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Alternative procedures in the European antitrust legal framework

Cartel settlements and Commitment Decisions

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The “ordinary” antitrust proceedings in Europe (1)

- **What ?**
 - Prohibition decisions following a fully-fledged procedure **of a completely adversarial nature**
 - Legal basis in the EU legal framework : Art. 7 of Reg 1/2003
- **Article 7 Prohibition decisions following fully-fledged procedure encompass three aspects**
 1. Finding of an infringement
 2. Cease and desist order
 - May be accompanied by remedies : expansion of cease and desist order to bring infringement effectively to an end
 3. Separate, punitive aspect



The “ordinary” antitrust proceedings in Europe (2)

- **Different aspects can be present to various degrees**
- **Common features to all ordinary prohibition proceedings**
 1. Very complex procedure resulting in formal finding
 2. Highly confrontational context :
 - role of Commission (full burden of proof)
 - role of the companies (no active role whatsoever – pure defense)
 3. Typically very long and costly proceedings
- **Examples**



The “alternative” antitrust proceedings in Europe

- **Objectives of “alternative” antitrust proceedings**

- enhance efficiency and effectiveness in dealing with competition concerns
- substitute a cooperative dynamic to a non-cooperative equilibrium

- **What are the “alternative procedures” which complement the ordinary proceedings ?**

1. Settlement proceedings in cartel cases

- streamlined procedure
- fine reduced by 10 %
- but resulting in Art. 7 decision (finding infringement + fines)

2. Commitment proceedings in other antitrust cases

- remedies/commitments offered by company to address competition concerns (behavioural or structural)
- streamlined procedure resulting in special type of decision (based on Art. 9 of Reg. 1/2003) : no finding , no fines



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The Settlement Procedure in cartel cases



The cartel settlement procedure

- A reliable legal framework was set up to increase the overall efficiency of cartel enforcement in the EU : the settlement package (amendments of the procedural Regulation and publication of a Settlement Notice).
- Objective: Simplification of administrative procedure leading to adoption of cartel decision; enable the Commission to handle faster and more efficiently cartel cases. Savings of litigation costs.
- It comes with reduction of fines for the companies and allows for early awareness of likely liability.



Objectives and benefits

For Commission

- **Efficiency gains – cost savings**
 - Drafting and Translations
 - Access to file
 - Oral hearing and interpretation
 - Less appeals
- **Reinforcing effectiveness / deterrence**
 - More decisions
 - Higher risk of detection
 - Complement to leniency & fines

For Companies

- **Direct financial benefits**
 - Fine reduction (10%) cumulative with leniency
 - Savings in litigation/defence
- **Benefit of finality**
 - Shorter procedure: provides early “exit” route (corporate governance)
 - Early awareness of likely liability
- **Free choice**



Suitable cases

- **To achieve the objectives sought:**
 - Likelihood of reaching a settlement
 - Procedural efficiencies
- **Internal operational screening before exploring settlements, e.g.:**
 - Number of parties concerned / Parties' spontaneous interest to settle
 - Number of successful leniency applicants
 - Expected degree of contestation
 - Impact of aggravating circumstances
 - Parties' foreseeable conflicting positions
 - EU/EEA cases or cases already decided in other jurisdictions
 - Novel legal issues
 - ...



Putting EU settlements into practice Transitional phase / initial cases

- In the initial phase, also cases eligible with an “ordinary” draft SO ready and/or the full file screened for confidentiality.
- Five decisions so far
 - DRAMs decision (19 May 2010) : pure settlement
 - Animal Feed (20 July 2010) : hybrid settlement
 - Consumer Detergents (13 April 2011): pure settlement
 - CRT Glass (19 October 2011): pure settlement
 - Refrigeration Compressors (7.12.2011): pure settlement
- Settlement discussions are taking place in pending cases.
Confidentiality.



Summary of the DRAMs Cartel



- **10 undertakings / 24 companies:** Micron, Samsung, Hynix, Infineon, NEC, Hitachi, Elpida, Toshiba, Mitsubishi and Nanya;
- were involved in a **scheme and/or network of contacts and secret information sharing** by which **they coordinated their conduct on general pricing level and quotations to major PC/server Original Equipment Manufacturers (OEMs)**, ultimately amounting to price coordination to such clients;
- on the market for **DRAMs** (Dynamic Random Access Memory), i.e. **memory chips used in computers and servers**;
- The overall cartel lasted from **1 July 1998 until 15 June 2002.**
- **Fines imposed : € 331 million**



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Summary of the Animal Feed Cartel

- Cartel in Animal Feed phosphates (chemical compounds used in feed for animals)
- Longest cartel at EU level ever: over 34 years (1969-2004)
- Covering at all times a large part of the EU (and subsequently EEA) territory.
- Companies allocated sales quotas and customers, coordinated prices and, to the extent necessary, sales conditions and generally exchanged sensitive market information
- Multilateral meetings at European and national level
- At all stages cartel members adapted their strategy and organisation
- Fines imposed: € 175 million





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Summary of the Consumer Detergents cartel

- Infringement connected to implementation of environmental initiative to reduce dosages and weight of washing powder and related packaging material
- Industry discussions led to anticompetitive conduct among the major producers: Henkel, P&G and Unilever
- Cartel aimed at stabilisation of market positions and price coordination
- The cartel covered 8 Member States
- Duration: 7 January 2002 – 8 March 2005
- Fines imposed: €315 million





Summary of the CRT Glass Cartel

- EEA-wide cartel of 4 major CRT glass producers [Asahi Glass-AGC, Nippon Electric Glass-NEG, Samsung Corning and Schott]
- overall duration from 02/1999 until 12/2004
- Coordination of prices at trilateral / bilateral meetings for CRT glass types (target prices, prices for certain sizes and prices to be charged to major customers)
- cartel members engaged also in an exchange of sensitive commercial information
- „ex officio“ case, 3 leniency applications, inspections in Germany in 03/2009
- overall fine of € 128 million on 2 Asian (AGC, NEG) and a German company (Schott)



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Refrigeration Compressors Cartel

- EEA-wide cartel of 5 major producers of household and commercial refrigeration compressors, used in fridges, freezers, vending machines and ice-cream coolers
- Cartel participants: ACC/Elettromeccanica (Italy), Danfoss (Denmark + Germany), Embraco Europe and Whirlpool S.A. (Italy + Brazil), Panasonic (Japan) and Tecumseh (US, Brazil, France)
- overall duration from 04/2004 until 10/2007
- cartel members aimed at coordinating European pricing policies and keeping market shares stable in an attempt to recover cost increases
- cartel members held bilateral, trilateral and multilateral meetings at which they discussed prices and exchanged sensitive commercial information
- All cartel members applied for immunity/leniency
- overall fine of € 161 million imposed





The « pure » settlement scenario

DRAMs, Consumer Detergents, CRT Glass, Compressors

- DRAMs :one year process from start of settlement discussions until decision. Test case and high learning curve
- Consumer Detergents, CRT Glass, Refrigeration Compressors: real procedural efficiencies shown in these cases. Final decisions within 3 years from immunity application.
- Thorough « hearing » of case, COMP charges, parties arguments
- Utmost respect of rights of defence/procedure
- Streamlined SO and decision
- No negotiation on the fine range !
- Planning is essential



Animal Feed : hybrid settlement scenario

- One of the 6 parties discontinued the settlement route after having been informed of fine range
- From then onwards: bifurcation of procedures
- Cumbersome procedure
 - Non-settling party; full access to file, fully detailed SO, hearing, extensive reply to SO, fully motivated decision
 - Settling party: streamlined SO and decision
- Issues and challenges
 - Model for hybrid cases
 - Avoid free-riding



EU settlements in practice : overview of the procedure (1)

I. Investigation as usual

- Parties may express their interest in a 'hypothetical' settlement

II. Preparation for Settlement Phase

- Screening for suitable cases (point 5 of the Notice)
- Letter to all companies (and MS): initiation of proceedings in view of settlement (Art. 11(6)), request to express their interest (joint representation for undertakings)
- Leniency window closes

III. Bilateral rounds of settlement discussions

- Participating does not imply an admission of guilt or duty to settle
- Disclosure and exchange of arguments on potential objections, liability, fines
- Disclosure of evidence supporting potential objections, liability, fines
- Disclosure of other evidence upon reasoned request
- Commission retains discretion as to the opportunity, order and pace of disclosure and discussions
- Discussions are bilateral, frank and non usable as evidence



EU settlements in practice: overview of the procedure (2)

IV. Settlement

- Settlements submissions by the companies jointly represented (template settlement submission)
- Parties cannot be asked to acknowledge anything formally or to accept the prospect of a certain level of fines unless they have been able during the discussions to effectively exercise their rights to be heard on the envisaged objections, and unless they have been informed of the range of fines that they may incur

V. “Settled” Statement of Objections

- Notification of streamlined SO endorsing company’s settlement submissions, where appropriate
- Company’s reply to SO confirming that it endorses its settlement submission

VI. “Settlement” Decision pursuant to Articles 7 and 23 of Council Regulation n° 1/2003

- Streamlined final decision



Different jurisdictions - different choices

- Settlement in criminal anti-cartel enforcement: US plea agreements
 - Investigative tool to gather evidence
 - Each party is prosecuted separately
 - Bargaining over use of evidence
 - Single bargained penalty discount
 - Judicial enforcement: plea agreement submitted to Court
- Settlements in administrative anti-cartel enforcement: some examples
 - EU: cartel settlement procedure
 - France: *procédure de transaction*
 - The Netherlands: construction industry cartels
 - UK: Independent schools case



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The Commitment procedure in other antitrust cases (Article 9 of Regulation 1/2003)



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Underlying policy considerations for the introduction of the commitment procedure

- Improving the functioning of a market speedily and efficiently
 - Commission should be entitled to balance the interest in deterrence through fines against the interest in improving the functioning of a market speedily by curing a competition problem for the future
 - Commission need not give reasons for choosing Art. 7 - Art. 9 route (case T-170/06 Alrosa v. Commission, § 130)
- Remedy the flaws of informal settlement mechanisms which existed before (under old procedural framework) :
 - Sanction in case of breach
 - Transparency (Publication – precedent value)



Convergence of interests

For the Commission

- Remedying quickly a problem in the market
- Procedural efficiencies :
 - No access to file
 - Standard of proof lighter (Alrosa) and shorter decision
 - No appeal
- Calibrated remedies

For the parties

- No sanction
- Lesser reputational damage
- Lighter and shorter procedure
- less exposure to damages



Typology of cases suitable for commitment procedure

- In practice, the following type of cases are excluded :
 - Cartels
 - Procedural infringements
 - Terminated infringements
- But not :
 - Infringements which would call for a less severe fine



Application of commitment procedure in practice (1)

- In order to apply Art. 9, the Commission must **establish the “reality of competition concerns”**
- Commission expresses concerns in **preliminary assessment** and initiates proceedings.
- The undertakings concerned offer **commitments** addressing the Commission’s concerns.
- Before making the commitments binding by decision, the Commission launches **market test** (pro-active)
 - Publication of summary of the case and main content of the commitments
 - Request for information to third parties/complainant
 - Third parties must have at least one month from the publication to comment



Application of commitment procedure in practice (2)

- A Commission decision makes the commitments **binding on parties**
- Commitments may be adopted **for a specified period of time**
- They do not conclude on whether there has been or still is an infringement
- Art. 9 includes a **revision clause**: Reopening of proceedings upon request or on Commission initiative

Triggered by

- the occurrence of “material changes”
- violation of commitment
- decision based on incomplete, incorrect or misleading information.

- **Enforcement of breaches of EC commitments**

Fines for breach

- 10% of worldwide turnover
- Daily penalties of 5% of average daily turnover
- Showing of breach enough; no need to show fault etc.

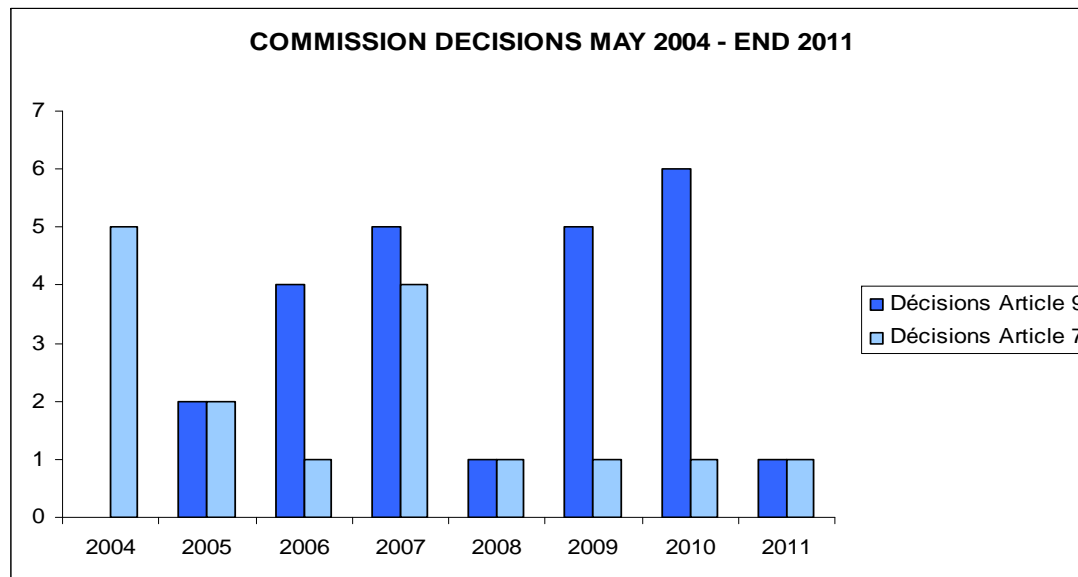


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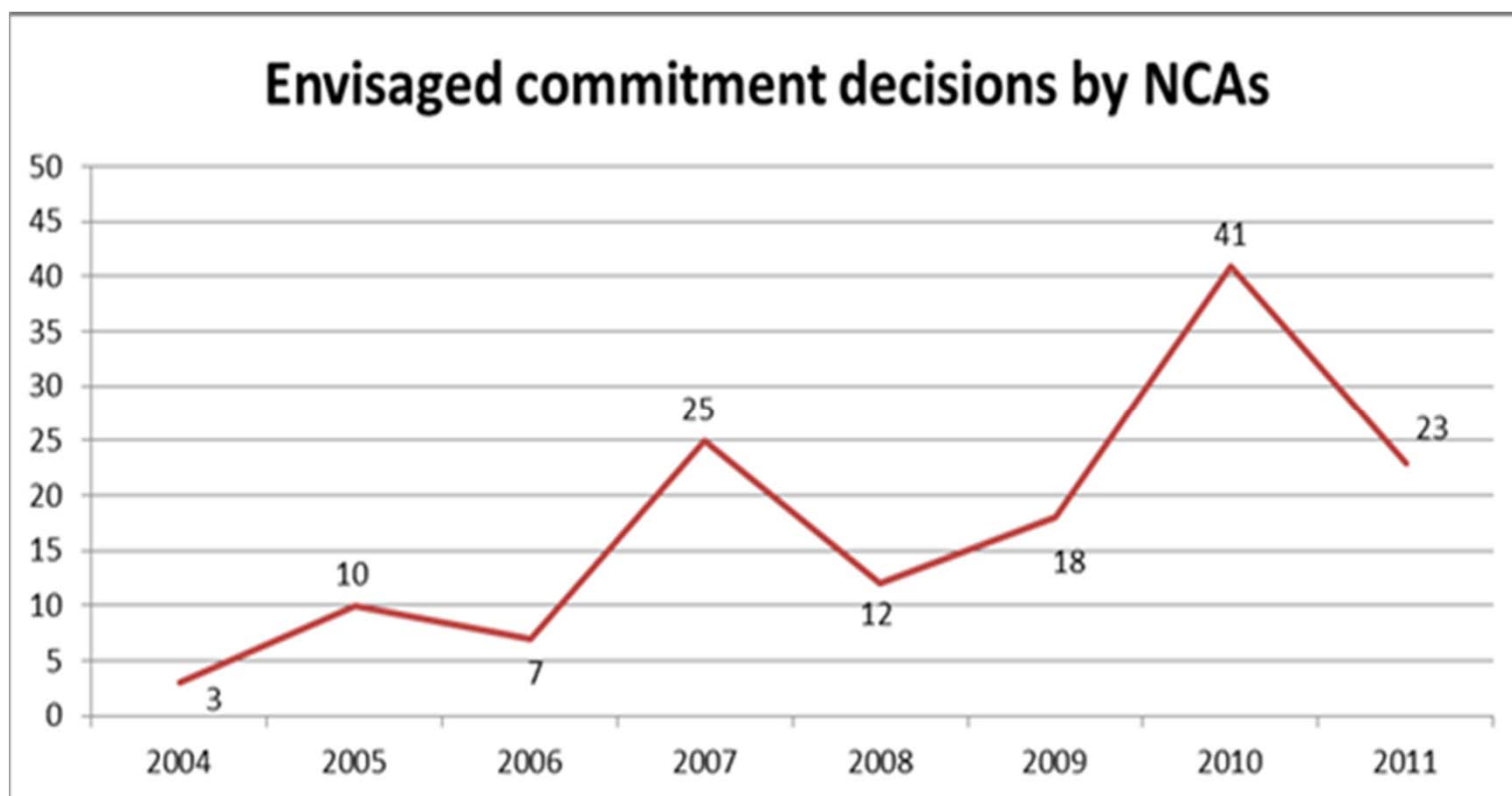
Contribution to the enforcement of the EU competition rules

- Since 2004 : 25 commitment decisions (16 infringement decisions over the same period in non-cartel cases)
- Initially, largely based on « old » notifications (ex. DFB, Repsol...)
- Since 2006, commitment decisions have become a real alternative to infringement decisions





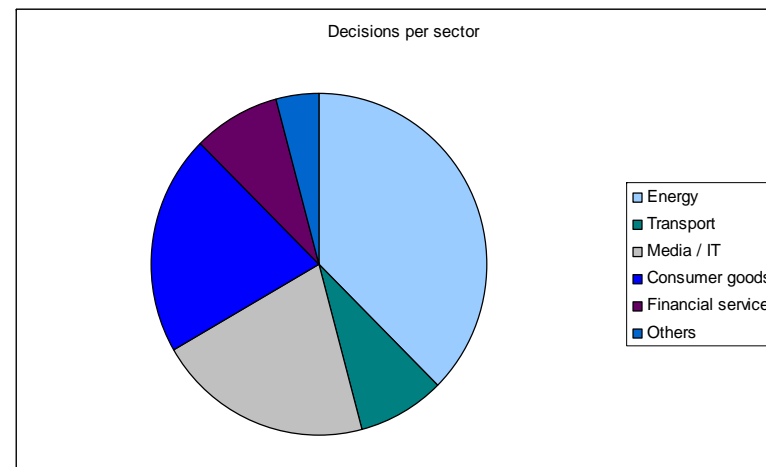
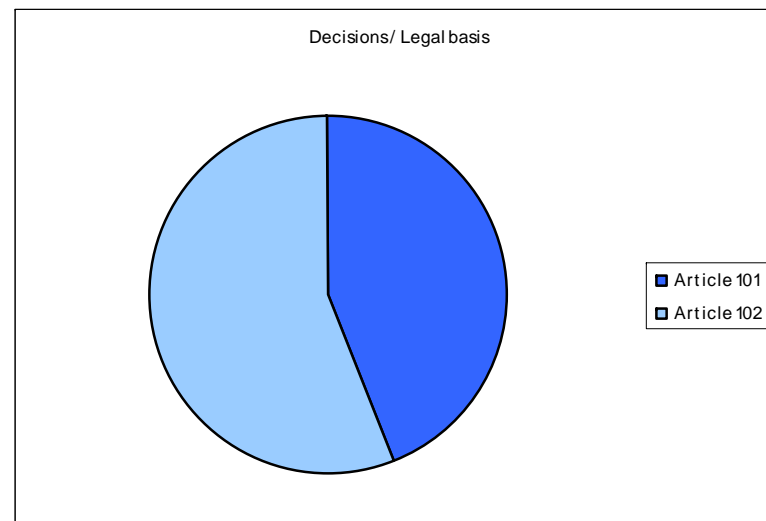
Commitment proceedings within the European Competition Network (decisions from NCAs)





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Case Number	Case Title
37.214	DFB
39.116	Coca-Cola
39.381	ALROSA
38.173	The Football Association Premier League Limited
38.348	REPSOL C.P.P.SA - Distribution de Carburants
38.681	Cannes Agreement
39.142,39.143	Fiat / Toyota / Opel / Daimler Chrysler (4 Decisions)
37.966	Distrigaz
39.388,39.389	E.ON electricity
39.402	RWE gas foreclosure
39.416	Ship Classification
39.316	GDF foreclosure
38.636	Rambus
39.530	Microsoft (tying)
39.386	Long term electricity contracts in France
39.351	Swedish interconnectors
39.317	E.ON gas foreclosure
39.596	One World
39.315	ENI
39.398	Visa MIF
39.592	Standard & Poors
39.692	IBM Maintenance Services





Design of remedies

Remedies/commitments should be

- Effective
- Clear and precise (unambiguous)
- Transparent
- Unconditional

Remedies/commitments may be

- behavioural
- structural

when there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy

Compliance with principle of proportionality ?

- difference between commitments offered by company and remedies imposed by competition authority (Alrosa Judgment)



Effectiveness

Possible criteria for assessment:

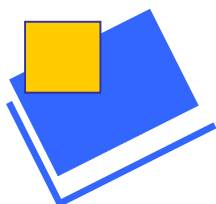
- Does the remedy lower barriers to entry?
- Does the remedy change the incentive or ability of market participants to compete?
- Is the remedy likely to increase consumer welfare?
- Does the remedy reduce efficiencies in production?
- How likely is it that the remedy prevents future competitive detriment?
- Can the remedy be practically implemented, monitored and enforced?
- How quickly can the remedy restore competition?
- ...



Monitoring and Enforcement of Remedies in general

Monitoring

- **Trustees**
- **Sector specific regulator**
- **Competitors, customers (Commission)**
- **National competition authority**
- **National courts (direct effect)**
- **Arbitration**



The use of commitment proceedings for the liberalisation of the energy market in Europe (1)

Focus on	DG Competition proceedings
<p>Network related foreclosure (Art. 102):</p> <ul style="list-style-type: none">– by impeding third-party access to transport network– through capacity hoarding & strategic underinvestment in the transmission system– through control of gas import infrastructure and long-term gas procurement agreements	<p>RWE gas foreclosure case (DE)</p> <p>ENI gas foreclosure case (IT)</p> <p>GdF gas foreclosure case (FR)</p> <p>EON electricity balancing case (DE)</p>



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The use of commitment proceedings for the liberalisation of the energy market in Europe (2)

Behavioural remedies where possible.

Structural remedies when necessary and proportionate

- Release by GDF of a large share of its long-term reservations of gas import capacity into France
- Divestiture of RWE gas transmission network
- Divestiture of ENI's share in the relevant international pipelines
- Divestiture of E.ON's transmission network



The use of commitment proceedings in the ICT sector The tying abuse in Microsoft II

- Microsoft holds a dominant position on the PC OS market (> 90% and stable market share; high barriers to entry; ...)
- Microsoft tied its web browser Internet Explorer to the Windows PC OS
- Strategic importance of web browsers
 - Web browsers are entry points for internet search
 - Web browsers are a gateway to web based applications
 - Web based applications could lower applications barrier to entry



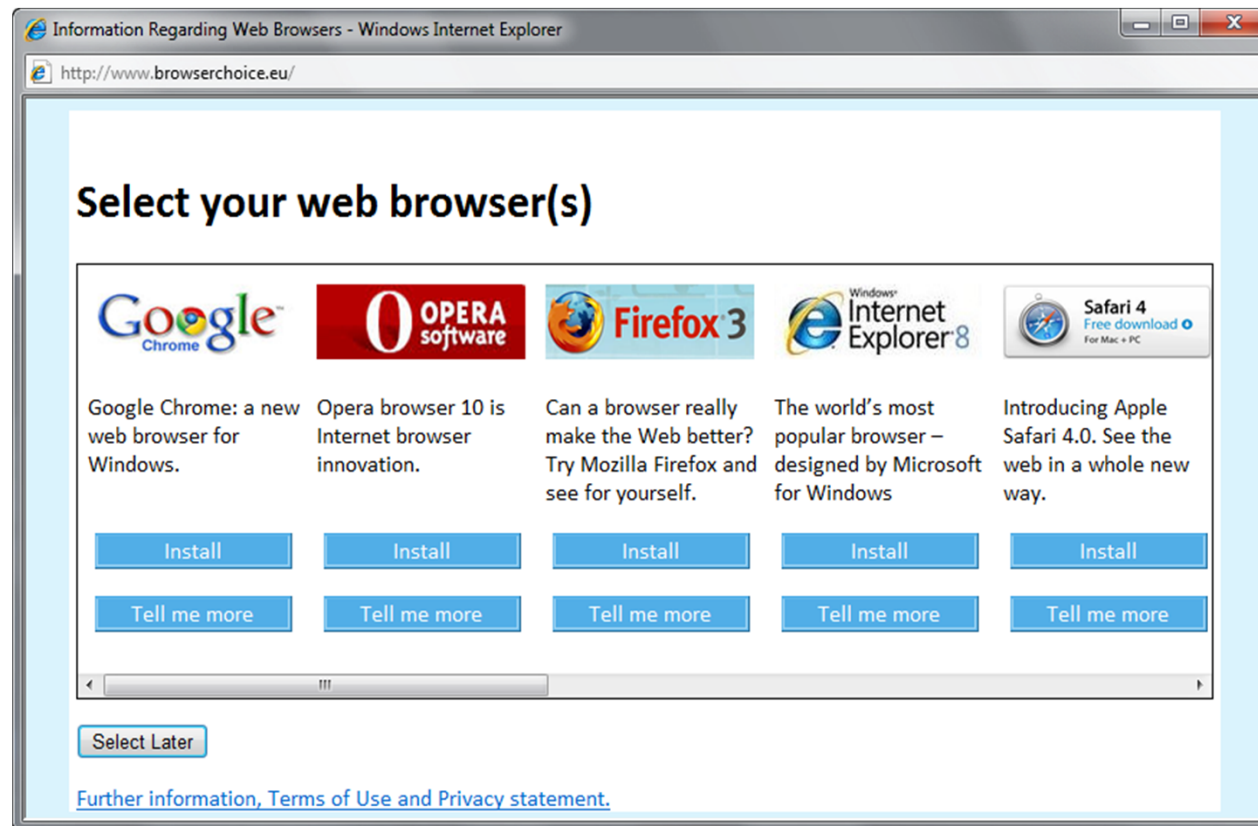
The use of commitment proceedings in the ICT sector

Commitments offered by Microsoft to solve Commission concerns

- OEMs
 - OEMs will be free to pre-install any web browser(s) of their choice
 - Possibility to de-install/turn off Internet Explorer
 - No retaliation from Microsoft
- Must inform remedy for users
 - Choice Screen; distributed via Windows Update also to installed base (Windows XP, Vista and 7)



Choice screen





Balancing Art 7 remedies – Art 9 commitments

- **Both require proper investigation, BUT Art. 7 requires the establishment of an infringement, while preliminary concerns are enough to trigger the application of Art. 9)**
- **Once Art. 9 decision adopted, case is typically resolved (cfr. delays in Art. 7 scenario)**
- **Art. 9 decisions are appropriate when the policy target is future behaviour and when a quick change in the market is necessary.**
- **Art. 7 decisions more advisable if need to establish a strong and clear precedent (e.g. for a novel question)**



Commitment proceedings : conclusion

- **efficient instrument**
- **significant instrument for tackling competition problems**
- **some convergence towards the practice in merger control**
- **but intrinsic limits:**
 - no court intervention;**
 - no sanction;**
 - less useful for damages actions**



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Questions

