



EU Commitment Decisions

**12th EU-China Competition Week
14-18th March 2016**

**Chris Mayock
DG Competition
European Commission**

Structure

- Background
- Procedure
- Choice of infringement decision or commitments
- Scope & type of commitments
- Content of the commitments
- After the commitments
- Commission's decisional practice
- Statistics



Background (1)

Main types of Commission decision under Regulation 1/2003

- Article 7 : Infringement
- Article 8 : Interim measures
- Article 9 : Commitments
- Article 10 : No infringement

Background (2)

Infringement decisions v commitment decisions

- Infringement decisions
 - Find an infringement
 - May impose cease & desist order, fines and/or remedies
- Commitment decisions
 - No finding of infringement
 - No fine
 - Accept commitments and make them binding



Procedure (1)

- Initiative
 - Initiative of the parties
 - Commission must be convinced of parties genuine willingness to propose effective commitments
 - Commission retains margin of discretion
- Commission issues a Preliminary Assessment
 - Clearly defined competition concerns
 - Well-defined theory of harm substantiated by evidence
- Parties submit commitments

Procedure (2)

- Acceptable commitments → market test
 - Publication in EU Official Journal + targeted requests for information
 - Description of concerns + link to commitments text + invitation to comment
- Advisory Committee
- Final decision



Choice of infringement decision v commitments decision (1)

- Commission has margin of discretion
- Case by case analysis – no predefined set of criteria
- Excluded : cases where the Commission intends to impose a fine (i.e. cartels, procedural infringements, past infringements)
- Not excluded : infringements which could lead to a fine

Choice of infringement decision v commitments decision (2)

Factors related to the type of decision

- Commitment decision
 - Efficient and swift solving of competition concerns
 - Procedural economy
- Infringement decision
 - Fines/deterrence
 - Precedent value
 - Actions for damages

Choice of infringement decision v commitments decision (3)

Case specific factors

- Effective commitments possible?
- Commitments offered : effective, clear, unconditional, easy to monitor
- Timing
- Number of parties, whether all are willing to offer commitments

NB: Overall, commitment decisions work when there is more to gain from fixing future functioning of the market rather than punishing past conduct



Scope & type of commitments

- Commitments can go further than the remedies that the Commission would have been able to impose in an infringement decision (*Alrosa* Judgment, Court of Justice)
- Both behavioural and structural commitments possible
- Choice based on particular case and commitments offered
- But Commission must choose least burdensome among several effective offers (usually behavioural)

Content of the commitments

- The commitment itself
- Implementation date
- Reporting
- Review Clause
- Anti-circumvention clause
- Duration & termination
- Trustee



After the Commitments

- Implementing (trustee)
- Monitoring
 - Complaints (customers competitors, trustee, regulator)
 - Commission own screening (based on reporting obligations)
- Sanctions for non-compliance
 - Fine (NB Microsoft)
 - Periodic penalty payments
- Re-opening of proceedings on substance possible



Commission decisional practice

Key areas of commitment decisions

- Technology markets (e.g. *Microsoft, IBM, E-Books*)
- Energy (e.g. *E.On, Gaz de France, BEH Gas*)
- Financial services (e.g. *Visa, Standard & Poor's*)
- Others (e.g. *FA Premier League, Star Alliance*)

Statistics since 2004 (1)

- Breakdown by infringement decision/commitments
 - Antitrust & cartels : 37 commitment decisions out of 127 (29%)
 - Antitrust only : 37 commitment decisions out of 59 (63%)
 - Abuse of dominance cases: 20 commitment decision out of 30 (66%)
- Breakdown by agreements (Art 101) v abuse of dominance (Art 102)
 - 19 pure agreement cases (51%)
 - 17 pure abuse of dominance cases (46%)
 - 1 decision based on both Articles 101 & 102 (3%)

Statistics since 2004 (2)

- Breakdown by type of commitments
 - 75% behavioural
 - 25% structural



Thank you for your attention