

Commitment Decisions: Judicial Minimalism

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Infringement v commitment decisions

- Sector inquiry/complaint
- Dawn raids/discovery
- Statement of Objections
- Oral hearing
- Decision
- (Right to appeal)
- Follow-on damages claims
- NCA lose competence

- Sector inquiry/complaint
- Preliminary assessment or statement of objections
- Negotiation of remedies
- Market testing (third party consultation)
- Commitment decision
- (Right to appeal, but limited as parties agreed to the commitment)
- Damages claim possible (but not follow on)
- Query if NCA retain competence

Commitment decisions in network industries

- Germany (2005-2008): 22 decisions by the Bundeskartellamt: 11 of which on long term supply contracts in electricity and gas
- EC Commission (as of 2010): 18 decisions, 8 in electricity and gas, 2 on TV broadcasting, 1 on music/collecting societies

Incentives to settle (Defendants)

- Good incentives
 - Quick resolution avoids uncertainty
 - Avoid stigma of formal adverse decision
 - Costs of litigation are saved
 - Avoid fines & reduce risk of damages claims
 - Commitment is not a precedent
- Bad incentives
 - Negotiate under-inclusive remedies (induce Type 2 errors)
 - Settle to avoid a deserved penalty

Incentives to settle (Commission)

- Good incentives
 - Cost savings (no need for SO, oral hearing, appeals)
 - Quicker resolution of anticompetitive effects
 - Commitments are legally binding
 - Allows targeted use of limited resources
- Bad incentives
 - Use an untested/weak theory of harm
 - Overly aggressive settlements (i) Type 1 errors; (ii) regulatory remedies
 - Close more cases to show how active one is

Incentives for third parties

- Good incentives
 - Market testing allows e.g. parties who risk foreclosure to voice views about the proposed remedy
 - Prospect of a quick remedy is an incentive to participate in the market test
 - Role in monitoring compliance with commitments
- Bad incentives
 - Third parties press for overly aggressive remedies (Type 1 errors)

Judicial role?

- Set out rights & duties for Commission & parties
 - incomplete procedures in Reg 1/2003
- Stimulate ‘good’ settlements
 - where a speedy solution is better for the market;
where fines unnecessary to secure compliance
- Preclude/deter ‘bad’ settlements
 - When fines/damages claims would be appropriate;
when Commission uses commitments to achieve
‘regulatory’ objectives or circumvents formal decision
inappropriately

Case C-441/07 *Commission v Alrosa* (29 June 2010)

- Factual matrix:
 - DeBeers & Alrosa (competitors upstream and downstream) notify agreement whereby A sells all export diamonds to DeB.
 - COM responds with two SOs: (1) against DeB (Art 102); (2) against A and DeB (Art 101)
 - Joint commitments proposed by A and DeB (reduction of sales)
 - Market test negative; COM indicates only cessation of commercial relations suffices
 - DeB offers commitment to phase out agreement. COM accepts
 - A appeals to GC: (1) commitment disproportionate, duty to consider alternatives that are less onerous; (2) A had a right to be heard & access to the file
 - COM appeals to ECJ and wins: (1) lighter proportionality requirement; (2) A is not an undertaking concerned & has no right to a hearing or to the file; (3) COM decision complies with legal requirements

Proportionality: law

- COM duty:
 - Verify commitments address its concerns [41]
 - Ensure that less onerous commitments that address COM concerns have not been offered [41]
 - NOT a duty to consider if other hypothetical commitments might also resolve concerns [67, 61]
 - Take into consideration interests of third parties [41]
- Judicial review:
 - Manifest error (COM has wide margin) [42]
- Rights of third parties:
 - Unaffected (i.e. damages claims in national courts? Further complaint to NCA?) [49]

Proportionality: policy

Undertakings which offer commitments... consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7...

On the other hand, the closure of the infringement proceedings brought against those undertakings allows them to avoid a finding of an infringement of competition law and a possible fine. [48]

Proportionality: implications

- ECJ confirms COM's intended use of Art 9: a settlement procedure
- Risks
 - Overly extensive remedies; regulatory remedies
 - Imbalance of bargaining power (e.g. COM suggests remedies)
 - Market test reliable? (collusion by third parties?)
 - Strategic use of Arts 101/102 & race to settle?
- Paradoxes
 - Guidance Paper on Art 102 (raising COM's evidential burdens)... followed by use of commitments (lowering
 - Structural remedies under Art 9 (E.On, RWE), untested under Art 7
 - New set of 'precedents' arising under Art 9? (esp for risk averse parties). A two-speed competition law

Procedural issues: law

- Alrosa not an undertaking that has any rights under Art 102 [89]
- Right of COM to reject proposed commitments without giving detailed reasons [95]
- COM has a wide discretion to make proposed commitment binding or reject it [94]

Procedural issues: implications

- Consistent with Art 9 as a settlement procedure
- COM bargaining position strengthened
- Likelihood of appeals reduced further
- Did the Commission use Art 9 to clear a cartel in *Alrosa*? (Cf. AG Kokott at [120]; *Sullivan et al v DeBeers et al* 3rd Cir 13 July 2010)

Conclusions

- ECJ's judicial minimalism compatible with a 'settlement' approach but
 - Should public authorities 'settle'?
 - Yes, procedural economy is in the public interest
 - No, if there are weak safeguards safeguarding the public interest of each settlement
 - Is there a risk of under-enforcement?
 - Yes, if *Alrosa* is a cartel settlement
 - No, if third parties avail themselves of private/public enforcement when commitments are weak
 - Is there a risk of over-enforcement?
 - Yes, as there are no effective safeguards if parties make overly generous commitments
 - No, if Commission exercises self-restraint