision that formalizes their commitment, BIAC notes that the lack of effective judicial review is highly unsatisfactory.

3.4 *Limitation of due process rights*

25. As part of commitment proceedings, the investigated parties are generally required to accept severe limitations of their rights of defense. For instance, it is not uncommon that no or only limited access to the file will be granted and that the parties will not be informed of the precise results of any market tests that the agency may embark on prior to formalizing the commitment decision.

26. BIAC is of the firm view that, while effective and full judicial review of commitment decisions is perhaps illusory, respect for the rights of defense are of prime importance in commitment proceedings. This is so especially in light of the bargaining power of agencies wishing to pursue the commitment route and the discretion that those agencies generally have with regard to the scope of the commitment. Indeed, especially in those circumstances is it important to have full access to the file - subject only to strictly defined legitimate confidentiality concerns - and to be informed in full detail of the anti-competitive concerns in a similar manner as would be the case in adversarial procedures. If and when the agency offers the option of a commitment decision, it should also enable the parties involved to make a fully informed choice between that route and the prospect of a conventional prohibition decision.

4. *Suggestions for improvements and desirable future OECD work*

27. The Competition Committee of the OECD is particularly well-placed to conduct further research in relation to the increased use of commitment decisions and negotiated enforcement tools generally and the likely effects. BIAC would very much support this and makes the following suggestions.

28. First, there may be a need to evaluate the discussions of this Competition Committee Round Table, to study in more detail the diverging approaches among agencies and, most importantly, to identify the scope for over-reaching commitment decisions that may bring about unwanted extra-territorial effects in foreign jurisdictions.

29. Second, BIAC suggests that ex-post evaluation of commitments is desirable to build an understanding of the effects of the imposed remedies and their proportionality, without however providing agencies the power to revisit those remedies.

¹² Case C-441/07P Alrosa v Commission (2010)

30. Second, BIAC believes that there is an urgent need for further reflection on the question how the due process rights of parties can be strengthened, in particular by full access to file rights and by providing full details of the allegations made against them.

31. Third, BIAC is supportive of further work that may culminate in guidelines that would reduce the scope for divergence among agencies as to the availability of commitment proceedings and the nature of remedies.

32. Fourth, BIAC believes that in light of the large discretion agencies have to conclude investigations by means of commitments and the limited judicial review of those decisions, there is an urgent need for enhanced consultation mechanisms among agencies to avoid inconsistent outcomes that may not only give rise to inefficiencies, but also compromise proper and effective competition law enforcement.