Ten years of commitment decisions under Article 9 of Regulation 1/2003: Too much of a good thing?

antitrustitalia lunch talk

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All views expressed are strictly personal

Article 9 of Regulation 1/2003

"This is a new mechanism introduced by Regulation 1/2003 which is intended to ensure that the competition rules laid down in [Articles 101 and 102 of] the Treaty are applied effectively, by means of the adoption of decisions making commitments, proposed by the parties and considered appropriate by the Commission, binding in order to provide a more rapid solution to the competition problems identified by the Commission, instead of proceedings by making a formal finding of an infringement. More particularly, Article 9 is based on considerations of procedural economy, and enables undertakings to participate fully in the procedure, by putting forward the solutions which appear to them to be the most appropriate and capable of addressing the Commission's concerns." (*Alrosa*, C-441/07 P, para 35)

provisions of Regulation 1/2003

- sanctions for non-compliance with commitments: fines, periodic penalty payments, and reopening of proceedings (Articles 23(2)(c), 24(1)(c), and 9(2)(b))
  e.g.: Decision 6 March 2013, AT.39530 Microsoft (Tying)

- no finding whether or not there has been or still is an infringement (recital 13)
- no prejudice to the powers of national competition authorities or courts to make such a finding (recitals 13 & 22)

- not in cases where the nature of the infringement calls for the imposition of a fine, in particular not in cartel cases (recital 13; para 116 of Notice 2011/C308/06 on best practices)
  note: specific cartel settlement procedure (Article 10a of Regulation 773/2004 and Notice 2008/C167/01; Timab Industries and CFPR, T-456/10)

European Commission formal antitrust decisions 2005-2014

Cartel prohibition decisions	Non-cartel prohibition decisions	Commitment decisions	Total
55	17 (of which 4 without fines)	29	101
		= 63 % of all decisions in non-cartel cases	

indications of success

- in all these cases both the Commission and the undertakings concerned must have considered that the commitment decision provided a better outcome for the case than proceeding under Article 7 (and possibly Article 23(2)) of Regulation 1/2003
- almost no litigation before the EU Courts : no actions by undertakings whose commitments have been made binding, nor by the one undertaking (heavily) fined for non-compliance; very few actions by third parties (*Alrosa*, C-441/07 P; *CEEES*, T-342/11)
- no complaints to Hearing Officer alleging violation of procedural rights
- no complaints to Ombudsman alleging maladministration

optimal enforcement: prohibition decisions vs commitment decisions

infringement decisions:

(1) clarification of the law
(2) termination of infringement
(3) public censure
(4) deterrence
(5) disgorgement / punishment
(6) facilitation of compensation

but long and costly proceedings

commitment decision optimal if *(and only if)* the benefit of faster and more effective (2) plus the cost savings outweigh the loss in (1),(3),(4),(5), and (6)

expressions of concern about excessive use of commitments

- ✓ "One of Europe's most respected antitrust thinkers [Frédéric Jenny] laid into the European Commission's four-year-long investigation of Google […], blaming the authority's failure to close the case on Joaquín Almunia's preference for commitments over prosecution" (GCR, 09/02/2015)
- ✓ "The European Commission risks marginalizing courts and antitrust victims by reaching too many settlements with companies suspected of abusing their market clout […]. The increasing use of "commitments" – through which companies, such as Google, offer to change their behaviour in return for cases being closed – means that the policymaker is escaping judicial scrutiny, said Wahl, an advocate general at the Court of Justice" (MLex, 20/10/14)

excessive use ?

leaving aside the *Google Search* case
(in which, at the initiative of Commissioner Vestager, a statement of objections was sent on 15 April 2015, thus opening the possibility of a prohibition decision),

can it be said more generally that the mechanism of commitment decisions has been overused,

in particular under the mandate of Commissioner Almunia?

Decisions 2010-2014 (Commissioner Almunia)

Year	Non-cartel prohibition decisions	Commitment decisions	Total
2010	1	5½	6½
2011	1	2	3
2012	0	4	4
2013	2	3	5
2014	4	1½	5½
Total	**8**	**16**	**24**

Decisions 2005-2009 (Commissioner Kroes)

Year	Non-cartel prohibition decisions	Commitment decisions	Total
2005	2	2	4
2006	1	4	5
2007	4	1	5
2008	1	1	2
2009	1	5	6
Total	**9**	**13**	**22**

comparison

- percentage of commitment decisions appears somewhat higher in 2010-2014 period (67 %) than in 2005-2009 period (59 %), but this difference is entirely due to the year 2010 (first year of Almunia mandate), which is very similar to 2009 (last year of Kroes mandate) and quite different from 2014 (last year of Almunia mandate)
- fluctuations from year to year, but no increasing trend to use commitment decisions; 63 % average appears representative for the whole 2005-2014 period

- is 63 % a high percentage ?
- comparison with other jurisdictions e.g. USA
- comparison with practice under Regulation 17

Decisions 2000-2004
(Regulation 17; Commissioner Monti)

Year	Article 102 prohibition decisions	Non-cartel Article 101 prohibition decisions	Exemption or negative clearance decisions following commitments	Exemption or negative clearance decisions not following commitments	Total
2000	0	3	0	3	6
2001	5	3	3	1	12
2002	0	1	4	1	6
2003	3	1	7	0	11
2004	2	2	1	0	5
Total	**10**	**10**	**15**	**5**	**40**
			= 60 % of formal decisions concerning non-cartel Article 101 infringements		

practice under Regulation 17

- in 60 % of the cases concerning non-cartel Article 101 infringements in which a formal decision was adopted, that formal decision was not a prohibition decision but rather a decision following commitments
- in addition to exemption or negative clearance decisions following commitments, many cases were closed informally following commitments,
  for instance 10 cases in the gas sector alone in the period 2000-2003 (MEMO/03/159)
- the closure of Article 102 cases following commitments was almost always informal,
  for instance six cases out of seven in the year 1997
  (L. Idot, *Cahiers de droit européen*, 1999, p.572)

conclusion: what has changed?

- the percentage of cases closed following commitments rather than through a prohibition decision does not appear to be higher under Regulation 1/2003 than it was under Regulation 17
- what has changed is the legal instrument used to close cases following commitments
- in particular for Article 102 cases, this change undeniably constitutes progress, because
  - compliance with commitment decisions under Article 9 of Regulation 1/2003 can be better enforced
  - the formal commitment procedure provides for more transparency and better opportunities for third parties to participate in the 'market testing' of proposed commitments

further reading

papers at ssrn.com/author=456087 :

- ✓ "Ten years of commitment decisions under Article 9 of Regulation 1/2003: Too much of a good thing?" (2015)
- ✓ "The use of settlements in public antitrust enforcement: Objectives and principles" (2008)
- ✓ "Settlements of EU antitrust investigations: Commitment decisions under Article 9 of Regulation 1/2003" (2006)
- ✓ "Ten years of Regulation 1/2003: A retrospective" (2014)