Is it time to review the use of article 9 commitments?

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Competition analysis: Is the recent increase in commitments decisions to be welcomed? Ken Daly, partner at Sidley Austin LLP (Brussels), and Stephen Dnes, associate (New York), explain how commitments work in practice, but raise concerns over the long-term impact of settling more and more cases in this way.

Original news

In the latest developments in the European Commission's anti-trust investigation into Google (online search), Google has published details of the concessions it is making to European Union regulators. At the same time, MorningStar Inc has lodged an appeal to the General Court to set aside the European Commission's 2012 commitments decision in the anti-trust investigation into Thomson Reuters.

When would the Commission consider that an Art 101 or 102 investigation is suitable for resolution through commitments?

Despite the rapid rise of commitments decisions, the decision whether to adopt them remains subject to significant Commission discretion. Two main boundaries circumscribe the discretion--one practical and one legal.

The practical constraint is that companies cannot be compelled to offer commitments and must first signal that they are happy in principle to adopt binding commitments--the commitments proposal is at least nominally the gift of the defendant. In practice, of course, there is a two-way dialogue and a degree of negotiation over the content of the commitments.

The legal constraint is that commitment packages must 'meet' the concerns in the case, which the Commission will have stated in a preliminary assessment following its investigation. A recital to the relevant EU Regulation (Regulation 1/2003) makes it clear that commitments will not be adopted in cases where a fine would be appropriate. For commitments to be appropriate, it must also necessarily be the case that the Commission thinks the conduct capable of future remedy.

Despite those constraints, the Commission has closed investigations through commitments with increasing frequency in recent years. Since 2009, for instance, over 85% of cases under Art 102 that were closed by a decision were commitments decisions. This is a surprising result because when the commitments procedure was adopted, the Commission suggested that they would be used sparingly and as part of a blend of enforcement procedures.

What's the practice for negotiation/fine-tuning commitments between the Commission and the defendant?

The relevant EU Regulation makes it clear that 'the undertakings concerned offer commitments', so the first step is for the defendants to decide they would be happy to propose commitments and to determine what they might look like. In practice, all stages of the process tend to involve negotiation with the Commission to make sure that the package is suitable to meet the concerns in the case. The Commission will assess the suitability of the commitments before it proceeds to a market test, and will usually ask the third parties who are already involved in the investigation for information to help with fine-tuning.

In the event that the market test highlights significant concerns about the proposal and the Commission believes these can be addressed through revisions, further negotiations will begin between the Commission, the defendant, and other interested parties. Note however that 'triangular' meetings at which the Commission might assemble the defendant, interested parties, and the case team in one place have so far tended not to occur, with the Commission preferring direct communication with each party.

What's the process for running a market test of proposed commitments? When would the Commission decide not to run a full market test?

The Commission is obliged to respect the rights of interested parties under Regulation 1/2003, art 27(4) where it intends to adopt a commitments decision. It must publish a concise summary of the case and the main content of the commitments. It must also provide a period for comment of at least one month. The Commission therefore publishes a notice in the Official Journal of the European Union providing details of the market test. If it plans to accept the commitments, it must seek the approval of the Advisory Committee on Restrictive Agreements and Dominant Positions, and the Hearing Officer must also file a report on whether rights of defence were respected in the case. It is incumbent on the Commission to show that these steps were fulfilled in adopting commitments.

How does the Commission balance the need for confidentiality in relation to sensitive information against the need to provide sufficient information to allow a proper market test?

The Commission will normally accept reasoned confidentiality claims and redact the sensitive information, although it has become increasingly strict in its assessment of confidentiality claims in recent years. Parties must substantiate claims in detail and may be asked to provide alternative content that is less sensitive, but that still provides interested parties with a degree of information. For example, specific, sensitive figures might be replaced with ranges of figures that are less sensitive, such as a range of turnover.

The Commission can also contact interested parties with specific questions without breaching confidentiality, such as queries relating to hypothetical situations.

What rights do third parties have in relation to cases that are resolved by commitments?

The main rights of third parties in commitments cases derive from Regulation 1/2003, art 27(4) which creates a duty on the part of the Commission to involve interested third parties. They have a right to submit observations, and the Commission in turn is under a duty when making its decision to respond to the comments it receives in a proportionate way. Where third parties raise credible and serious concerns, this means the Commission must almost always engage in detail with the points they raise in the market test.

Significantly, the European courts have held commitments decisions to be 'erga omnes' legal instruments, adopted by the Commission, despite the fact that commitments offers are technically in the gift of the defendant. In so distinguishing commitments offers from any ultimate decisions, the courts have elevated the position of third parties and recognised the impact decisions may have on them.

In the event that they feel their rights have not been respected, third parties can complain to the Hearing Officer in the case. Ultimately, third parties can also lodge an appeal at the General Court seeking to

challenge commitments decisions. They must meet a strict standing test, but there is no reason in principle why the standing criteria would not be met in the case of third parties whom the Commission has consulted in detail during the investigation.

If third parties are unhappy with commitments accepted by the Commission, what is the scope for challenging a decision and what is the timeframe for doing so?

Third parties must show that they are 'directly and individually concerned' by the commitments decision to have standing to challenge it, a test that has been construed in the case law to mean that the third party in question must be substantially distinguished from almost all other parties. Despite its strictness, however, there is no reason that the test would not be fulfilled where third parties have been substantially involved in the investigation. The case law is nuanced, but does provide that parties who are approached by the Commission and subsequently responded are sufficiently differentiated to have standing. Other substantial interactions with the Commission can also meet the test.

The rule on timing is that the challenge must be brought within two months, plus approximately one month for publication and 'distance', resulting in a total timeframe of approximately three months. To protect legitimate interests in having proper notice, time runs from the official publication of the multi-lingual summary of the measure in the Official Journal of the European Union. The deadline therefore tends to fall some months after the Commission itself adopts the commitments, as it can take time for the summary to be translated into all the official EU languages.

What's the long-term impact on competition jurisprudence of more cases being settled with commitments?

The rise of commitments decisions poses significant concerns. Firstly, their popularity is undermining the development of precedents. Secondly, the Commission appears to be using the commitments procedure to 'settle' cases despite the commitments procedure expressly not allowing for settlements--there is a clear duty to 'meet' the concerns in the case regardless of the administrative expediency in accepting commitments, so it cannot be regarded as a 'settlement' procedure in the conventional sense.

As a result, guidance to practitioners and industry is diminished. The sources of competition law have always been several and subtle, but commitments decisions are very thin and do not demonstrate a clear line at which liability begins. Important cases with precedential significance for entire industries are being resolved through commitments. For instance, the long competition law debate surrounding patents that are adopted as part of industry standards looks set to be resolved at least in part by commitments decisions. This leaves industry with very little guidance on critically important questions.

The Commission itself is aware of the problem with precedents and stated in its White Paper at the time that the commitments procedure was adopted that the alternative means to resolve a case, namely a prohibition decision, 'would be of great importance as precedents'. Some might wonder if there has been a case of selective memory.

Commitments decisions also abrogate important procedural safeguards developed over the years to protect legitimate interests of the parties affected by the investigation. As a result, cases that are less than solid may nonetheless result in commitments, and in other cases illegal behaviour may not be properly addressed.

Moreover, commitments decisions have in some cases tended to go further than what the Commission could order on its own account. As so many investigations are being resolved through commitments, the effect is not only to blur where liability begins, but also to increase its extent. In some cases, commitments decisions even appear to be forming the foundation of legislation designed to regulate entire sectors--hardly an appropriate outcome on the basis of a decision designed to deal with a single company on the basis of the preliminary findings of a single investigation.

These are real and pressing issues, but ones that are capable of remedy. A number of simple and sensible steps would improve the situation. First, commitments decisions could provide more detail on the investigation, and especially how they are supposed to address the concerns in the case, and the Commission should not be afraid to stand up to companies who refuse the inclusion of crucial details on the

investigation, which are inevitably important to other parties affected by the investigation. A very practical procedural safeguard would be to require publication of the 'preliminary assessment', which states the concerns commitments decisions are supposed to address. This would greatly enhance transparency surrounding commitments decisions. The findings in the preliminary assessment result from a publicly funded investigation, and the interest of the public in reading the assessment is not an unreasonable one.

Commitments decisions have become one of the Commission's main enforcement tools, a position that is neither sustainable nor desirable. The issue lies not in the existence of commitments decisions, but in their extravagant overuse with no heed for important procedural safeguards or the role to be played by other enforcement tools. The sooner the current pattern of commitments decisions is reconsidered, the better.

Sidley Austin represents a number of clients with interests in cases where commitments have been offered or accepted. However, the views expressed are exclusively those of the authors and do not necessarily reflect those of Sidley Austin LLP or any of its clients. These responses have been prepared for informational purposes only and do not constitute legal advice.

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