

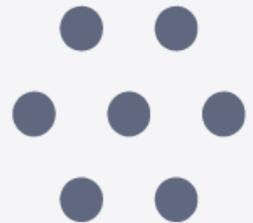


Commitment Decisions in Unilateral Conduct Cases

UCWG Webinar

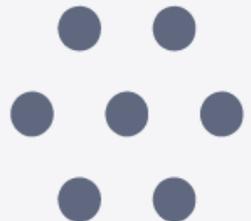
13 March 2014

Fevzi. M. TOKSOY, PhD



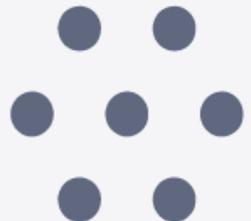
Remarks

- It has been a decade that commitments are introduced in the procedure of EU Competition Law.
- It has become a major tool to fight possible infringements in Art 102 cases.
- The purpose was to reach a speedier solution (ending the consumer harm) with relatively lower transaction costs.
 - saving administrative and investigative resources that would be required in an Article 7 procedure
 - solving market problems expeditiously through effective commitments



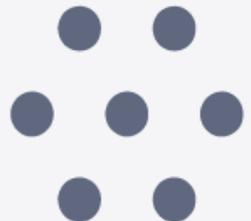
Remarks

- This tool is now under the focus of the global antitrust platforms due to the still ongoing Google commitments discussions in the EU.
- Some criticize the increased use of commitments procedure, based on the arguments that
 - it should be a rarely used tool in order not to hinder development of a coherent case-law
 - It should be more transparent in procedure
 - It should be based on more guidance by the Commission
- Some others support the use of it since the commitments are the outcome of business oriented minds and market-tests which together lead to more sound and creative ways to protect the benefits of the consumers



Remarks

- Although question mark is still pending on whether the number of case load is sufficient to come up with generalized outcomes, I think we have quite a decade of cases and discussions to assess the performance of commitments.



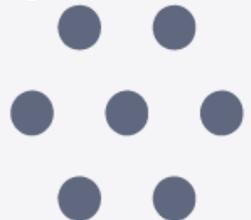
Why Commitments?

- **AUTHORITY SIDE**

- Faster resolution in benefit of the consumer
- Resources are used effectively

- **BUSINESS SIDE**

- No infringement/No fines/Limited or no damage actions
- Manageable reputational issues (even positive)
- Lower legal & representation costs? Questionable...



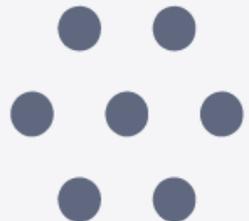
Increased Use of Commitments In The EU

- **FACTS**

- Mostly regulated industries (Energy and Telecom)
- Mostly Almunia presidency... (One prohibition/Ten commitments in Art102 cases)

- **FEARS**

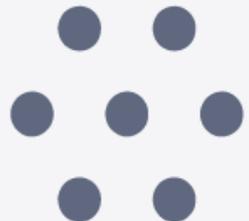
- Lack of predictable, coherent case-law
- More creative and effective remedies than what EU Commission would impose through infringement decisions?
- Lack of transparency in the process



Towards a more sustainable system...

- PROBLEMS?

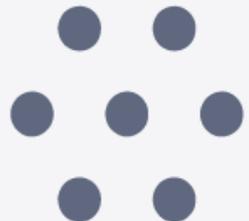
- *Since commitment decisions are inappropriate in cases where the EC intends to impose a fine (1/2003), more clarification needed on the reasoning of the Commission to opt for commitments rather than pursuing Article 7 procedure.*
- More clarification needed at the Preliminary Findings stage to help the defendant design suitable commitments (In contrast of para 100 of the Report on the Functioning of Regulation 1/2003: *The preliminary assessment does therefore not need to have the level of detail required for a statement of objections, which produces procedural efficiencies*).



Towards a more sustainable system...

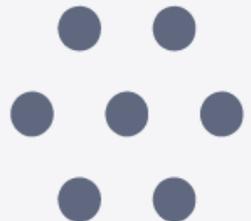
- **PROBLEMS? (cont'd)**

- Commitments too narrow or overly broad to resolve the identified competition concerns: Clearer definition of the abusive practice of commitments for better results in
 - Market tests
 - To the point commitments
- More explanations by the EC on the appropriateness and adequacy tests of the commitments
- Possibility of national authorities to bring cases relating to the same subject matter



On Google Case...

- It is somewhat questionable that (given the spirit of Article 9) it is the Commission who repeatedly asked for commitments, explicitly blocking an Article 7 Decision by its own will... Why this persistence?
- How new issues in Competition law will be tackled if all is settled through commitments?
- Distortions in fast-evolving markets require fast-track procedures to have effective/competitive outcomes in those markets... Is this the case in Google?



Consent Agreements in Unilateral Conduct Cases

Linda M Holleran
United States Federal Trade Commission

March 13, 2014

The views expressed in this presentation are those of the author and do not necessarily represent the views of the Federal Trade Commission or any individual Commissioner

Overview

- General considerations of consent agreements in unilateral conduct cases from a US perspective
- When to use consent agreements and the overall process
- Costs and benefits of various types of remedies in unilateral conduct cases
- General suggestions for drafting consent agreements
- Case example: *FTC v. Transitions Optical*

Consent Agreements

- Consent agreements are voluntary and negotiated settlements of agency charges of anticompetitive conduct, without any admission or finding of wrong-doing
- Primary goals:
 - Stop unlawful conduct and prevent its recurrence
 - Restore possibility of competition in affected market(s)
 - Deterrence of similar misconduct in other markets
- The overall benefit of using consent agreements is efficiency:
 - Can save significant agency resources as well as private attorney/litigation costs
 - Can bring effective remedies to the market much more quickly than if the case is litigated
- The main disadvantage is their lack of precedential value

When to Use Consent Agreements

- As a preliminary matter, potential remedies should be considered at the beginning of an investigation. If there can be no effective remedy to the alleged misconduct, an agency should consider whether it should pursue an investigation at all.
- In US, consent agreements can be used in any context – no limitations on use in specific markets or for specific types of conduct
- Deciding when to begin negotiating a consent agreement is a judgment call: You lose some of the efficiencies of a consent agreement by starting the process late, but the agency needs to conduct a sufficient investigation to know:
 - Competition WAS likely harmed by the alleged misconduct;
 - The full scope of the misconduct;
 - The full scope of harm; and
 - The specific remedies that would be necessary to restore competition.
- If an investigation is still incomplete, it is also a judgment call whether to stop investigation efforts and focus solely on consent negotiations, or whether to continue the investigation while also pursuing settlement negotiations.

Process

- The possibility of a consent agreement can be first raised by agency staff or the target
- Agency staff should be able to explain to the target the theory of harm and how each aspect of the proposed remedy seeks to remedy that harm and restore competition
- The target has the opportunity to negotiate specific terms of the consent agreement, and if it disagrees with staff's position, to present its arguments to agency management or individual Commissioners
- There are three parts to a final consent package: the agreement containing the negotiated consent; the proposed complaint; and an analysis to aid public comment
 - The only negotiated document is the consent agreement, although the target has the right to review the proposed complaint before signing the agreement
 - The analysis to aid public comment is instrumental to agency goals: it explains the market background, the alleged conduct, and why that conduct raised competitive concerns

Process continued

- Once the agreement is signed by both parties, it is sent up to the Commission for approval. Here, they can approve it as is, or require changes to any of the documents.
- Once the Commissioners approve the consent package, it is published in the Federal Register, and the public has 30 days to make comments.
- At the end of the 30 days, the Commission will review all of the received public comments, and either approve the consent agreement as originally written or make changes to address the comments.
- Once the consent agreement is final, any violation will incur significant fines and penalties

Types of Remedies

- Designing remedies in unilateral conduct cases presents particular challenges that are less likely to be confronted in mergers or cartel/agreement cases
- Unlike mergers, which can be blocked, or collusion cases where actions can simply be enjoined, unilateral conduct cases require much more care to ensure that the remedy does not create disincentives for the dominant firm against offering discounts, innovating, or otherwise competing vigorously
- In the US, there are three primary types of remedies for unilateral conduct cases:
 - Prohibitory (cease and desist)
 - Affirmative
 - Structural
- Different remedies have different administrative costs (e.g., remedy design and ongoing administration), and different effects on efficiency and innovation.
- The preferred remedy will be the one that accomplishes the remedial goals while minimizing the costs of administration and the risks of chilling efficient conduct and incentives to innovate.

Prohibitory Conduct Remedies

- Prohibitory remedies enjoin the conduct found to be illegal (*e.g.*, cease and desist)
 - They may also include “fencing in” relief that prohibits similar conduct that has similar effects
- Benefits:
 - Easy to administer
 - Low risk of chilling efficient conduct

Note: Defining the “fence” can increase up-front administrative and monitoring costs, and may chill more efficient conduct
- This is a standard remedy in unilateral conduct cases, but it may not always be sufficient to restore competition, particularly if dominance is durable or if there are lingering effects of the defendant’s conduct
- Great care must be taken to avoid overly broad prohibitory provisions that stifle competition by preventing the dominant competitor from innovating, enhancing efficiency, or offering better value to customers

Affirmative Conduct Remedies

- Affirmative conduct remedies require the target to take certain affirmative actions to restore competition (*e.g.*, compulsory license)
- This type of remedy may be appropriate where prohibitory remedies are inadequate to restore competition
- Relatively costly to design and administer, and can risk chilling efficient conduct and incentives to innovate:
 - Enforcer must identify the steps necessary to restore competition
 - High oversight costs, especially with access remedies
 - Forced sharing may diminish the incentives of the defendant, its rivals and similarly situated firms in other industries to invest in innovation
- Some of these costs may be mitigated by avoiding affirmative remedies of long duration, especially in dynamic industries
- Courts and enforcers may face difficulties in supervising an ongoing commercial relationship mandated by such a remedy. Price and service terms must often be set, although the dominant firm's prior or contemporaneous terms of dealing may provide a guide.

Structural Remedies

- Requires the sale or divestiture of part of the target's firm (business unit, assets, *etc.*)
 - While frequently used in merger/acquisition matters, they are extremely rare in unilateral conduct cases
- Advantages:
 - Can rapidly eliminate market power and restore competition
 - “Fix it and forget it:” It immediately changes the defendant's incentives, and reduces monitoring costs. Remedy is generally self-enforcing.
- Disadvantages:
 - Can have significant up-front remedy design costs, depending on the assets to be divested and the organization of the firm
 - Can involve monitoring costs, especially if remedy includes ongoing interactions
 - Can destroy efficiencies
 - May be disproportionate to severity of harm from conduct
- Types of structural relief:
 - Horizontal or vertical divestiture.
 - Divestiture of property rights.

General Suggestions for Defining Remedies

- William Kovacic (1989):
 - Promptly define the remedial objectives and develop a plan to achieve them
 - Understand the industry
 - Make adjustments if there is a history of misconduct
 - Anticipate the defendant's likely response
 - Identify side effects
 - Analyze administrability
 - Select a remedy
 - Develop a framework for implementation

Suggestions for Drafting Remedies

- Remedies should be clearly and plainly written so that the target, the enforcing agency, competitors, and customers all know what particular conduct complies with -- or violates – the order
 - Provisions merely reciting general statutory language are usually pointless, and vague provisions are unlikely to induce effective compliance without extensive further proceedings
 - The remedy may also need to identify specific conduct in which the dominant firm is permitted to engage
- Consider use of a compliance division with experience at drafting and enforcing consent agreements
- Consider requiring the target to distribute the consent agreement to all customers or other impacted industry members
- Consider the dynamics of the market in determining the duration of the order
 - The order should be of sufficient duration to encourage entry and expansion of competitors
 - However, a remedy of overly long duration can stifle a firm’s flexibility and may impose unnecessary costs

Ensuring Compliance with the Remedy

- Regular compliance reports to the agency
- Document retention obligations
- Access to the defendant's employees and records
- Appointment of a special monitor
- Antitrust compliance program within company
- Fines for failure to comply

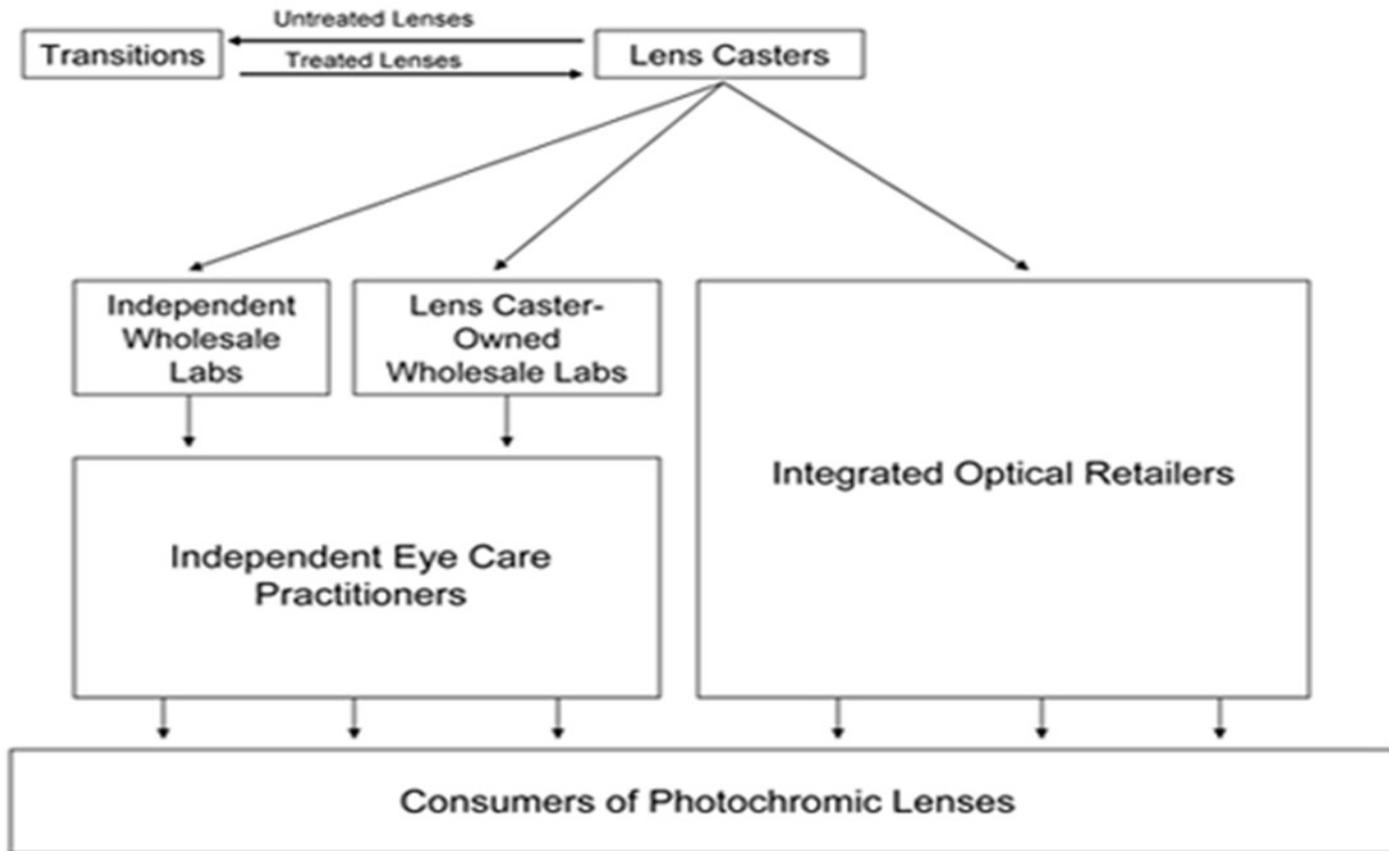
Case Example: *FTC v. Transitions Optical*

- FTC investigation resolved in 2010
- Transitions Optical produced photochromic lenses as part of the eyeglass manufacturing process (these lenses darken when exposed to sunlight)
- Produced over 80% of photochromic lenses for past 5 years
- Industry has high barriers to entry: capital costs, intellectual property, and regulatory requirements

<http://www.ftc.gov/os/caselist/0910062/index.shtm>



FTC v. Transitions Optical



FTC v. Transitions Optical

- Began with exclusive dealing with lens casters
 - Transitions terminated lens casters who dealt with potential competing products, Corning (SunSensors) and Vision-Ease (LifeRx)
- Transitions also entered into exclusive agreements with retailers and “preferred” promotion agreements with labs
 - Gave up-front payments/rebates to retailer for long-term exclusive agreements
 - Gave labs rebates if they withheld sales efforts for competing products
 - Gave discount to retailers and wholesale labs if customer bought all of its photochromic needs from Transitions
- Requiring exclusivity of lens casters foreclosed 85% of sales opportunities at this level of distribution
 - Amplified by exclusionary practices with retailers and wholesale labs, foreclosing up to 40% of this distribution channel
- No procompetitive efficiencies justified conduct

FTC v. Transitions Optical

Transitions prohibited from:

- Entering exclusivity agreements with lens casters, including any agreements providing favoritism to Transitions (or disfavoring competing photochromic treatments)
- Allows exclusive agreements with retailers and wholesale labs, but they must be terminable with 30 days' notice, and only partially exclusive if requested by customers
- Prohibits various “de facto” exclusive dealing accomplished through market share discounts and other means
- Certain other restrictions, *e.g.*, prevented various forms of retaliation against customers that used competing photochromic treatments



EU commitment procedure

ICN Webinar - 13/03/2014

Nicolas Bessot*

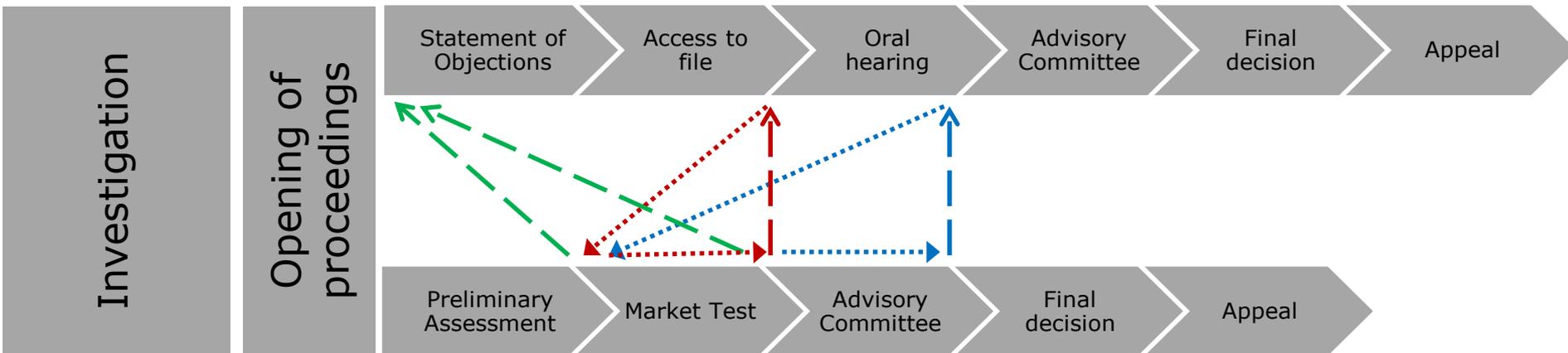
European Commission - DG Competition - Unit A1
Antitrust case support and policy

Characteristics

- One tool in the Commission's arsenal
 - ✓ Art. 7: cease and desist, fine, remedies
 - ✓ Art. 8: interim measures
 - ✓ **Art. 9: commitments**
 - ✓ Art. 10: decision of inapplicability
- Main characteristics of commitment decisions
 - ✓ **No finding** of infringement nor legality
 - ✓ Commitments **voluntarily offered** by undertaking(s) are made binding
 - ✓ **Sanctions** for non-compliance (fine, periodic penalty payments)
 - ✓ **Re-opening** of proceedings possible on substance (Art. 9§2)

Procedure (1)

Prohibition path (Art. 7)



Commitment path (Art. 9)

Procedure (2)

- Initiative
 - ✓ **Initiative of the Parties** - Commission may test the parties' willingness
 - ✓ Commission must be convinced of the parties' genuine willingness to propose effective commitments
 - ✓ **Commission's margin of discretion** (case-by-case assessment)
- Commission issues a Preliminary Assessment (PA)
 - ✓ Parties made aware of **clearly identified** competition **concerns**
 - ✓ Concerns based on **well defined theory of harm** substantiated by evidence
- Market test of formal commitments
 - ✓ Publication in the EU Official Journal + targeted requests for information
 - ✓ Description of the concerns + link to commitments text + Invitation to comment
- Advisory committee and final decision

Incentives

- For the **Commission**
 - ✓ Outcome: well-designed commitments, effective impact on the market
 - ✓ Speed: swift implementation
 - ✓ Procedural economy: in the administrative procedure + (generally) no court proceedings
- For the **parties**
 - ✓ Outcome: no finding of infringement, no fine, smaller exposure to damages actions
 - ✓ Longer term: subject to remedies designed by themselves, reputation
 - ✓ Procedural economy: litigation costs avoided, investigation closed

Prohibition v. Commitment decision (1)

- Commission's margin of discretion
 - ✓ **Case-by-case analysis** - No predefined set of criteria
 - ✓ Excluded:
 - Cases where the Commission intends to impose a fine
 - In practice: hard-core cartels, procedural infringements, past infringements
 - ✓ Not excluded:
 - Infringements which could lead to a fine, even when a SO was notified
- Decision implies a complex assessment of
 - ✓ Factors related to the **case at stake**
 - ✓ Factors related to the **type of decision**

Prohibition v. Commitment decision (2)

- Factors related to the type of decision
 - ✓ Commitment decision: efficient and swift solving of competition concerns, procedural economy
 - ✓ Prohibition decision: deterrence, precedent value, actions for damages
- Some case specific factors
 - ✓ **Effective commitments possible ?** (more than "to comply with the law")
 - ✓ Commitments offered: **effective, clear, unconditional**, easy to **monitor**
 - ✓ **Timing**
 - The later the submission of commitments, the less potential for procedural economy
 - If commitment path taken before SO, failed Art. 9 process may come at a cost (delay) for the investigation
 - ✓ **Number of parties**, whether all parties are willing to offer commitments

Focus: transparency

- Transparency towards investigated parties
 - ✓ **State of play** meetings both before and after the PA, debriefing on market test results
 - ✓ Numerous exchanges between parties and Commission to discuss commitments
 - ✓ Competition **concerns communicated** to investigated parties
 - ✓ Parties may call upon the **Hearing Officer** at any time in relation to the effective exercise of their procedural rights
 - ✓ Parties may decide to discontinue commitment discussions
- Transparency towards complainants/third parties
 - ✓ Possibility to comment during **market test**, and targeted RFI
 - ✓ Complainants directly informed of the Commission's willingness to accept commitments

Focus: legal certainty

- Impact on legal certainty
 - ✓ No formal finding of infringements
 - ✓ Less appeals, hence less precedents set by EU Courts
- However, non-negligible guidance
 - ✓ Commitment decisions have replaced past **informal commitments**
 - ✓ Commitment decisions may provide **more legal certainty than a mere cease and desist order under Art. 7**
 - ✓ Emergence of a well-established and consistent **remedy's policy** (convergence with merger remedies)
 - ✓ Quicker decisions = more decisions = increased guidance

Focus: procedural economy

- Depends on **timing** of commitment proposal
- Potential for procedural economy
 - ✓ Is important when commitments are offered **before the SO**
 - ✓ But can be annihilated if commitment discussions fail and need to revert to the prohibition path
- Some commitment cases take long
 - ✓ However: how long would a prohibition decision have taken **in the same case?**

Focus: type of commitments

- **Behavioural** or **structural** commitments
 - ✓ Choice based on case at stake + commitments offered
 - ✓ In case of equally effective remedies, the Commission should opt for the least burdensome (usually behavioural) commitments
 - ✓ Around 74% of cases with behavioural commitments since 2004
 - ✓ Around 26% of cases with structural commitments since 2004
- **Non ambiguous, directly applicable** and **non-conditional**
 - ✓ Possible issues: third party holding pre-emption / veto rights for divestiture

Focus: effectiveness and compliance

- Assessing **likely impact**
 - ✓ Sectorial knowledge, experience with similar remedies
 - ✓ Formal market test, targeted RFIs
 - ✓ Cooperation with national regulators
 - ✓ In-house economic assessment (chief economist team)
- Monitoring **effectiveness and compliance**
 - ✓ Complaints (customers, competitors, suppliers)
 - ✓ Trustees, regulators
 - ✓ Commission's own screening, often based on reporting obligations
- Sanctions for **failure to comply**
 - ✓ Fine: one precedent (Microsoft 2013 – €561 million)
 - ✓ Re-opening of the proceedings on substance

Focus: statistics since May 2004

- General

- ✓ Antitrust & Cartels: 116 decisions, incl. 34 commitment decisions (29%)
- ✓ Antitrust only: 54 decisions, incl. 34 commitment decisions (63%)
- ✓ Unilateral conduct cases: 25 decisions, incl. 18 commitment decisions (72%)
- ✓ Why are unilateral conduct cases good candidates for commitments?
 - Commitment discussions facilitated when there is only one party?
 - Dominant undertakings more used to regulator's intervention? (e.g. national incumbents in energy sector)
 - Commitments: a better outcome than a fine for exclusionary cases?

- Of all commitment cases (101 and 102 TFEU)

- ✓ 17 unilateral conduct cases (102 TFEU) - 50%
- ✓ 16 non-unilateral conduct cases (101 TFEU) - 47%
- ✓ 1 decision based on both 101 and 102 TFEU - 3%

Conclusion: overall assessment

- **Useful** instrument
 - ✓ Became a true alternative to prohibition decisions
 - ✓ Convergence with remedy policy in merger control
- Clear **limitations**
 - ✓ Friction with the policy to foster damages actions
 - ✓ Less court guidance
 - ✓ No sanction on substance
- For the robustness of the system
 - ✓ Clear and deterrent **sanctions** in case of non-compliance
 - ✓ Possibility to **re-open** the proceedings on substance
 - ✓ Maintain the **authority's discretion** as to whether to engage in commitment discussions



The use of commitment decisions in unilateral conduct cases

International Competition Network Webinar

Yves Botteman, Partner

March 13, 2014

Commitment Decisions

- An alternative to infringement decisions
 - Dispute is “settled” without the imposition of a fine, in exchange for remedies offered to address the European Commission’s (EC) competition concerns
 - Forward-looking and only for a specific time-period
- Projected advantages:
 - For the EC
 - Administrative efficiency
 - Quick and targeted fixes (with more creative remedies)
 - Fines still possible, if non-compliance
 - Reduced likelihood for appeals at the EU Courts in Luxembourg
 - For the investigated company
 - Put the case behind with lower costs along the process, no fine and a more limited scope for follow-on actions
 - Direct participation in the formulation of the remedies
 - No negative publicity
 - More clarity on the boundaries of permissible behavior going forward?
 - For third parties
 - More timely restoration of conditions of effective competition in the relevant market?

A Commitment-Based Enforcement Paradigm?

- Gradually increasing use of commitment decisions by the EC
 - In recent years, almost all unilateral conduct cases end up being settled through commitments
- A new era of enforcement?
 - Policy orientation of the Commissioner Almunia and his cabinet
 - Economic crisis in Europe
- Growing “contractualization” of EU antitrust enforcement?

A Critical Look at the Current Situation

- Heavy use of commitment decisions in unilateral conduct cases against a “thin” legal framework
 - Only one provision in Regulation 1/2003, with no guidelines
- Limited boundaries as to when it is **appropriate** to use the tool
 - No legal constraints or limitations
 - “Commitment decisions are inappropriate in cases where the Commission intends to impose a fine” (Regulation 1/2003)
 - “The Commission does not apply the Article 9 procedure to secret cartels” (Antitrust Manual of Proceedings)
 - “If the Commission [...] wants to establish an important precedent, it may prefer the path of an Article 7 decision” (Antitrust Manual of Proceedings)
 - Decisional practice by the EC indicates a discretionary use of the tool:
 - In well-tested theories of harm...
 - but also in relation to novel issues or questionable theories!
 - Limited scope for judicial control
 - Missed opportunity in *Hynix*
 - Appeal in *Thomson Reuters* to address this issue?

Adequacy of the Process

- Potential remedies resemble an accordion image
 - Conflicting incentives
 - Investigated company aiming at narrow commitments vs. third parties aiming at broad commitments
 - EC in the role of an arbitrator?
 - Contractualization of antitrust enforcement: binding only *inter partes*? Does the process result in protecting competition vs. specific interests?
- Limited transparency towards the investigated company
 - Disclosure of limited facts and conduct of cursory economic/legal analyses
 - Often, implicated companies do not fully comprehend the theory of harm and why their conduct may be infringing Article 102 TFEU

Adequacy of the Process (cont'd)

- What checks and balances available?
 - In principle, no SO – only Preliminary Assessment
 - Timing of drafting of Preliminary Assessment?
 - Commitment discussions often opaque, even for the defending company
 - Is the Market Test the solution?
 - Simplified proportionality test following *Alrosa*
 - Limited burden on the EC
 - Should the EC resolve all antitrust concerns or may it settle for less?

External Transparency

- Short-term risks
 - Uncertainty for business community to carry out self-assessments
 - Business operators exploiting prevailing legal uncertainty?
- Long-term risks
 - Gradually obsolete EC and EU Courts case-law?
 - Gradually weakened EC?

Impact on Enforcement Across the EU

- Commitment decisions also a reality in EU Member States
 - Trend of gradually increasing use
 - Diversification of national commitment proceedings, as a result of the lack of guidance at EU level
- Despite the Guidance on enforcement priorities in relation to unilateral conduct cases (2009), there is a risk of inconsistent and fragmented application of Article 102 TFEU
 - Novel legal issues and under-developed theories of harm
- Effect on efforts for a more robust system of private enforcement of EU competition rules?
 - No finding of infringement in commitment decisions

Effectiveness of Remedies

- Remedies should be defined as clearly as possible
 - Well-defined scope
 - Reduce uncertainty as to rights and duties of the parties
- Monitoring implementation of the commitments is key
 - Growing reliance on monitoring trustees (even in the context of behavioral commitments)
 - Selection of the trustee is critical (no conflict of interest and right industry expertise)
 - Trustee to be appointed as soon as possible after commitment decision is adopted
 - Mission statement must be clear and duties must be well-defined
- For the EC, the use of monitoring trustees has undeniable advantages; but there need to be regular checks
- For implicated companies, implementation often raises complex compliance issues and requires adequate attention and resources

Proposals for a More Sustainable Use of Commitment Decisions

A More Comprehensive Legal Framework?

- Proposal for a two-step approach
 - Step 1: A *post-mortem* exercise by the EC
 - Step 2: Guidance by the EC
 - More clarity on the criteria determining the appropriateness of commitments
 - More safeguards to minimise the risk of abuses in the context of the commitment proceedings
 - More focus on the ultimate effectiveness of the antitrust intervention
 - Monitor implementation and review regularly whether the remedy has achieved its purpose

More Clarity on the Criteria Determining the Means of Enforcement

- Difficult balance: legal framework should not eliminate efficiencies of the commitment procedure
- Commitment decisions in cases resting on well-established case-law
- Reflect on the instances where commitment decisions may not be an appropriate means to resolve the competition concerns
 - Need for deterrence?
 - Need to set a precedent?
 - Caveat for fast-evolving markets?
- Extension of the use of settlement procedure to more than cartel cases?

More Safeguards to Minimise the Risk of Abuses as to the Commitments' Scope

- Paradox of commitment decisions
 - Lower proportionality test, but potential for more far-reaching remedies
- Need to make commitment proceedings more transparent towards
 - The investigated company
 - Comprehensive and timely presentation of competition concerns to allow for an informed choice
 - Right of access to the file?
 - Structural remedies as a last resort
 - Third parties
 - Clarification as to the rights of the complainant
 - Threshold issue: Must commitment decisions remove all concerns raised?

More Focus on the Ultimate Effectiveness of the Antitrust Intervention

- Need for correct and timely (i) implementation, (ii) monitoring and (iii) enforcement of the commitments
 - Avoid implementation delays by providing a clear implementation timeline, with penalties for not abiding by it?
 - More clarity as to the choice of (i) allowing the institution of self-monitoring mechanisms, or (ii) appointing Monitoring Trustees
 - Possibility to re-open proceedings if commitments prove to be unsuccessful to solve the identified competition concerns?

Conclusions

Concluding Remarks

- Commitment procedures are a necessary instrument of any mature antitrust system
 - Potential benefits to all parties to the proceedings
- However, need for a more sustainable use
 - At present, framework with not enough safeguards
 - Find the right balance: a more elaborate, but not cumbersome commitment procedure
 - Maintain key advantages of the procedure, while (i) improving its predictability, (ii) ensuring deterrence, (iii) safeguarding the consistent application and enforcement of EU competition law across the EU block, (iv) minimising abuses of the procedure, and (v) ensuring the ultimate success of the EC's intervention

Thank you