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Competition *policy brief*

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To commit or not to commit?

Deciding between prohibition and commitments

1. Introduction

Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits anti-competitive agreements and concerted practices, while Article 102 of the TFEU prohibits abuses of dominant market positions in the Single Market. The Commission may enforce these rules through two types of decisions: "**prohibition" decisions, which are taken under Article 7** of the EU Antitrust Regulation (Regulation 1/2003), and **"commitment" decisions, which are taken under Article 9** of that same regulation.

This policy brief describes each type of decision and explains the reasons for choosing one or the other.

Both prohibition decisions under Article 7 and commitment decisions under Article 9 follow a fully transparent process. Both types of decisions are published, and are binding on the companies concerned. This creates legal certainty and preserves competition in the Single Market. In both types of decisions, the Commission may impose the same kinds of binding structural or behavioural obligations on the companies under investigation.

Under Article 9, these measures ("commitments") are voluntarily offered by the companies and should address the Commission's competition concerns. Under Article 7, these measures ("remedies") are imposed by the Commission when they are necessary to bring the infringement to an end.

Both commitments and remedies may include obligations to adopt a certain conduct or reach certain results (e.g. divesting an asset, or licencing an IP right), as well as obligations to refrain from adopting a certain behaviour.

In addition, Article 7 decisions can impose fines on companies for having infringed the Treaty rules. Article 9 decisions can also indirectly lead to fines, should a company not respect its commitments.

2. Article 7 vs. Article 9

In an Article 7 decision, the Commission must establish an infringement, which requires an in-depth investigation. Questions of fact and law must conform to standards of evidence set by the European Courts.

In an Article 9 decision, however, the Commission does not establish an infringement. The Commission formally communicates to the company a summary of the main facts of the case, identifying the competition concerns. This serves as a basis for the parties to put forward appropriate commitments to address these concerns.

The article under which the Commission deals with the case has no effect on the kind of infringement investigated and the theory of harm (i.e. the explanation of why the behaviour at hand may harm competition and consumers). However, Article 7 and Article 9 do have different requirements regarding the level of necessary qualitative and quantitative analysis and evidence.

In a nutshell

The Commission retains a margin of discretion in the choice of opting for an Article 7 prohibition decision or an Article 9 commitments decision. The choice depends on the main objectives pursued and the specific features of the case. In practice, commitment decisions are not appropriate in cases calling mainly for imposing high fines for past behaviour, or where no effective, clear and precise remedy is identifiable. They are only possible when companies are willing to offer appropriate commitments.

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These different demands derive from the distinction between identifying concerns about a *possible* infringement versus the finding of an *actual* infringement. Even so, the competition concerns in an Article 9 decision must also be based on a coherent theory of harm and supported by evidence for such concerns.

The choice of taking an Article 7 or Article 9 decision does not depend on the strength of the case. It depends first on whether a party chooses to offer commitments and, second, on whether the Commission finds these appropriate and accepts them. If the Commission considers the offer unsuitable it will continue the investigation and conclude with an Article 7 decision.

Article 7 decision

A prohibition decision under Article 7 is a clear ban of anti-competitive behaviour based on the finding of an infringement. Prohibition decisions create a solid legal precedent once confirmed by the courts and have a strong deterrent effect, especially when combined with a fine. Article 7 decisions may impose fines, but since there is no finding of infringement, no fines are imposed under Article 9. Article 7 decisions may also be more helpful than Article 9 decisions to victims of antitrust violations seeking to obtain damages.

The Commission will adopt an Article 7 prohibition decision when the primary goal is to **punish for past behaviour**. For example, cartels are a very serious infringement where punishment and deterrence are in order. As a result, commitments under Article 9 cannot be offered in the case of cartels.

The Commission is also more likely to opt for a prohibition decision if it is important to **set a legal precedent**. Prohibition decisions are usually reasoned in greater detail and explain the Commission's theory of harm more exhaustively, which gives more guidance to market players. Prohibition decisions are also frequently challenged before EU Courts, which gives judges the opportunity to clarify the law, whereas appeals of Article 9 decisions, including by third parties, are rare.

Finally, the Commission will also opt for a prohibition decision when the only commitment that is or can be offered is to **cease the anti-competitive behaviour**, in other words, to comply with the law in the future.

An example of an Article 7 decision is the Lundbeck case (IP/13/563). In June 2013, the Commission fined Danish pharmaceutical company Lundbeck and several competitors for colluding in a 'pay for delay' deal, where Lundbeck paid these companies to keep their cheaper, generic medicine off the market. The Commission wanted to sanction this type of behaviour, which delays the market entry of cheaper medicines to the detriment of both patients and public budgets, so it opted for proceedings under Article 7. The case is now under appeal before the General Court.

Article 9 decision

Article 9 commitment decisions, introduced by Regulation 1/2003, have proven to be an effective addition to the Commission's arsenal. They have replaced the practice of informally closing cases based on voluntary, non-binding commitments which did not provide for any kind of legal certainty and did not impose binding obligations on the companies concerned.

In a decision under Article 9, the Commission accepts commitments offered by a company that appropriately address the Commission's concerns as formally communicated to the company, offer sound solutions and achieve real change in the markets. The Commission adopts a decision **obliging the company to implement the commitments** as offered. Adopting an Article 9 decision allows the Commission to impose a fine if the company breaches the legally binding commitments it has entered into. To impose such a fine, the Commission does not need to establish a breach of Article 101 or 102 TFEU, but simply has to show that the company did not comply with the commitments. Like fines under Article 7, these fines cannot exceed 10% of the global annual turnover of the undertaking concerned.

It is important to stress that the Commission will not accept commitments that fall short of addressing its concerns. The Commission does not enter into a "bargaining" process that would allow a company to get away with insufficient commitments. In addition, it is possible for the Commission to accept commitments that potentially go beyond what it could have imposed under Article 7.

Commitment decisions can have several advantages over prohibition decisions, generally resulting from the more cooperative nature of the procedure:

- **Quicker impact on the market** and resolution of the competition concerns than would have been possible for the same case under Article 7. This has proven to be particularly important in markets that are in the process of liberalisation, such as in the energy sector, or fast-moving markets such as the IT sector, where dealing with competition concerns as quickly and as effectively as possible is key. When companies offer commitments early in the process, these procedural gains are even more significant.

- **More effective remedies.** Although the same type of remedies are theoretically available for Article 7 and Article 9 decisions, Article 7 decisions tend to prohibit and sanction infringements committed in the past, whereas commitments under Article 9 are forward-looking: a company commits to a specific behaviour – beyond merely respecting the law - over a specific duration, or to structural measures such as divestitures, with long-lasting effects on

the market. Commitments may therefore prevent competition concerns from returning in the future, while Article 7 decisions tend to rely on the deterrent effect of the fine. The cooperative nature of Article 9 allows for a more finely tuned and detailed tailoring of the commitments as well as swifter implementation.

- **Better and swifter implementation of structural and behavioural measures** aimed at solving competition concerns. The fact that the companies under investigation design the commitments themselves facilitates their implementation. The threat of fines for violations of commitments provides companies with an incentive to implement them properly.

Thanks to procedural efficiencies, commitments have a quicker impact on the market. The procedure for Article 9 decisions is less burdensome, particularly if commitments are introduced early. Indeed, if the company under investigation is ready to propose appropriate commitments, it can **avoid lengthy oral and written adversarial proceedings,** in which the Commission can only take a final decision after having allowed the company to access the file and to defend itself. At the same time, the use of market testing ensures the EU commitments process is probably among the most transparent in the world, giving market participants the opportunity formally to comment on the commitments before the Commission completes its analysis of the proposals.

When it receives commitment proposals by a company, the Commission carries out a market test. This means that the commitment proposals are published and interested parties can send their comments to the Commission. This helps the Commission complete its analysis on whether the commitments address the concerns it has identified. Following the market test, the Commission may ask the company to improve its commitment proposals. In some cases – namely if the changes are not simply improvements but alter the very nature of the commitment proposals – the Commission may decide to launch a second market test before taking a decision.

Although they do not create as strong a legal precedent as an Article 7 prohibition decision, Article 9 decisions, which are motivated and based on a solid theory of harm, may also provide guidance to companies.

This was for example the case in the *EDF Long Term Contracts* case (IP/10/290) in relation to the standards applied by the Commission to customer foreclosure cases, and in the *Siemens/Areva* case (IP/12/618) where the Commission clarified the concept of ancillary restraints in antitrust cases.

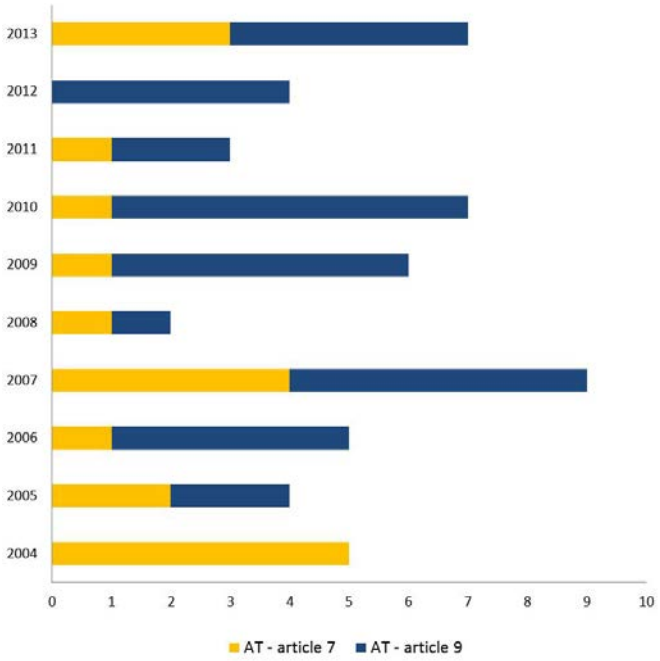
An example of an Article 9 decision is the Visa Europe multilateral interchange fees ("MIF") case. In 2010, Visa Europe had committed to reduce its MIFs for debit card transactions (IP/10/1684). The Commission then investigated Visa Europe's MIFs for credit cards as well as its rules limiting cross-border provision of card acceptance services. The concern was that such fees and rules artificially restricted competition and raised prices for consumers. In order to address those concerns, Visa Europe offered in particular to reduce its credit card MIFs 0.3%, to reform its rules concerning cross-border competition and to increase transparency of merchant fees and MIF rates. The Commission accepted these commitments in February 2014 because they effectively removed the anti-competitive effects it had identified (IP/14/197).

3. The Commission's enforcement

Between May 2004 and February 2014, the Commission adopted 34 commitment decisions under Article 9 and 19 prohibition decisions under Article 7 (excluding all cartel cases).

The decision to pursue an Article 9 decision rather than an Article 7 decision is based on the relative advantages and disadvantages of the two procedures in the specific circumstances of the case.

Commission decisions adopted under Article 7 and Article 9 of Regulation 1/2003 (May 2004 – December 2013) – excludes cartels



The Commission will prefer Article 7 decisions in cases of very serious infringements, such as cartels, as well as when there is no remedy available to solve the competition problem other than a cease-and-desist order.

A commitment under Article 9 to comply with the law in the future (e.g. committing not to share markets or not to apply resale price maintenance) should not be accepted.

Solving this type of case with a commitment decision is both useless (the law applies anyway) and detrimental to effective enforcement.

In contrast, an Article 9 decision is more appropriate when the primary target is not punishment for past behaviour, but adjusting future behaviour. This makes Article 9 decisions a good option for fast-moving markets, where the speed of enforcement is crucial for the effectiveness of the commitments. Of course, if the companies concerned are not ready to offer appropriate commitments to the Commission, Article 7 may be the only option available to ensure competition rules are complied with.

The Commission has made extensive use of Article 9 decisions in the IT and digital economy sectors. In Microsoft (2009, IP/09/1941), the Commission accepted the company's commitment to give users a browser choice in the Windows operating system, facilitating the use of competing browsers. In IBM (2011, IP/11/1539), the Commission accepted the company's commitment to make spare parts and technical information available to independent mainframe maintainers, opening the mainframe maintenance market to competitors. In eBooks (2012 and 2013, IP/12/1367 and IP/13/746), the Commission accepted commitments that were offered by Apple and five international publishers to terminate existing agency agreements that include retail price restrictions and to exclude certain clauses in their agency agreements during five years. These commitments restored the normal competitive conditions of the eBooks market.

Another important consideration is the timing of the commitments proposal. The Commission may refuse to consider commitments offered too late in the process, as this can cancel out the procedural efficiency typical of Article 9 decisions, making it faster to proceed to a prohibition decision. Finally, an optimal use of the Article 9 procedure is when all parties under investigation are willing to offer commitments.

An Article 9 decision implies continuous surveillance by the Commission of the proper implementation of the commitments during the agreed term. The commitments usually foresee the appointment of a Monitoring and/or Divestiture Trustee, who must be approved by the Commission. The Monitoring Trustee supervises the undertakings concerned to ensure they fulfil their commitments, thereby supporting the Commission's own monitoring efforts. The choice of the appropriate monitoring tools depends on the specificities of the case. The Commission takes action if a company does not comply with the commitments it has agreed to. This is illustrated by the €561 million fine the Commission imposed on Microsoft in March 2013 (IP/13/196) for not complying with its browser choice commitment that had been made binding in an Article 9 decision of 2009.

4. Conclusion

A large number of factors must be taken into account to determine whether an Article 7 prohibition decision or an Article 9 commitment decision is more appropriate. Consequently, it would be a mistake to believe that the figures above represent a trend.

The Commission retains a wide margin of discretion concerning the choice between a prohibition and a commitment decision. At the same time this margin has a limit in cartel cases, which call for the imposition of high fines for past behaviour. Article 101 or 102 infringements where no effective, clear and precise remedies can be identified will continue to be addressed through Article 7 decisions.

Ultimately, the choice between Article 7 and Article 9 depends on the objectives pursued: deterrence, punishment and precedent value on the one hand, efficient and swift solving of competition concerns on the other.