



ECN RECOMMENDATION ON COMMITMENT PROCEDURES

By the present Recommendation the ECN Competition Authorities (the Authorities) express their common views on the need for making commitments binding and enforceable on undertakings and for ensuring a minimum level of procedural guarantees for stakeholders. It contains the general principles which the Authorities consider relevant to ensure the effective enforcement of the EU competition rules within the ECN.

This Recommendation may serve as guidance to all those involved in shaping the legal framework for the enforcement of Articles 101 and 102 TFEU. It is without prejudice to the legal frameworks of those ECN jurisdictions which already provide for these general principles or which go beyond the scope of the present Recommendation.

I. INTRODUCTION

1. A formal decision by an Authority accepting commitments is a means of ending an investigation into a possible infringement of competition law. Such commitments are voluntarily offered by the undertaking under investigation to meet the competition concerns identified. The decision of the Authority to accept the commitments makes them binding on, and enforceable against, the undertaking which has given them. Such a decision concludes that there are no longer grounds for action by the Authority. Commitment decisions do not make a finding of an infringement, nor do they conclude that an infringement would be terminated.
2. Commitment decisions have a number of advantages: The first is the quick reestablishment of effective competition on the market, to the benefit of consumers

and the public interest. The second is effectiveness, as commitment decisions do not need to be based on full-scale investigations and do not reach conclusions on the facts of the case or the application of the law. Moreover, they usually involve less procedural steps which allows for more appropriate use of Authorities' resources. For the undertaking subject to the proceedings, faster proceedings and the absence of a decision finding an infringement may be attractive, as well as the fact that commitments are voluntarily submitted and are not imposed.

3. Article 5 of Council Regulation (EC) No 1/2003 of 16 December 2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty expressly enables national competition authorities to adopt decisions accepting commitments when applying Articles 101 and 102 TFEU.¹ The possibility to adopt commitment decisions is expressly provided for by specific legal provisions in almost all EU Member States. The European Commission may adopt commitment decisions pursuant to Article 9 of Council Regulation (EC) No 1/2003. Within the ECN, considerable experience with the adoption of commitment decisions has been developed since the entry into application of Council Regulation (EC) No 1/2003 in 2004.
4. It is at the discretion of the Authority whether or not to accept commitments. An Authority can at any stage continue proceedings with a view to adopting a prohibition decision to bring to an end an agreement or conduct that is found to infringe the competition rules and may provide for the imposition of remedies and/or fines.
5. The exercise of the powers outlined in this Recommendation should be in accordance with the general principles of EU law, notably proportionality, legal certainty and the observance of fundamental rights, including those enshrined in the Charter of Fundamental Rights of the European Union and the European Convention of Human Rights where applicable.

¹ OJ L1/1, 4.1.2003.

6. The fundamental steps of the commitment proceedings are similar in all jurisdictions and usually include: (i) the submission by the undertaking of proposed commitments aimed at addressing the concerns raised by the competition Authority; (ii) discussions between the undertaking and the competent Authority on the proposed commitments and possible changes to the proposal; (iii) possible involvement of third parties or complainants potentially interested by the proposal for commitments; (iv) a final assessment of the proposal usually followed by a formal decision.
7. The most serious infringements are a priori excluded from commitment decisions in several jurisdictions. Some jurisdictions do not explicitly exclude the possibility of submitting the commitments but in practice infer such a conclusion from recital 13 of Council Regulation (EC) No 1/2003 which provides that commitment decisions are not, in principle, appropriate in cases in which the Commission intends to impose a fine.²
8. Several Authorities have established policies or issued guidelines concerning commitment proceedings and commitment decisions. In some cases such policies have been published in order to give undertakings guidance about the benefits they may gain from the procedure, the practical requirements for their applications, the different procedural steps and the possible outcomes and the cases when commitments are likely to be acceptable.
9. Commitment decisions have proved to be an efficient and effective tool of the competition law enforcement in most European jurisdictions. In order to ensure that this power is available through-out the ECN, it is important that all jurisdictions expressly provide for the adoption of commitment decisions by law. Further convergence in this area within the ECN would help to ensure the coherent enforcement of Articles 101 and 102 TFEU.

² Consequently, the Commission does not apply its commitments procedure under Article 9 of Council Regulation (EC) No 1/2003 to secret cartels that fall under the Notice on immunity from fines and reduction of fines in cartel cases OJ C298, 8.12.2006, p.17 (para 116 of the Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C308, 20.10.2011, p.6). Other Authorities have also set out in guidelines which "serious infringements" are excluded from being the subject of a commitment decision.

10. To ensure that the advantages of commitment decisions are fully realised in terms of securing swift changes to the market which address the competition concerns and procedural economies, it is important to ensure that the procedures for the adoption of commitment decisions are effective and efficient, while ensuring sufficient opportunity for the undertaking under investigation to interact with the Authority.
11. The decision to enter into proceedings with a view to adopting a commitment decision rests with the Authority, upon a proposal of the undertaking subject to the proceedings. Discussions between Authorities and undertakings on possible commitments typically take place during the investigation phase and the undertaking subject to the proceedings should be encouraged to signal its interest in discussing commitments at the earliest possible stage to optimise the effectiveness of commitment proceedings.
12. Discussions are held between the Authorities and the undertaking subject to the proceedings. Complainants and third parties may participate by submitting comments, either in response to being directly consulted by an Authority or through systems of public consultation or market test, depending on the legal framework in place in the respective jurisdiction.
13. The duration of the discussions should be sufficiently flexible to allow for the submission of commitments which address the competition concerns and at the same time be administratively efficient. Either the Authority or the undertaking subject to the proceedings may decide at any moment during the proceedings not to continue their discussions, in particular if the Authority is not convinced of the undertaking's genuine willingness to propose commitments which will address the competition concerns. The Authority will then normally continue proceedings with a view to the adoption of a prohibition decision.
14. In this context, it is important that the Authorities have the power to obtain from undertakings the necessary information in order to verify that commitments proposal meets the competition concerns identified and to ask for any relevant clarifications or modifications that they deem necessary.

15. The views of other players in the market on the proposed commitments can play an important part in assessing their adequacy to meet the competition concerns and to allow such third parties the opportunity to submit their observations. In some jurisdictions a mandatory market test is foreseen which typically involves the publication of a summary of the case and the main content of the commitments proposed and grants a period in which observations can be submitted. In other jurisdictions, holding a market test is discretionary and its form may be decided on a case by case basis. Other means to test the adequacy of the commitments to meet the competition concerns may also be employed, for example, some Authorities may send the non-confidential version of the commitments offered to the complainant or to other third parties which, depending on the respective system, may or may not be admitted to the proceedings.
16. With regard to the nature of the commitments which can be adopted, the commitments can be behavioural, and concern the conduct of the undertaking e.g. a supply obligation, or structural if they lead to changes to the structure of an undertaking, e.g. the divestiture of part of an undertaking. In the ECN, behavioural commitments have been more frequently used than those of a structural nature.
17. The Authorities, on the basis of the market test and/or any other information available decide whether the commitments meet the competition concerns identified. When applying the principle of proportionality, the Authorities should not be obliged to go further than verifying that the commitments do not manifestly go beyond what is necessary to address these concerns and that the undertakings subject to the proceedings have not offered less onerous commitments that also address the competition concerns adequately. When carrying out that assessment, the Authorities take into consideration the interests of third parties. In any case, the Authorities are not obliged to compare voluntary commitments submitted by the undertakings subject to the proceedings with measures which they could impose

under a prohibition decision and to disregard as disproportionate any commitments which go beyond such measures.³

18. Experience gathered within the ECN shows that commitments which are unambiguous and self-executing are the most conducive to an effective and efficient outcome. This means that their implementation should not be dependent on the will of a third party which is not bound by the commitments. However, if in a particular case the commitments cannot be implemented without the agreement of a third party, the undertaking giving the commitments may be requested to provide timely evidence of the third party's agreement.
19. Commitment decisions may apply for a specified period. The duration of the commitments may vary significantly from market to market, depending, for example, on the reactivity of the markets concerned or the investments needed for certain improvements.
20. Monitoring compliance with commitment decisions is fundamental to guarantee the effectiveness of this enforcement tool. Monitoring tools can vary depending on a number of factors, including the type and scope of the commitments, the structure of the relevant market and/or the size of the undertakings involved.
21. Effective monitoring mechanisms may include: (i) ex-officio monitoring by the Authority; (ii) monitoring based on complaints or information from market participants providing information about possible non-compliance with the commitments on their own initiative or upon request of the competent authority.; (iii) regular reporting by the undertakings which are the addressees of the commitment decision; (iv) monitoring based on cooperation with sectoral regulators and/or other public (national/international) bodies; (v) the use of trustees and/or external experts or non-governmental advisors; and (vi) an express review clause. The choice of mechanism to be used depends on the case at hand and may include a combination of different tools.

³ Case C-441/07 P *Commission v Alrosa*, judgment of 20 June 2010.

22. Within the ECN, many jurisdictions provide for the withdrawal, removal or amendment of the commitment decision and/or the reopening of proceedings where: (i) there has been a material change to the facts or the relevant legal context⁴ on which the decision was based, and/or (ii) the decision was based on misleading, incorrect or incomplete information. In addition, in most jurisdictions, the Authority also has the power to reopen proceedings if the undertakings which are the subject of a commitment decision act contrary to their commitments.
23. In addition to the possibility to re-open proceedings in case of non-compliance with a commitment decision, many Authorities have the possibility to impose a sanction, notably an administrative fine and/or means to compel compliance, such as a periodic penalty payment, in line with Article 24(1) of Regulation (EC) No 1/2003 or a court order. To underpin the effectiveness of commitment decisions, it is essential that effective sanctions may be imposed for non-compliance with commitment decisions and that effective means are at the disposal of Authorities in order to compel compliance.
24. Commitment decisions taken by the Authorities can be currently appealed in many jurisdictions by the undertakings whose commitments have been made binding. In some jurisdictions, the possibility of appealing a commitment decision is also available to persons in respect of whom the commitment decision contains provisions and/or a third party whose interest might be influenced by the commitment decision. That being said, commitment decisions rarely give rise to litigation in practice, as they are based on voluntarily submitted commitment proposals by the parties under investigation and lead to a more consensual conclusion of proceedings.

⁴ For example, amendments to existing regulation or law which influence the implementation of the commitments by the undertaking or introduce significant changes to the market scenario in which the decision was adopted.

II. ECN RECOMMENDATION

It is recommended that:

1. All ECN jurisdictions should provide *explicitly* in their legal framework for effective means to adopt formal decisions by which commitments offered by undertakings to meet competition concerns are made binding on, and enforceable against, them. Such a decision should not conclude whether there was or still is an infringement but should find that there are no longer grounds for action.
2. It is at the discretion of the Authority whether or not to accept commitments and to adopt a commitment decision or to decide at any stage to continue proceedings with a view to adopting a prohibition decision.
3. The procedures for adopting commitment decisions should be efficient and effective with a view to securing swift changes to the market to address the competition concerns, as well as procedural economies.
4. The undertakings subject to the proceedings should have sufficient opportunity to interact with the Authority conducting the proceedings.
5. The Authorities may seek the views of market participants on whether the commitments address the competition concerns.
6. When applying the principle of proportionality, the Authorities should be confined to verifying that the commitments address the competition concerns. In particular, they should not be obliged to compare voluntary commitments submitted by the undertakings with measures which they could impose under a prohibition decision and to disregard as disproportionate any commitments which go beyond such measures.
7. The Authorities should have at their disposal effective powers to monitor the implementation of decisions ordering commitments.
8. In case of non-compliance with decisions ordering commitments, the Authorities should have at their disposal effective sanctions, notably fines. Authorities should

also have effective means at their disposal to compel compliance with decisions ordering commitments, for example through the imposition of periodic penalty payments which are set at an appropriate level.

9. The Authorities should have the power to reopen proceedings where: (i) there has been a material change in any of the facts on which the decision was based; (ii) the undertakings which are the subject of a commitment decision act contrary to their commitments; or (iii) the decision was based on incomplete, incorrect or misleading information.

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