

Unclassified

DAF/COMP/WD(2016)60

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

08-Jun-2016

English - Or. English

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

DAF/COMP/WD(2016)60
Unclassified

COMMITMENT DECISIONS IN ANTITRUST CASES

-- Summaries of contributions --

15-17 June 2016

This document reproduces summaries of contributions 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*

JT03397680

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

English - Or. English

COMMITMENT DECISIONS IN ANTITRUST CASES

-- Summaries of Contributions --

This document contains summaries of the various written contributions received for the discussion on Commitment Decisions in Antitrust cases (125th Competition Committee meeting, 15-17 June 2016). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

TABLE OF CONTENTS

AUSTRALIA	3
BIAC	4
CHILE*	5
COLOMBIA*	6
ESTONIA*	7
EU*	8
FINLAND	9
FRANCE	10
GREECE*	11
INDONESIA	12
ISRAEL	13
ITALY*	14
KOREA*	15
LITHUANIA	16
MEXICO	17
NETHERLANDS	18
PORTUGAL	19
ROMANIA	20
RUSSIAN FEDERATION	21
SINGAPORE*	22
SOUTH AFRICA*	23
SPAIN*	24
SWEDEN	25
SWITZERLAND	26
TURKEY	27
UNITED KINGDOM	28
UNITED STATES	29

AUSTRALIA

The Australian Competition and Consumer Commission (ACCC) is Australia's competition regulator and is responsible for enforcing the Australian competition rules, set out in the Competition and Consumer Act 2010 (CCA).

Under the Australian model of competition enforcement, the ACCC does not have the power to make findings that there has been an infringement of the CCA. Rather, the ACCC investigates potential infringements of the CCA and, where it considers appropriate, must bring them before the Federal Court of Australia for determination. However, the ACCC can also, where appropriate, accept written commitments (known in Australia as undertakings) or resolve matters administratively.

Section 87B of the CCA gives the ACCC the power to accept voluntary written undertakings in connection with a matter in relation to which it has powers under the CCA. While the ACCC cannot demand or require such undertakings, in practice it is common for the ACCC to raise them as an option in appropriate matters. Section 87B undertakings are enforceable before the Australian courts.

The ACCC will generally only seek to resolve a matter through court-enforceable undertakings where it believes that a breach of the CCA has occurred, or is likely to have occurred, and that a resolution based on enforceable undertakings offers an appropriate solution in terms of lasting compliance with the law and redress for injured parties.

While the content of each undertaking is subject to negotiation with the party concerned, most undertakings accepted by the ACCC are for a period of between three and five years and directly address the conduct that has given rise to the alleged breach and its consequences. Undertakings can be both behavioural and structural. Following their acceptance, an undertaking may be varied or withdrawn with the consent of the ACCC and its implementation and effectiveness will be monitored.

After more than 20 years of employing section 87B undertakings to resolve competition matters, the ACCC's experience is that binding undertakings are an effective and efficient means of achieving compliance with the competition provisions in the CCA; they have generally been well-accepted by the public and the legal and business communities. Undertakings are a flexible tool and can be crafted to suit the particular commercial circumstances of the party offering the undertaking. In addition, undertakings avoid, in most cases, the costs of lengthy and uncertain court proceedings.

Section 87B undertakings are a matter of public record and are open to public scrutiny. They are made available on the ACCC's website.

BIAC

BIAC is very much aware of the potential benefits of concluding formal investigations of alleged anti-competitive conduct 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.

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 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.

There are some suggestions for improvements. First, there may be a need to evaluate the discussions of this roundtable, 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. Second, 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. Third, 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. Fourth, 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. Lastly, 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 a 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.

CHILE*

The Chilean competition law (in the Decree Law N° 211 (DL 211)) aims to promote and defend competition in the markets. This task is conferred on the Economic National Prosecutor's Office ("FNE") and the Competition Court ("TDLC"). The FNE investigates antitrust infractions, but it cannot impose sanctions, which are imposed by the TDLC, the court in charge of sanctioning.

The DL 211 establishes two types of proceedings, a contentious and a non-contentious proceeding. However, the FNE's investigations do not necessarily lead to a TDLC's proceeding. Besides them, the FNE can also enter into an extrajudicial agreement or dismiss an investigation due to change of conduct.

The FNE can file a contentious complaint so that the TDLC can oversee and try situations that could constitute violations of the competition law. Parties may enter into a settlement to close the proceeding. The settlement has been used for different types of conduct (cartels, abuse of dominance, mergers). From 2013 to 2015, there are 11 judicial settlements, 3 of which are cartel cases, 2 are abuse of dominance cases. Full settlements terminate the proceeding without court ruling, and the parties agree to some undertakings that can mitigate the risk detected by the FNE. Partial settlement has been mainly used in cartel cases.

In non-contentious cases, because of the non-adversarial character of this type of proceedings, it is not usual to have settlement. In fact, there has only been one settlement in the last 3 years in this type of proceedings.

Since 2009 the FNE has the power to enter into extrajudicial agreements with the investigated company. Extrajudicial agreements must be approved by the TDLC, and once executed, become binding. This type of agreements has been only used in abuses of dominance and merger cases. From 2013 to 2015, there are 6 extrajudicial agreements, 2 of which are abuse of dominance, and 4 are merger cases.

COLOMBIA*

The Colombian competition regime has settlements as a tool to terminate investigations for anticompetitive practices in an anticipated way. The defendant may offer to settle the investigation without admitting a violation or being imposed sanction, by proposing commitments to the Superintendence of Industry and Commerce (SIC). If the party does not comply with such commitments, the same sanctions provided for anticompetitive practices can be imposed.

Some argue that ‘commitments’ are detrimental to development of competition law, since they prevent the SIC from analysing anticompetitive conducts and creating precedents. Some critics also consider that they may lead to amnesty, since the commitments are not always connected to objectives of competition law – i.a., dissuasive function. On the contrary, some consider that they are beneficial, since they can modify conduct of companies without the need to engage in a full investigation, which enables the SIC to invest its resources on more relevant and complex cases.

Since 1998 and until 2012, approximately 46 competition cases were terminated by settlements. Among them, 38% are on limitations of the access to markets or marketing channels, followed by tying (28%) and discrimination of equivalent operations (14%). As for economic sectors, food (19%), bricks (12%), supermarkets (6%), cement (5%) and domestic gas (5%). The SIC considers that settlements must be an exceptional mechanism and should only be accepted when they include structural commitments. As such, settlement offers have not been accepted under the current administration of the SIC, since October 2012. Moreover, the current policy states that settlements are not appropriate in cartel cases under any circumstance.

Unlike in other jurisdictions, alleged infringers are not expected to accept responsibility and/or cooperate with the investigation. The amount of the sanction is not fixed in the settlement agreement, and the legitimacy to propose a settlement offer only relies on the investigated party. Unlike the “commitments”, settlements in Colombia had been considered appropriate in all antitrust cases, including cartels, although the current policy changed. The SIC does not make any analysis of the investigated conduct so the commitments do not necessarily respond to specific concerns previously identified by the SIC.

On monitoring and compliance, traditionally, investigated parties are required to constitute an insurance policy (collateral), normally valid for one year and renewable for another year, which ensures compliance with the guarantees offered. Article 22 of Law 1340 of 2009 also establishes that if investigation is finished by settlements the parties must pay an annual contribution to cover the cost of the SIC’s compliance monitoring activities.

ESTONIA*

In Estonia, the power to adopt commitment decisions was introduced in June 2013. The Competition Act (§ 637) sets out the terms for application, largely designed in accordance with the requirements set out in Regulation 1/2003.

The power to approve commitment is provided for both types of possible infringements (Article 101 and 102 of the TFEU) but in practice the Authority has adopted commitment decisions only in abuse of dominance cases. It is extremely unlikely that commitments are approved in cartel cases because of the severity of the infringement.

Since 2013 the Authority has adopted 3 commitment decisions and 4 infringement decisions. Two commitment decisions concerned the energy sector and one related to cash-in-transit service. The Authority has made decisions which included behavioural commitments, but not structural remedies. The Competition Act does not explicitly foresee the possibility to accept structural remedies and it is unlikely that an undertaking would voluntarily propose them.

In one case, the remedies have been successful in restoring effective competition because there was a transparent and fair tender carried out to purchase heating services as the undertaking had proposed, although in two other cases the fulfilment of commitments is still pending.

Until now monitoring has been fairly easy, because commitments have been quite straight-forward and easy to monitor. In practice the average period for monitoring compliance with the commitments is up to 1.5 years. There has been no example of an undertaking breaching the commitments. Should this happen the Authority has a power to adopt a compulsory precept to fulfil the commitments or an undertaking would face periodic penalty payment (up to 9600 euros) for failing to do so.

There have been too few commitment decisions to evaluate the benefits of such instrument, but it may be said that commitment decisions have saved resources and improved quality of remedies. The Authority considers that the introduction of commitment decisions has not had significant impact in the number of enforcement actions, but the undertakings have become more aware of the possibility to offer remedies.

EU*

Article 9 of Regulation (EC) No 1/2003 provides the Commission with the possibility to conclude cases by a commitment decision. The main difference with prohibition decisions is that commitment decisions do not establish the existence of an infringement; they refer to "concerns expressed by the Commission". As such, commitment decisions do not impose a fine on the undertakings at stake.

Pursuant to Recital 13 of Regulation (EC) No 1/2003, commitment decisions are not an option in cases where the Commission intends to impose a fine, as is the case with the most serious restrictions. Accordingly, the Commission does not apply the commitment procedure to the most serious infringements such as cartels where there is no commitment possible to solve the competition problem.

If the Commission accepts commitments, it may adopt a decision which makes them binding on the parties. The commitments can be of behavioural or of structural type. The commitments must adequately address the identified competition concerns and also be unambiguous and self-executing.

Since 2004, out of 57 antitrust decisions (excluding cartels), 35 decisions concerned commitment decisions; 16 decisions involved Article 101 TFEU prohibiting anticompetitive agreements, 18 decisions involved Article 102 TFEU prohibiting abuse of dominance, and one involved both Articles. 74% of all commitments was of behavioural nature and 26% was structural. Commitment decisions are particularly important in markets in the process of liberalisation such as energy sector and markets that require prompt intervention, but antitrust proceedings could be concluded with a commitment decision in all sectors.

The possibility to adopt commitment decisions enhances the efficiency and the effectiveness of the enforcement activities of the Commission. Both commitment decision and prohibition decision have their respective characteristics and advantages, and the choice of which procedure to follow depends on the characteristics of each case. Examples of factors for choosing commitments are procedural efficiencies and quick impact on the market. Deterrence effect, established precedential value and advantages for private enforcement are the main characters of prohibition decisions. Besides, seriousness and duration of the infringement, the timing of commitment proposal made, and the number of parties involved can affect the choice above. When commitments are appropriate, there are benefits for both enforcers and the parties concerned.

FINLAND

In Finland, the antitrust proceedings can end at least in three different ways. If the Finnish Competition and Consumer Authority (FCCA) finds enough evidence of infringement of the Competition Act, it can make a proposal of penalty payment to the Market Court and it can at the same time adopt a prohibition decision ordering to stop the infringement. The FCCA can adopt a prohibition decision separately without the proposal of penalty payment or adopt a decision obliging the parties to comply with commitments. The FCCA can impose a periodic penalty payment to enforce the decision issued on the basis of the Competition Act. The Market Court can order a periodic penalty payment to be paid.

The FCCA has adopted altogether nine commitment decisions in 2004-2015 and 15 decisions establishing an infringement of the Finnish Competition Act or article 101 and 102 TFEU, excluding all cartel decisions. The FCCA has accepted commitments in vertical (2), horizontal co-operation (1) and also in dominance cases (6), but not in cartel cases. The FCCA has adopted commitment decisions most often in the telecommunications sectors (4 out of 9), one in the banking sector, one in the motor vehicle sector and the rest in miscellaneous sectors (fuels, explosives, monitoring register of animal breeding). The FCCA has not adopted commitments in the fast-moving sectors.

Out of the nine commitment decisions adopted by the FCCA in 2004-2015, in seven cases it took less than five years and in two cases it took roughly five years from the first procedure, complaint or the FCCA's own initiative, to the adoption of the commitment decision. In five of seven cases, it took roughly a year to adopt the decision. During 2004-2015, the FCCA adopted 15 infringement decisions (excluding cartels) and the finality of these decisions is achieved years after the FCCA's decision, as appeals to courts tend to take years in Finland.

If the undertaking has acted contrary to the commitment decision, the FCCA has to make a full proposal to the Market court establishing the existence of the infringement. A national Competition Act Working group is assessing whether the FCCA should be granted powers to propose penalty payments for breaching commitment decisions. The commitment decisions adopted by FCCA can be appealed to the Market Court and further to the Supreme Administrative Court, but the Courts have not dealt with any commitment decisions in antitrust cases.

FRANCE

La procédure d'engagements a été introduite en droit français par l'ordonnance n°2004-1173 du 4 novembre 2004, quelques mois après l'entrée en vigueur du Règlement 1/2003 qui prévoit que les autorités nationales de concurrence doivent notamment disposer de tels pouvoirs. L'Autorité de la concurrence a ensuite précisé dans un communiqué de procédure du 2 mars 2009 les principales étapes et le fonctionnement de la procédure d'engagements.

Les textes ne prévoient pas quels comportements peuvent faire l'objet d'une procédure d'engagements – mais de fait l'Autorité ne l'applique pas aux pratiques les plus graves. Quant à son déroulement, plusieurs étapes sont à distinguer : le déclenchement de la procédure, à l'initiative de l'entreprise, avant toute notification de griefs ; l'évaluation préliminaire effectuée par les services d'instruction, qui précise en quoi les atteintes à la concurrence relevées sont susceptibles de constituer une pratique prohibée, sans pour autant qualifier les pratiques ; l'offre d'engagements formalisée par l'entreprise en vue de répondre aux préoccupations de concurrence identifiées, qui doivent être pertinents, crédibles et vérifiables ; la publication de l'offre d'engagements, à destination du saisissant, du commissaire du Gouvernement et des tiers dont les intérêts pourraient être affectés, qui ouvre un test de marché durant lequel les observations formulées permettent de vérifier la pertinence des engagements proposés, et le cas échéant de les amender ; enfin, après une séance organisée devant le Collège, si les engagements proposés sont considérés comme répondant aux préoccupations de concurrence, l'Autorité adopte une décision unilatérale les rendant obligatoires et mettant fin à la procédure.

Sur 56 décisions d'engagements adoptées depuis 2004, 59 % portaient sur des préoccupations en lien avec des pratiques d'abus de position dominante, 27 % sur des ententes, pour l'essentiel verticales, et 14 % sur des pratiques mixtes (ententes et abus de position dominante). Les secteurs des télécommunications, de la publicité, de la presse et de la distribution, notamment en ligne, sont ceux dans lesquels le plus de procédures d'engagements ont été ouvertes.

Le suivi des engagements conditionne leur effet utile, et plusieurs questions peuvent ici se poser aux entreprises comme à l'Autorité. En matière de durée, les engagements peuvent être adoptés pour une durée indéterminée, lorsqu'il doit être durablement remédié aux préoccupations de concurrence, ou être limités dans le temps, si le rétablissement de la concurrence est prévisible. Le suivi de l'exécution des engagements, qui incombe à l'Autorité, passe par des mécanismes variés et qui dépendent de la nature des engagements : surveillance interne *via* un rapport annuel transmis à l'Autorité, création d'un comité interne d'évaluation, recours à un tiers indépendant... Les entreprises étant à l'initiative des engagements, leur non-respect est tenu pour grave et appelle une sanction exemplaire. Enfin, si les décisions d'engagements ne valent ni reconnaissance par l'entreprise, ni constat par l'Autorité de l'existence d'une pratique anticoncurrentielle, celui qui s'estime victime d'une pratique ayant fait l'objet d'une telle décision peut engager une action en réparation, à charge pour lui d'en établir le caractère anticoncurrentiel.

GREECE*

The possibility to adopt commitment decisions is provided for in the Greek Competition Act. The HCC has issued guidelines concerning commitment proceedings in 2014 (Notice), in order to give undertakings practical guidance. Since the adoption of the Notice, the HCC has issued an increased number of commitment decisions.

The HCC enjoys a wide margin of discretion in deciding on commitments. The HCC considers commitments to be appropriate in cases where the competition concerns (a) are readily identifiable; (b) are fully addressed by the commitments and no other new concerns emerge; and (c) may be efficiently resolved within a short period of time. The Notice also states the instances in which the HCC will not accept commitments such as cases involving serious restrictions of competition (cartels, hard-core restrictions and serious abusive conduct).

The digitalization of the HCC systems (Digital Competition Commission Services) is expected to facilitate further the commitment procedure, thereby reducing administrative costs and freeing resources.

The HCC has the power to accept structural and/or behavioural commitments, but structural commitments have not yet been adopted. The HCC is not expressly obliged to verify that commitments do not manifestly go beyond what is necessary to address competition concerns, nor that the parties have not offered less onerous commitments that address the competition concerns adequately.

Commitments may immediately, fully and efficiently deal with competition concerns whilst allowing for a better allocation of resources. Offering commitments at an early stage of the procedure may promote flexibility and shorten the time frame for resolution. However, those perceived benefits have yet to materialize to the fullest, primarily because of late offering of commitments.

The extensive use of commitment decisions entails a risk that the parties involved may possibly delay or manipulate the process, so as to avoid an infringement decision, to the detriment of the deterrent effect and the legal clarity. There is also an increased concern that commitment decisions may have a chilling effect on follow-on damages actions. The Notice and decisional practice of the HCC aim at minimizing both these risks, by applying rigorously and coherently the criteria of appropriateness and eligibility of cases to be resolved by commitments.

INDONESIA

The Indonesian competition authority (KPPU) issued in 2006 a Commission Regulation No. 1 concerning Case Handling Procedure which introduced for the first time a form of commitment decision in Indonesia, known as 'behavioural change provision'. This was triggered by Mandiri Bank case in 2001.

The Commission Regulation states that: (i) the KPPU can decide that further investigations may be unnecessary if the businesses involved in the investigation commit to change their behaviour; (ii) the behavioural change be the ceasing of the anti-competitive agreement or activity and/or paying the damage caused by the alleged infringement; (iii) the implementation of the behavioural change must be conducted within 60 working days. During this period, a dedicated monitoring team formed by KPPU will monitor and evaluate the behavioural change. Should the businesses fail to fulfil their obligations, the KPPU will resume the enforcement procedure for further examination.

Since the adoption of the Commission Regulation No. 1/2006, the KPPU has issued 7 commitment decisions (behavioural change provisions).

During these 4 years of the implementation, the commitment procedure has been subject to a number of challenges. Most challenges related to the lack of legal basis of this practice, and to the moral hazard that it may bring. In light of these concerns, the KPPU made changes to the case handling procedure with the objective of improving its effectiveness and due process. The revised version of case handling procedure is included in Commission Regulation No. 1/2010.

The KPPU still needs a comprehensive guideline to prevent multiple interpretation and politicisation of this procedure, whereby allowing KPPU to maximise benefits associated with the procedure. These include procedural economy and efficiency, speedy improvement of the market conditions, and increased legal certainty for business, and in the long run contribute to robust investment in Indonesia.

ISRAEL

Since the year 2000, the Director General has been authorized to reach proposed consent decrees with parties to alleged infringements of the Restrictive Trade Practices Act 1988 (hereinafter – "the Law"), in lieu of other enforcement measures, and apply for their approval by the Antitrust Tribunal. A consent decree approved by the Antitrust Tribunal has the force of a District Court judgment, for all effects and purposes. Since the law was amended to allow for consent decrees, the Israeli Antitrust Authority (hereinafter – "the IAA") has reached 35 consent decrees, which constitute about 30% of the enforcement proceedings pursued by the IAA.

Consent decrees are one of the most flexible enforcement measures available to the IAA. A consent decree may replace both administrative enforcement procedures and criminal proceedings under the Law. Furthermore, the Director General has broad discretion as to when and how to use this proceeding, both in relation to the types of violations and in relation to the types of remedies adopted. Remedies under a consent decree can include behavioral and structural commitments, a monetary payment to the state treasury or any other remedy agreed to by the parties. Transparency and review of the Director General's discretion are achieved through the mechanism set by the Law, which requires the Director General to publish her intention to reach the consent decree, inviting those who might be harmed to present their arguments, and ultimately – through the requirement for the Antitrust Tribunal's approval.

Given that a consent decree is by definition an outcome of negotiations, it entails the Director General's forgoing a more severe sanction that a full enforcement procedure would have yielded, assuming an infringement had been established. As a consequence, overly aggressive use of consent decrees and underutilization of other enforcement measures might reduce the severity level of sanctions imposed for infringements of the Law, by that diminish the IAA's deterrence ability, and subsequently diminish the Director General's ability to obtain desirable and valuable consent decrees.

Thus, Consent Decrees are an important supplement to full-enforcement proceedings, but cannot replace them. Maintaining the advantages of consent decrees requires that they co-exist with vigorous continued use of other enforcement measures.

ITALY*

Commitment procedures as envisaged in Art. 9 of Reg. n. 1/2003 were introduced in Italy in 2006. One difference is that the Italian framework sets a term for the presentation of commitments to the Italian Competition Authority (AGCM), that is three months from the notification of the decision opening the investigation.

The Notice, issued in 2006 and lastly revised in 2012, states the general policy on when commitments may not be accepted, and that commitments must be suitable to be fully and timely implemented and be easily verifiable.

Commitments have been used in 62 proceedings since 2006. After an extensive use during the first years (2007-2011), commitment decisions have become much less common recently: between 2012 and 2015 the share of commitments among the overall number of proceedings has plunged to 27%, while infringement decisions have nearly reached 60% of the total.

Commitment decisions have involved a variety of sectors; electricity and gas (14 cases), transport (7), telecoms (5), publishing (4), banking (3) and pharmaceutical (3). 55% of commitment decisions (34) concern abuse of dominance, while 38% of the, (26) concern anticompetitive restraint (excl. cartels).

All commitments are behavioural, except for one recent case in financial info services sector ended with structural commitments (divestiture of branch).

On commitments and private enforcement, there have been some interesting cases in the evidential value of commitment decisions in damages actions and acquisition and protection of documents filed during the investigations.

Commitments can be particularly effective in novel and fast-moving markets, as exemplified in the Booking.com/Expedia investigation, in which several other European agencies coordinated. That required the AGCM to adjust its timetable for the presentation and assessment of commitments.

The Notice revised in 2012 has served as a thoughtful and critical review of the GCM initial practice and called for a more cautious use of this tool. Commitments can be useful, provided that they are used wisely and with care. Nevertheless, full-fledged investigations aimed to detect and punish infringement remain key tools to ensure deterrence, foster legal certainty and protect consumer welfare.

KOREA*

A consent order refers to an agreement or settlement that promptly closes a case without having to establish the illegality of the conduct of an enterprise investigated by the Korea Fair Trade Commission (KFTC). Consent orders were introduced in late 2011. They enable the KFTC to resolve an investigation under the Fair Trade Act (Act) in a more flexible manner. A consent order was also introduced to the Act on Fair Labeling and Advertising in 2014.

A consent order is applied to conduct allegedly in violation of the Act, but cartels and other serious violations are exempted.

A consent order by the KFTC does not necessarily mean that the KFTC establishes the conduct is illegal. Once a consent order is approved, it becomes binding on the enterprise. The KFTC has to check on the implementation of the consent order. In the case where the consent order is not executed and the company has no justifiable reason, the order shall be repealed or a fine up to 2 million won per day can be levied until the company complies with the order. The procedure for consent orders is largely similar to that in other countries, but one differently from other jurisdictions the KFTC is obligated to consult with the Prosecutor General before finalising the consent order.

Consent decrees allow prompt and actual damage relief for consumers, as well as swift and effective recovery of the status of competition in market. This is possible only if remedies are designed in consultation with the enterprise and subject to the views of interested parties who are aware of the market situation. Benefits for businesses can be measures in the savings on time and cost to handle the case, and in the minimal impact on their corporate reputation. The procedure has also benefits for the KFTC which will be able to reduce cost of the administrative process and of the judicial review procedure.

Since late 2011, there have been 5 consent orders: 2 concerned abuses of market dominance, one an abuse of superior bargaining position, one a merger case and one in unfair advertisement. In the first consent decree (Naver-Daum case), the investigation was closed with remedies to recover effective competition and to establish damage relief measures for consumers.

LITHUANIA

The Law on Competition states that the Competition Council shall adopt a resolution to close the investigation if the actions did not cause a significant damage to the interests protected by the law and the undertaking suspected of the violation of the Law has voluntarily terminated the actions and submitted to the Competition Council a written obligation not to perform such actions or to perform actions eliminating the suspected violation or creating preconditions to avoid it in the future.

The courts have confirmed in their practice that when adopting a commitment decision, the Competition Council does not have to establish that the investigated undertaking has indeed infringed the Law on Competition. The Competition Council enjoys a wide discretionary power when deciding whether or not to adopt a commitment decision in a particular case and what the scope of commitments is.

In total there have been 62 infringement decisions in antitrust cases and 8 commitment decisions for the period from January 2004 to May 2016. Commitment decisions have been adopted mostly in cases of alleged abuse of dominance. There has not been any sector that is more frequently subject to commitment decisions than other sectors.

Competition rules in Lithuania allow both structural and behavioural remedies. In practice, behavioural remedies were adopted in many cases by obligating undertakings to change contract clauses.

In its earlier practice the Competition Council did not market-test commitments. However, in its recent decisions the Council announced publicly the commitments for comments before adopting them.

Aiming at deterring the breaches of commitments, the Law on Competition establishes that a fine of up to five per cent of the average gross daily income in the preceding business year may be imposed on undertakings for each day of failure to meet the assumed commitments.

In order to ensure the compliance with the Law on Competition, the Competition Council usually obligates the investigated undertaking to report within a given timeframe to the Competition Council how it has implemented the commitments and to provide evidence thereof.

Usually commitment decisions are not appealed to courts. Courts have held that assessment of commitments can be divided into the assessment of the form of commitments and the assessment of substantive adequacy of commitments. Accordingly, the courts have reviewed whether commitment decisions addressed these issues properly. On the other hand, the judicial review is limited and a court could not substitute its own assessment for that of the Competition Council.

According to the Law on Competition, the Competition Council adopts a commitment decision without the need to establish an infringement. Therefore, a plaintiff in a private damages action could not claim that the Competition Council established an infringement.

In general, the benefits of commitment decisions have materialized. However, the average duration of commitment procedures was not shorter than that of infringement investigations.

MEXICO

Under the Mexican competition law, commitments are available only for merger and relative monopolistic practices cases (abuse of dominance). Until now, all abuse of dominance cases involving settlements have been resolved with behavioural remedies including cease and desist orders.

The new Federal Economic Competition Law in 2014 granted enhanced powers to the Commission, including the possibility for parties to terminate a procedure in an anticipated manner by reaching pro-competitive solutions without the delay and drain of resources associated to in-depth investigations. Economic Agents involved in abuse of dominance investigations may request an exemption or a fine reduction by offering viable commitments to the Commission.

As means of providing greater certainty and transparency, COFECE published in 2015 the “Guidelines on the Procedure for the Exemption and Fine Reduction Benefit for Abuses of Dominance and Unlawful Concentrations” by which it defines a standardised approach of the procedures in detail, including negotiation of settlements and offering of commitments.

For commitments in abuse of dominance cases, the Commission prefers behavioural remedies, since their flexibility and reversibility makes them a viable tool when dealing with changing and dynamic markets, whereas structural measures are themselves inherently risky and provide no guarantee of success. COFECE’s experience with abuse of dominance cases and commitment decisions has resulted in a considerable use of behavioural remedies.

There is work yet to be done to ensure full success of settling cases through commitment decisions, especially regarding compliance and assessment of their effectiveness. An assessment of these measures has to be done to define if the commitments have addressed competition concerns. The use of ex-post evaluations is a viable option, which would allow agencies to identify the elements that have affected the effectiveness of commitments.

NETHERLANDS

In line with its oversight strategy, the Netherlands Authority for Consumers and Markets sees commitment decisions as an effective instrument to solve problems on Dutch markets that harm consumer welfare. This contribution details ACM's legal framework for using commitment decisions, which is similar to the legislation guiding other authorities. ACM explicitly puts the impact on consumers at the centre of its actions and not, for example, the number of complaints dealt with or the number of fines imposed. We illustrate ACM's approach to commitment decisions in a description of two recent commitment cases. The cases concern abuse of dominance by a copyright collecting society and public announcements about intended market behaviour between mobile operators. The contribution also details the view from the Dutch Court on the use of commitments in the copyright case. Based on these cases and on earlier experience, ACM has formulated a number of lessons learned, which are shared in the final part of this paper.

PORTUGAL

Since the entry into force of the new Competition Act in July 2012, the Portuguese Competition Authority (PCA) explicitly has the power to adopt commitment decisions to close antitrust investigations, when it concludes that the remedies offered by the parties involved are adequate to eliminate the competition concerns identified.

Since 2012, the PCA has issued five commitment decisions in the media and motor vehicles sectors, and is currently market testing remedies submitted in the grocery retail sector.

The PCA's overall experience with the commitment procedure has been positive, as it has allowed the PCA to address competition concerns swiftly, in the benefit of consumers.

ROMANIA

Current submission is structured in four parts. In the first part, the commitment procedure in antitrust cases currently in place in Romania is presented. In the second part called designing and monitoring of commitments, the focus is on the main types of behavioural remedies accepted by RCC since the adoption of the specific secondary legislation in this area. The assessment of the sectors where the commitment decisions have been applied so far as well as two recent procedures by which RCC applied penalties to companies for failure to comply with the commitments assumed are also detailed in this section. The third part of the submission addresses the judicial review of commitment decisions and the relationship with private enforcement. In the section four and last of the paper, the objectives pursued by the RCC when accepting commitments are presented together with the situations when the RCC will not accept commitments in antitrust cases.

RUSSIAN FEDERATION

Violation of antimonopoly legislation in the Russian Federation entails the liability stipulated by the legislation of the Russian Federation. The specific characteristic of the Russian antimonopoly legislation is that a fact of an antimonopoly violation is established at the stage of the investigation in accordance with the Chapter 9 of the Law on Protection of Competition, and the guilt - at the stage of the proceedings on an administrative offense/criminal proceedings. In fact, there is a situation when a violation element (a fact) and the element of composition of the same violation (guilt) are the results of different procedures.

Because of the specific characteristics of the Russian legislation mentioned above, the institution of relief from liability under the agreement of the parties at the stage of initiation of a case on violation of antimonopoly legislation is not existed in Russia. Russian competition authority is not empowered to make any commitment agreements with an economic entity on the stage of considering materials on violation of antimonopoly legislation.

At the same time, in the process of appealing of a decision of an antimonopoly authority the settlement procedure exists.

The procedure and conditions of the settlement agreements, as well as requirements for its content and execution are provided by Chapter 15 of the Arbitration Procedure Code of the Russian Federation.

In case of conclusion of the settlement agreement, an economic entity and the FAS Russia make an agreement in the court on the compromise conditions to settle their dispute upon competition legislation.

In practice, settlement agreements are usually concluded upon cases of abuse of dominant position by establishing and maintaining monopolistically high prices. However, they are allowed in almost any antitrust disputes. The relevance and effectiveness of such agreements are proved by the fact that they usually are concluded on large or socially important matters.

The settlement agreement, approved by the court, is compulsory for execution. This is also a guarantee of protection of rights of the Parties of the agreement. At the same time, the settlement agreement is possible to challenge if it violates the rights and interests of other persons or considers to be contradictive to the law.

The FAS Russia suppose that the settlement agreements are an effective tool for compromise resolution of disputes between economic entities and the FAS Russia on the stage of the court appeal. The FAS Russia believes that the development of the institution of settlement agreements is necessary because this is one of the effective tools to exercise its public functions. At the same time, settlement agreements are an effective way of ensuring the rights and legitimate interests of participants of the case, including the right to judicial protection.

SINGAPORE*

Negotiated remedies in Singapore have taken the forms of legally binding commitments, non-binding undertakings and re-filing of notifications with amended scope. Singapore has adopted these types of decisions on all types of cases, including horizontal agreements, abuse of dominance and mergers.

The Competition Commission of Singapore (CCS) is empowered to accept legally binding commitments only for merger cases (Section 60A of the Competition Act).

Parties under antitrust investigation may offer non-binding undertakings. CCS may close an investigation if the undertaking addresses the competition concerns. CCS needs to resume the investigation in case of breach of the undertaking, as opposed to enforcing directly against breach of a binding commitment.

Future conduct may be notified to CCS for guidance. Where CCS expresses a competition concern, the parties may re-file the notification with an amended scope of conduct and CCS may issue a clearance decision or guidance, granting immunity on the amended scope of the conduct. In the event of a 'breach', CCS may open a fresh investigation against the actual conduct.

From 2006 to date, CCS has adopted 11 negotiated remedies (including all the three types above) out of 28 enforcement cases and the number is growing. 6 decisions relate to from abuse of dominance, two mergers and three horizontal agreements. They account for 86% of abuse of dominance, 40% of merger cases and 16% of horizontal agreement cases. One remedy was structural and the remaining 14 were behavioural.

Negotiated remedies are relatively frequent in aviation and food & beverage industries. Four cases involved 'network industries', two cases involved 'aftermarkets', one case involved the online/digital sector.

In 2013, CCS established the CRU (Commitments and Remedies Unit), an internal functional body working for enhancement of commitments in Singapore.

One drawback of the current system is the lack of legal power to accept binding commitments for anticompetitive agreements and abuses of dominance. It is plausible that this gap be filled via legislative amendment in the near future.

SOUTH AFRICA*

The Competition Act (Act) provides that, if the Competition Commission (Commission) and a respondent “agree on the terms of an appropriate order,” the Competition Tribunal (Tribunal) may confirm the agreement in a consent order.

The principle of appropriateness constitutes an important limit to the Commission and Tribunal’s discretion in imposing remedies. Consent orders are therefore settlement agreements reached between the Commission and respondents and generally after the Commission has completed an investigation. The Tribunal must confirm a consent order in order for it to be legally enforceable.

The Commission requires that the agreement incorporates the following material terms: an admission of a contravention of the Act; payment of an administrative penalty; cessation of the anticompetitive conduct; implementation of a compliance programme; and cooperation with the Commission in the prosecution of any other respondents. Depending on the conduct, the implementation of a remedy to address the anticompetitive conduct will be a key feature of the settlement and may have an impact on the quantum of the administrative penalty.

The number of consent orders has increased recently. From a historical view, there were 8 consent orders in 2009 and 5 in 2010, but increased to 21 in 2011, 27 in 2012, 14 in 2013 and 42 in 2014, respectively. For the financial year 2014, the Commission concluded 43 settlement agreements in 2014. 18 settlements agreements were in the construction industry, arising out of a Commission’s investigation into the industry and its Construction Fast Track Settlement Programme. This involved the unusual approach of inviting firms to settle alleged past transgressions and many firms responded positively to the invitation. Of the 43 cases settled, 39 relate to cartel contraventions, whilst three relate to abuse of a dominant position and one relates to a vertical practice. The Tribunal, however, confirmed 42 consent orders.

The increase in consent orders issued by the Tribunal has largely been driven by the increase the settlements of cartel cases. This provides a clear indication of the success of the Commission’s Cartel division and the leniency policy that underpins the uncovering of cartel cases.

SPAIN*

Commitment decisions in antitrust were introduced in 2001, but they become more frequent after the reforms of the Spanish Competition Act of 2007 and the publication of a Commitments Notice (Notice) by the Authority in 2011. There had been only three cases terminated with a commitments decision from 2001 to 2007, but since then 29 cases ended with commitment decisions.

The Notice sets practical guidance to the Authority and shows companies how to proceed and what to expect when they offer commitments. The Notice covers the procedural issues that will be taken into account by the Authority to decide whether a commitment will be accepted or not. For example, it requires that commitments solve in a clear and unambiguous way the competition issues, that they can be quickly and effectively implemented, and that compliance is viable and effective.

The Notice also states that the Authority will not apply a commitment procedure in the following cases: (i) if the investigated conduct is an infringement related to a cartel or if its effects are of a one-time nature; (ii) the conduct has produced irreversible effects on competition for a long time or if they had affected a substantial part of the market; (iii) the offender has been previously punished for a similar competition infringement or has been a party to a similar commitment decision; and (iv) when a declaration of infringement is necessary to preserve the efficiency and the deterrent function of competition laws.

Since the publication of the Notice, the Authority has authorised 12 commitments, out of 16 accepted requests. It has denied the initiation of the proceedings in 28 cases. Comparing these figures with those prior to the Notice, the proportion of accepted requests has fallen from around 61% to 36%, whereas the proportion of successful commitments has slightly increased from 77% to 80%, showing that the action of the Authority is now more predictable and efficient.

Commitment decisions can be an efficient way of closing an investigation and restoring competition. Despite these advantages, it is not a suitable solution in all cases. The Notice has proved to be a useful guide for both the Authority and the companies, resulting in improvement of transparency and legal certainty.

SWEDEN

During the past decade, the Swedish Competition Authority's ("SCA") experience of assessing commitment decisions in a number of antitrust cases has given the SCA valuable insight into the assessment of whether the conditions for adopting a commitment decision in a given case have been met. The SCA's experience shows that adoption of commitment decisions is particularly well-suited for cases concerning complex markets and cases where the conduct consists of complex contractual activities and exhibits both positive and negative elements.

In this contribution the legal requirements for the adoption of commitment decisions under the Swedish Competition Act are presented, followed by a presentation of the SCA's most recent cases where commitment decisions were adopted.

The presentation is followed by a discussion of the benefits and risks associated with using commitment decisions as an enforcement tool. The discussion centres around the appropriateness of this enforcement measure with reference to the circumstances of a given case, looking at the timing of the adoption of a commitment decision, the types of infringements which are appropriate for commitment decisions, and the types of conduct and markets under investigation.

Finally, the contribution considers the criteria to be fulfilled in order to accept a commitment decision, discussing the identification of the competition problems, issues of proportionality, the requirement to motivate a decision to accept commitments, and the monitoring of commitment decisions.

SWITZERLAND

Switzerland knows a form of negotiated/consensual termination of antitrust cases with the amicable agreement in the procedure of an amicable settlement according to Article 29 of the Swiss Cartel Act (Cartel Act).¹ Like commitment decisions in other jurisdictions, the Swiss amicable settlement entails legally binding commitments voluntarily submitted by parties in an antitrust investigation with the objective of eliminating a restriction of competition considered unlawful by the competition authority.

Unlike commitment decisions in other jurisdictions,² amicable agreements in Swiss antitrust law are not only possible in investigations for alleged abuses of dominant positions and vertical anti-competitive agreements but also in investigations for cartels. In conclusion, the Swiss agency does not distinguish between commitments and settlements, but operates with amicable settlements in all types of cases of unlawful restrictions of competition.

Like commitments in most jurisdictions,³ amicable agreements in Swiss antitrust law are included in formal decisions. However, since amicable settlements are also applicable to unlawful restrictions of competition that are subject to direct sanctions and the Swiss Competition Commission (COMCO) needs to adopt an infringement decision to impose sanctions, amicable agreements do not render a full investigation unnecessary in these cases.

Nevertheless, there is evidence that amicable settlements generally lead to shorter and less expensive proceedings. This is mostly due to the fact, that in cases with a settlement, the settling parties usually agree on a reduced density of argumentation in the infringement decision. Thus, the investigations are reduced to the minimum necessary in order to establish an infringement.

From the perspective of the companies, in addition to shorter and less expensive procedures and a reduction of fines, benefits like a quicker resolution of cases, positive publicity and an improved quality of remedies are likely to have a positive impact on the decision of a company to enter into an amicable settlement with the COMCO.

¹ Federal Act on Cartels and other Restraints of Competition (Cartel Act, CartA, <https://www.admin.ch/opc/en/classified-compilation/19950278/index.html>).

² OECD, Directorate for Financial and Enterprise Affairs, Competition Committee, Commitment Decisions in Antitrust Cases, Background paper by the Secretariat (DAF/COMP(2016)7), hereinafter OECD background paper, para. 1.

³ OECD background paper, para. 3.

TURKEY

1. In Turkey, there is no legal procedure for adopting commitment decisions set by Turkish Competition Act No 4054 (Competition Act). Although parties cannot offer commitments officially, the decisions adopted by the Turkish Competition Authority's (TCA) Board (Board) on the basis of Article 9(3) of the Competition Act can be accepted as commitment under certain conditions. According to this provision; *"The Board, prior to taking a decision pursuant to the first paragraph, shall inform in writing the undertaking or associations of undertakings concerned of its opinions concerning how to terminate the infringement."* As it is clear from the ground for the article, this article arranges how the Board must act in case infringements of the Articles 4, 6 and 7 are established, to terminate the infringements.

2. Throughout the years, the Board has adopted some decisions as a way to close antitrust investigations on the basis of this provision. For example, in *Cable TV Operators*⁴ and *Turkish Telecom*⁵ Decisions, upon the parties' acceptance of the Board's requirements for terminating the infringements, the preliminary inquiries were closed and the Board decided that there were no grounds for further action. In another example, *Kale Pazarlama*⁶, the Board accepted commitments and the investigation was closed. *Xerox*⁷ is another example in which the Board ruled that there is no more need for action if Xerox makes necessary changes to its distribution agreements and sent its opinions to Xerox regarding the necessary changes.

3. However, it is not possible to say that this provision is applied consistently. There are numerous discussions about how this provision should be applied and under which procedure the commitment decisions should be adopted. To end these discussions, the Draft Act on the amendment of the Act No. 4054 (Draft Act), paves the way for the commitment procedure. According to the relevant article of the Draft Act; *"During a preliminary inquiry or an investigation, in case undertakings or associations of undertakings concerned make commitments for eliminating competition concerns occurred within the scope of Article 4 or 6 and those commitments are accepted by the Board, an investigation may not be initiated about those undertakings or associations of undertakings, or the ongoing investigation may be terminated."* Within this sense, Board will be able to accept reasonable commitments submitted by the parties during preliminary investigations or investigations, and decide not to launch an investigation or to end an ongoing one. Additionally, if the grounds for the commitment decision change, the Board can open an investigation or resume the investigation to determine if there has been a competition infringement.

4. It can be said that this Draft Act is similar to other jurisdictions' regulation within the sense that it entails legally binding commitments voluntarily submitted to a TCA by parties in an antitrust investigation with the objective of eliminating the grounds for the enforcement action to continue.

⁴ 25.12.2003, 03-83/1003-405

⁵ 08.01.2004, 04-01/27-9

⁶ 13.06.2005, 05-39/548-125

⁷ 02.05.2013, 13-25/331-150

UNITED KINGDOM

The ability of the Competition and Markets Authority (CMA) to accept commitments in appropriate cases is an important part of its antitrust enforcement toolkit. Under UK law, parties can voluntarily offer binding commitments to resolve the concerns identified in an investigation and the CMA has the discretion to decide whether to accept those commitments. While no decision is reached as to whether the law has been broken, commitments can allow competition concerns to be resolved more quickly or effectively than pursuing a case to its conclusion.

The CMA is also mindful of the potential impact of commitments on deterrence and legal precedent as well as on other parties affected by them. This is why it considers accepting commitments only in the right cases and subject to the third party consultation and verification provided by market testing.

To date in the UK, the CMA and its predecessor (the Office of Fair Trading (OFT)) along with sector regulators exercising concurrent competition powers have accepted commitments in 11 antitrust cases in a variety of sectors. In light of the CMA's own case experience, the CMA held a roundtable in September 2015 to hear the views of competition law and policy specialists on the opportunities and challenges of using commitments. The discussion has informed the approach to the CMA's use of commitments going forward, alongside the CMA's own ongoing practical experience.

We have set out in this submission both our own approach to the use of commitments within the legal framework in which we operate as well as highlighting some of the points raised at the roundtable.

UNITED STATES

The United States antitrust agencies – the U.S. Department of Justice Antitrust Division (“DOJ” or “Division”) and the U.S. Federal Trade Commission (“FTC”) (collectively, “the agencies”) – resolve most of their civil non-merger antitrust cases with negotiated settlements – referred to as “commitments” in this roundtable – as they do with mergers. Litigated civil non-merger cases are rare. Settlements are an important procedural tool, because they let the agencies and the target parties resolve their disputes effectively, quickly, and thoroughly. The test for an acceptable settlement, therefore, is whether it addresses the anticompetitive conduct in a way that eliminates the harm and prevents its recurrence. The agencies will not accept a proposed settlement that will not accomplish those goals; in those instances, the agencies will litigate to achieve an effective result.

The agencies’ ability to resolve antitrust violations without necessarily proceeding through litigation is an important tool to achieve effective and expeditious relief from anticompetitive conduct, without both the agency and the parties incurring the costs of delay and litigation. The agency obtains the relief it needs much sooner than it would from litigation, and it avoids the risk that it might not prevail. The parties obtain certainty about what they may, and may not, do in the future. A further benefit of negotiated settlements is that the agency and parties can discuss in great detail the scope of the remedy, including any carve-outs that may be supported by particular circumstances. A fine-tuned remedy that fully accommodates legitimate business needs of the parties while still providing full competitive relief may not be easily obtained in an adversarial litigation context. The agencies’ settlements have effectively halted unlawful conduct in many matters over the decades of antitrust enforcement in the U.S.; they have prevented their recurrence; and they have informed the public about the agencies’ view of the application of antitrust laws to economic activity.