

Commitment decisions

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Views expressed are personal and not necessarily those of the CMA

Overview

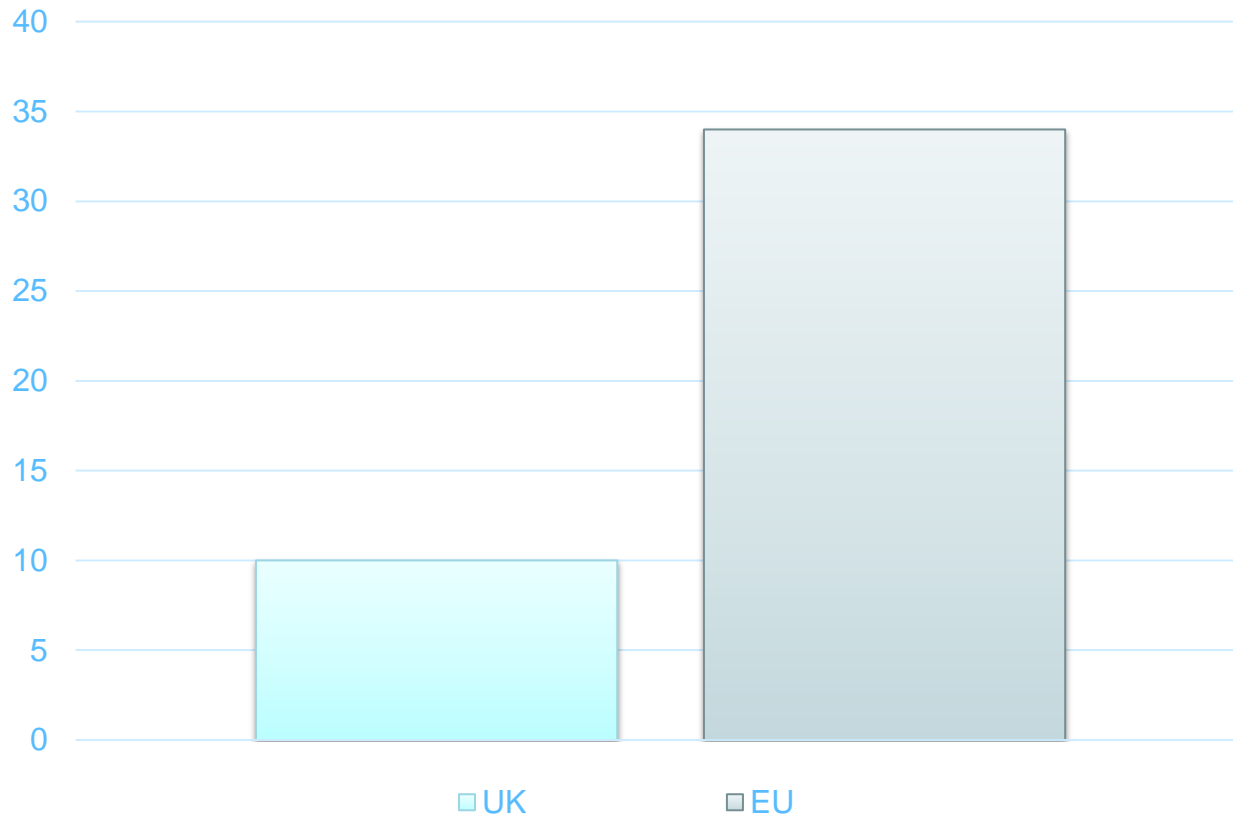
- Introduction and key issues
- EU and UK usage
- Offer and scope
- Consideration and market testing
- Acceptance and enforcement
- Advantages and disadvantages
- Observations

Introduction and key issues

- Binding promises
- Procedural economy
- Termination of investigation
- No finding of infringement
- No fine
- Discretionary

EU and UK Commitment decisions

2005 - 2015



Have commitments been offered?

- Commitments are offered voluntarily
- Commitments can be offered up until final decision, but earlier is better
- The offer of commitments or withdrawal will not be used as evidence in any subsequent decision

Is the case right for commitments?

- Commitments will not be appropriate in cases where:
 - Terminating the investigation without a decision risks undermining deterrence
 - The case involves secret cartels or a serious abuse of a dominant position
 - There is a lack of legal precedent in the subject area
 - Procedural economies will not be achieved
- If the offer is made and the case is appropriate, Authority to send clear summary of facts and concerns

What is the scope of the commitments?

- The competition concerns must be readily identifiable and must be fully addressed by the commitments
- The appropriateness of the commitments must be clear
- They must be practical and realistic and capable of being implemented effectively and in a short period of time
- Compliance with commitments should not be difficult to discern

Are the commitments right for the case?

- Business to suggest form and content
- Structural - a commitment to withdraw from an activity, to licence assets, to divest a business...
- Behavioural – a commitment to cease / modify conduct, to cease an arrangement...
- UK case examples:
 - Appoint and remunerate a trustee to oversee divestment (*Severn Trent*)
 - Impose compliance reporting obligations (*Hotel Online Booking*)
 - Establish a dispute resolution procedure (*Western Isles – road fuel*)
 - Specify a detailed time line for compliance (*Bristol Water*)

Do third parties have an opinion?

- Give notice to third parties likely to be affected by the commitments
- Provide a summary of the case, state the purpose of the commitments and how they meet the concern
- Consider all representations and ensure plausible points raised are properly investigated
- Inform the business of the nature of the market responses
- Consult on any material modifications
- Ensure internal processes are fair

What happens once accepted?

- Acceptance or rejection of commitments will be published
- Investigation will be terminated unless reasonable grounds for believing:
 - A material change of circumstance
 - A failure to adhere to terms
 - Incomplete, false or misleading evidence
- Investigation can continue into concerns not addressed by commitments
- Decisions are judicially reviewable

How are commitments enforced?

- Adopted for a specified period of time and may be released or varied
- In the UK, if non-compliance, Authority can apply for court orders, interim measures or reopen case
- The Commission has the power to fine a business up to 10% of its total turnover or to impose periodic penalty payments
- In 2013, Microsoft was fined EUR 561 million for its non-compliance (1% of its total turnover)

Advantages?

- Restore competition and resulting benefits to consumers more quickly
- Realise significant procedural and administrative efficiencies
- Timely intervention in rapidly evolving markets
- Scope for more flexible and effective remedies (that may go beyond the remedies available in an infringement decision)
- Better or swifter implementation of remedies
- May contribute to broader policy objective (e.g. EU energy liberalisation policy)
- Less likely to be appealed by the businesses concerned

Disadvantages and concerns?

- Perception of an easy way out of a full infringement decision
- Lack of penalty and of deterrence
- Lack of legal certainty – precedent value may be undermined
- Design of remedies is dependent on response to market testing
- No robust theory of harm
- Information asymmetries – ‘gaming’ by investigated companies
- Impact on third parties who may wish to sue for damages (if no infringement decision)

Observations

- Competition authorities have a margin of discretion in the choice of opting for commitments or settlement
- Choice does not depend on the strength of the case
- Choice depends on the specific features of the case and the main objectives pursued: deterrence, punishment and precedent (for settlement), versus efficiency and swift solving of competition concerns (for commitments)

Thank you for your attention