

European Commission Continues its Extensive Use of the Commitments Procedure to Settle Cases

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The European Commission now makes regular use of the commitments procedure under Article 9 of EC Regulation 1/2003 (its basic competition law procedural regulation) in order to settle investigations. When adopted, the procedure was not expected to be used regularly. However, its flexibility, relative speed and the fact that no infringement decision is made (upon which third party actions can be based) or fine imposed has resulted in it becoming a key tool for the Commission outside the cartel sphere.

The first commitments decision was made in January 2005 and related to the central marketing of the media rights of the Bundesliga and 2¹. The European Commission had been concerned that the exclusive selling of commercial broadcasting rights by the German Football League (“Ligaverband”) may have violated the EU’s ban on cartels and restrictive business practices (now contained in Article 101 of the Treaty on the Functioning of the European Union (“TFEU”)). The commitments liberalized the central marketing arrangements and increased the availability of rights for television and new media (such as Universal Mobile Telecommunications Systems (“UMTS”) and the Internet).

Since then there has been a regular flow of commitments decisions. The Coca-Cola decision of June 2005² was the next one after Ligaverband and also the first concerning an alleged abuse of a dominant position (in violation of what is now Article 102 of the TFEU) and the first to apply EU-wide. The commitments offered by Coca-Cola and three major bottlers related to carbonated soft drinks (“CSDs”) and restricted the ability of these companies to use exclusivity arrangements and target or growth rebates and also their use of Coca-Cola’s strongest brands to sell less popular products. In

¹ Case COMP/C.2/37.214 — Joint selling of the media rights to the German Bundesliga (OJ L 134, 27.05.2005, p. 46).

² Case COMP/A.39.116/B2 — Coca-Cola (OJ L 253, 29.09.2005, p. 21).

addition, the commitments provided for the compulsory availability to third parties of space in certain of Coca-Cola’s coolers.

Four commitments decisions were adopted in 2006, two in 2007 and then two more in 2008. The Distrigaz decision from 2007³ and the two 2008 decisions⁴ (both relating to E.ON) followed the Commission’s energy sector competition inquiry. The E.ON cases were particularly notable due to the remedies imposed. The Commission identified concerns that E.ON may have withdrawn available generation capacity from the German wholesale electricity markets (to raise prices), and may have deterred new investors in generation. Furthermore, the Commission had concerns that E.ON may have favored its production affiliate for providing balancing services, while passing the resulting costs on to final consumers, and prevented other power producers from exporting balancing energy into its transmission zone. E.ON agreed to divest around 5,000 MW of its generation capacity to address the concerns regarding the generation market. E.ON also committed to divest its extra-high voltage network to meet the concerns on the electricity balancing market. These unprecedented (outside the merger control sphere) remedies were designed fundamentally to change the landscape of the German electricity markets and marked the first time in European competition law history that a company divested very significant assets to address competition concerns.

In 2009, the Commission was very active and adopted five more commitments decisions (concerning Rambus⁵, RWE⁶, GDF Suez⁷, Independent Association of

³ Case COMP/B-1/37966 — Distrigaz (OJ C 9, 15.1.2008, p. 8).

⁴ Cases COMP/39.388 — German Electricity Wholesale Market and COMP/39.389 — German Electricity Balancing Market (OJ C 36, 13.2.2009, p. 8).

⁵ Case COMP/38.636 — RAMBUS (OJ C 30, 6.2.2010, p. 17).

⁶ Case COMP/39.402 — RWE Gas Foreclosure (not yet published in the OJ).

Classification Services⁸ (ship classification) and Microsoft⁹). GDF Suez and RWE were both further energy sector cases, with RWE agreeing to divest its western German high-pressure gas transmission network and GDF Suez, agreeing to make a major structural reduction in its long-term reservations of gas import infrastructure capacity into France. Of the others, Microsoft in particular is interesting due to the originality of the remedy adopted, demonstrating the flexibility allowed by commitment decisions. Microsoft agreed to make available a mechanism in Windows 7 that allows Internet Explorer to be turned on or off and also to distribute software to EEA users of its operating systems to introduce a Choice Screen that gives consumers a choice to install competing web browsers.

2010 is likely to be just as active as 2009, with the energy sector again in focus. On March 17, 2010, the Commission announced that it had accepted commitments from French electricity group EDF in order to deal with concerns that EDF's contracts with large electricity consumers may hinder the entry and expansion of its competitors in France.¹⁰ These commitments address the terms of EDF's contracts with its customers in France.

Further, at the time of writing, the Commission was market testing proposed commitments received from Italian natural gas supplier ENI and members of the oneworld airline alliance. The ENI case was also launched in the wake of the Commission's energy sector inquiry, following concerns that ENI's behaviour was blocking competitors' access to the transport infrastructure needed to import gas into Italy in breach of Article 102 TFEU. ENI has proposed structural remedies that effectively mean the full divestiture of all of ENI's shares in all gas transport pipelines in relation to which the Commission has competition concerns.

The airline case relates to concerns under Article 101 TFEU about agreements between British Airways, American Airlines and Iberia. Pursuant to these

agreements, the parties intend to jointly manage schedules, capacity and pricing, as well as share revenues on transatlantic routes between North America and Europe. They have now offered commitments in order to alleviate the Commission's concerns. In particular, they have offered to make available landing and take-off slots at London Heathrow or London Gatwick airports on routes to Boston, New York, Dallas and Miami. There are also related proposals concerning, among other matters, operating authorizations at New York's JFK airport and access to frequent flyer programs on the relevant routes.

There should be an interesting development in this area at European court level during 2010 when the European Court of Justice ("ECJ") hands down its judgment in Case C-441/07 P *Commission of the European Communities v Alrosa Company Ltd.* Alrosa is challenging the 2006 De Beers commitment decision, in which De Beers, as the worldwide market leader in the diamond trade, undertook not to purchase any more rough diamonds from Alrosa, the second largest producer, bringing to an end a long-standing trading relationship between the two groups. Alrosa considers that decision to be disproportionate and also takes the view that its right to be heard has been infringed. Before the European General Court Alrosa obtained the annulment of the decision and the Commission appealed. Advocate General Kokott, advising the ECJ, suggested (opinion of September 17, 2009) that the ECJ should set aside the General Court's judgment and thereby dismiss the appeal against the Commission's decision. It would appear likely that this will be followed.

Assuming the commitments procedure survives this appeal, it is interesting to note that it is just one example of the use of settlements by the Commission when enforcing EU competition law. Difficult merger cases have since the introduction of the EU Merger Regulation been "settled" with remedies, which are offered by the parties. There is also now a Commission settlement procedure for cartels, which at the time of writing has yet to be used, but which in exchange for a guilty admission from the parties allows for a slightly lower fine and a quicker procedure. Opinion is divided on the appropriateness of the cartel settlement procedure, in particular due to worries about the rights of the defence, but it seems certain that it will, like the commitments procedure, become a standard part of EU competition law enforcement.

⁷ Case COMP/39.316 — GDF (OJ C 57, 9.3.2010, p. 13).

⁸ Case COMP/39.416 — Ship classification (OJ C 2, 6.1.2010, p. 5).

⁹ Case COMP/39.530 — Microsoft (Tying) (OJ C 36, 13.2.2010, p. 7).

¹⁰ Case COMP/ B-1/39.386 — Long-term contracts France (not yet published in the OJ).