CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
March 2013 (3)

The Increasing (Ab)use of Commitments in European Antitrust Law: Stockholm Syndrome

Stefano Grassani
Pavia e Ansaldo

The Increasing (Ab)use of Commitments in European Antitrust Law: Stockholm Syndrome?

Stefano Grassani[1]

I. INTRODUCTION

If an "EU antitrust hot topic of the month" award were to be attributed for March 2013, the prize would certainly go to the issue of commitments pursuant to article 9 of Regulation 1/2003, which made the front page of most antitrust newswires and blogs thanks to two notable cases.

On the one hand, on March 6, 2013, the Commission adopted a decision imposing a fine of U.S.$794 million on Microsoft for failure to comply with undertakings offered, in 2009 to the European Commission, in exchange for the closing of the abuse-of-dominance investigation related to the alleged tying of Internet Explorer and the Windows operating system.[2] On the other hand, on March 13, 2013, the Commission published in the *Official Journal of the European Union* the text of its December 2012 decision where it had accepted commitments from Apple and four publishers in connection with a supposed concerted practice as to retail prices of e-Books.[3]

Ten years after the enactment of Regulation 1/2003, these decisions give us the occasion for a few reflections on the subject of the institutional and philosophical implications that stem from the insertion in the EU framework of commitments as means to preempt further public enforcement action on the merits.

II. THE EVOLUTION OF COMMITMENTS IN THE EUROPEAN UNION: FROM THE EXCEPTION TO THE RULE

Although, strictly speaking, commitments had been resorted to, under other legal forms, in EU proceedings well prior to Regulation 1/2003,[4] when Regulation 1/2003 was passed at the end of 2002 it was widely perceived that commitments (article 9) would remain an "unusual and rare" item of the European Commission's enforcement toolkit.[5] The Commission itself had made

---

[1] Head Antitrust Practice, Pavia e Ansaldo, Milan-Italy.

[2] *See* the Commission's press release at: http://europa.eu/rapid/press-release_IP-13-196_en.htm.

[3] Case COMP/39.847 — E-BOOKS, *available at*: http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:073:0017:0020:EN:PDF.

[4] *See*, among others, *IRI/Nielsen*, where the Commission had provisionally concluded that Nielsen had abused its dominant position on the European market for retail tracking services by concluding exclusivity contracts with retailers, preventing the latter from providing certain kinds of market data to Nielsen's competitors. Further to a complaint from IRI, "the Commission conducted negotiations with Nielsen to arrive at an acceptable solution ensuring that competition was not distorted." *See* 1996 Annual Report; http://ec.europa.eu/comm/competition/annual_reports/rap96en_en.pdf). The case was settled by an undertaking from Nielsen and was thus dismissed.

[5] John Temple Lang, *Commitment Decisions and Settlements with antitrust authorities and private parties under European antitrust law*, in Fordham Corporate Law Institute, 270 (2005).

clear that commitment decisions "are not appropriate where the Commission intends to impose a fine."[6] Such a statement, if seen in light of the Commission's chronic lack of staff and need to prioritize investigations, left little hope for cases which were so serious in nature to warrant the Commission's scrutiny but, yet, not so sufficiently grave as to be potentially eligible for a fine and thus qualify for commitments.

At the same time, it was highly unclear to what extent national competition authorities ("NCAs") would be willing to take commitment decisions in their own jurisdictions.

The past decade of antitrust administration within the European Union instead shows that, after a very cautious initial approach, commitments have instead become such an ordinary ingredient of any antitrust case that "today, almost infringement proceedings outside the hardcore-cartel arena ultimately end with a commitment decision."[7]

In reality, the above mentioned e-Book decision seems to even cross that line. There, the Commission accepted commitments in a factual scenario that is not far away from that of a hard-core cartel, given that, as the decision states:

> (…) the Commission's preliminary view was that prior to 2009, at least the four publishers expressed to each other concerns regarding retail prices for e-books being set by Amazon, a large online retailer, at or below wholesale prices. (…) [E]ach of the four publishers engaged in direct and indirect (through Apple) contacts aimed at either raising the retail prices of e-books above those of Amazon (as was the case in the UK) or avoiding the arrival of such prices altogether (as was the case in France and Germany) in the EEA. In order to achieve this aim, the four publishers, together with Apple, intended to jointly switch the sale of e-books from a wholesale model (where the retailer determines retail prices) to an agency model (where the publisher determines retail prices) on a global basis and on the same key pricing terms, first with Apple and then with other retailers (including Amazon)" (para. 8).
>
> "(…) the joint switch for the sale of e-books from a wholesale model to an agency model with the same key pricing terms on a global basis amounted to a concerted practice with the object of either raising retail prices of e-books in the EEA or preventing the emergence of lower prices of e-books in the EEA. (para. 11)

This growing use of commitments is well reflected in the figures of EU Commission's antitrust enforcement since Regulation 1 took effect in 2003: "out of 41 decisions taken by the Commission, we had 15 prohibitions and 26 commitments."[8] If one considers that horizontal cartels constitute the bulk of Commission's enforcement and that, as explained, such cases are

---

[6] Recital 13 of Regulation 1/2003. The principle in now also expressly embedded in the 2011 *Best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU*, which at paragraph 116 reads: "116. Commitment decisions are not appropriate in cases where the Commission considers that the nature of the infringement calls for the imposition of a fine. Consequently, the Commission does not apply the Article 9 procedure to secret cartels that fall under the Notice on immunity from fines and reduction of fines in cartel cases." (OJ C308/6).

[7] Schweitzer, *Commitment decisions in the EU and in the Member States: Functions and risks of a new instrument of competition law enforcement within a federal enforcement regime*, *available at* http://ssnr.com/abstract=2101630, at 2.

[8] J. Almunia, *Remedies, commitments and settlements in antitrust,* speech delivered in Brussels, at 2 (March 8, 2013).

not deemed theoretically suitable for commitments, article 9 has *de facto* disposed of the vast majority of proceedings in all other areas of antitrust law.

Paradoxically, a major thrust in this direction came from some of the NCAs, which—contrary to all initial skepticisms—have made significant use of this instrument. In particular, the Italian antitrust agency was among the frontrunners in this race for the application of article 9-type commitments at the national level, to the point that, according to some observers, commitments have been heavily abused, being used in contexts where a decision on merits should have been required.

III. THE STRUCTURAL DIFFERENCE BETWEEN EU COMMITMENTS AND U.S. CONSENT DECREES: THE RISK OF A STOCKHOLM SYNDROME

When Regulation 1/2003 was drafted, the goal of the Commission was to replicate, at the EU level, consent decrees available to the Department of Justice in the U.S. legal system. Alexander Schaub, then Director General at DG Competition, very clearly outlined the scope of article 9 as follows:

> Article 9 of the Draft Regulation creates a new tool for the Commission that was inspired by the 'consent decrees' in the American system: decisions accepting commitments.[9]

There is, however. a fundamental "institutional" difference between how consent decrees are administered in the U.S. civil courts and how commitments are dealt with under Regulation 1/2003.

In the United States, consent decrees are presented before an independent judge, who governs the proceedings on the merits and who is ultimately vested with the power to rule on the matter and to enter the decree. There, the antitrust agency plays the mere role of the plaintiff, who has the burden to convince the judge that a certain conduct infringes competition. On the other side of the ocean, the Commission enjoys the much criticized dual role of prosecutor and judge. This circumstance radically changes the setting within which commitments are offered by companies, because it is undeniable that it is one thing for defendants to voluntarily decide to submit undertakings before a third-party entity adjudicating the claim; and a totally different thing for the same company to have to deal with a counterpart who adjudicates on the merits.

In response, the Commission has repeatedly stipulated that commitments are offered by companies, and they are not requested by case handlers:

> Fines and other remedies are imposed by the Commission; whereas commitments are offered voluntarily by the company.[10]

True, commitments come from the parties interested in preventing a decision on the merits. Nevertheless, the above mentioned institutional framework inevitably creates the conditions for a Stockholm syndrome, whereby commitments may be subtly solicited and/or whereby companies perfectly realize that they have much to lose if they risk facing the Commission in an adversarial stand.

---

[9] Schaub, *The Commission's position within the network, European Competition Law Annual 2002*, at 4.

[10] J. Almunia, *supra* note 8 at 2.

This condition of procedural deference—which sometimes becomes fear altogether—is well reflected also at the national level, in those many jurisdictions that replicate the EU system. In Italy, for example, most (if not all) of the cases where commitments have not been proposed (or have not been granted) ended with a finding of violation against defendants.

The implications drawn from the above scenario are significant, because the threat of a decision on the merits may be used to force the release of commitments which, sometimes, may even resemble regulation rather than real competition enforcement. Not surprisingly, it has been rightly pointed out that the Commission "gains broad policy-making powers when acting on the basis of article 9 of Reg. 1/2003 … The Commission may pursue goals that it could not have considered otherwise and can impose conditions that it could not have imposed as remedies" pursuant to a decision on the merits, depending on the specific vision the Commission has of a particular market.[11]

IV. THE DISCRETION OF THE COMMISSION IN ACCEPTING REMEDIES

Much has been said by scholars and practitioners as to the extent of judicial review in competition cases. And although it is still to be seen whether the review of legality run by EU Courts also implies a full check on Commission's assessments of complex economic issues, little doubt exists that the Commission enjoys ample discretion as to applying article 9.

Further to the EU Court's judgment in *Alrosa,*[12] the Commission is required to assess proposals for commitments against the general principle of proportionality. In connection to that judgment, while the Commission shall verify whether commitments offered are proportionate to its concerns, EU Courts can only second-guess an assessment pursuant to a "manifest-error" test.

This is why it is nowadays currently acknowledged that "based on the ECJ's Alrosa-judgment, substantial judicial control of commitment is no longer to be expected at the EU level."[13] As Commissioner Almunia has recently put it, "we have a wide margin of discretion before an article 9 decision is taken."[14]

Needless to say, limited judicial review reinforces the perplexities inherent in an unbalanced institutional scenario. It is evident that the less control courts have on the Commission's decision to accept or refuse commitments, the more acute is the moral suasion that the Commission may exert on companies subject to an antitrust investigation.

V. CONCLUSIONS

It is undisputable that commitments have helped the Commission enforce antitrust law in a quick and efficient manner, often to the immediate benefit of competitors and consumers, without the delays and uncertainties that a full-fledged decision on the merits of the case would have required.

It is also a fact that the institutional framework within which antitrust law is enforced in the European Union raises speculation regarding the actual protection of rights of defense of

[11] Schweitzer, *supra* note 7 at 3.
[12] Case C-441/07 P, ECR 2010 I-5949.
[13] Schweitzer, *supra* note 7, at 19.
[14] J. Almunia, *supra* note 7 at 4.

companies involved in such proceedings. Clearly speaking, the question is not about the presence, at various degrees, of procedural safeguards which—in theory and to some extent also in practice—offer defendants the opportunity to plead their case. The real issue, and challenge for the years to come, is whether the 50-year-old EU system is well equipped to run antitrust law in an environment which has significantly changed across the decades and which, now more than ever, calls for equality of arms between enforcing agencies and defendants.

In such an environment, commitments may certainly contribute to effective antitrust enforcement in fast moving times. However, unless an overhaul of the entire system is accomplished, the risks remain that companies are to be left at the "mercy" of the Commission and NCAs; and that commitments will become the procedural poisonous fruit of the institutional poisonous tree.