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The Competitive Effects of Headline Price Announcements

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Concentrated industries often feature "headline" price increases. This issue was central to the assessment of the competitive effects of the merger between DS Smith and James in the corrugated cardboard packaging industry in the UK. This note discusses under what conditions headline price announcements might be problematic, and why in this specific instance the available evidence suggested that no coordination was likely to arise in the market post-merger.

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A White Book for the Reform of Spanish Competition Law

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In January 2003, the Spanish Ministry of Economy presented to the public for consultation the "White Book for the reform of the Spanish Competition Law System ("White Book"). The White Book aims at initiating a legal reform procedure that will work in a more efficient Spanish competition law, in tune with the newly modernized competition laws of the European Union. The article briefly describes and comments on the most significant aspects of the reform proposed by the White Book.

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The recent Decision of the Court of Appeal for Western Sweden ("SwedTelecom v Viking Telekom AB (publ)) proves to be of pivotal importance to the enforcement of the arbitrability of competition law issues, even ex officio, on the European continent, thus falling squarely into line with previous experiences along similar lines in other major European fora.

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Implications of the Charleroi Case for the Competitiveness of EU Air Transport

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The Charleroi decision has received much publicity and generates continuous public diverging views among airports and airlines. The decision in this state aid case stems from a worrying lack of understanding by the Commission of the enormous changes in the air transport industry following the liberalisation. The proposed state aid "guidelines", which are based on the Charleroi decision, will seriously undermine the competitiveness of European air transport, to the benefit of failing national airlines.

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The Corte di Cassazione takes "Courage": a Recent Ruling Opens Limited Rights for Consumers in Competition Cases

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Comments on the recent Unipol Decision, which determined that consumers who suffer damages from a contract relying on an imperium cartel, may claim damages deriving from the downstream agreement, provided that the cartel restricts competition in the relevant market. Reviews the background to the case and issues concerning jurisdictional and legal standing for consumers in antitrust cases under Italian law. Discusses the cause of hindrance of effective private enforcement of competition rights in Italy and the EU.

MIGUEL SOUSA FERRO

Continuing to Commitment Decisions—Unanswered Questions on Article 9 Decisions

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This paper tackles some of the practical concerns arising from the adoption of Commitment Decisions by the European Commission, under Reg.1/2003, namely impact on private litigation and attenuation with National Competition Authorities. It hopes to build on some of the options expressed by John Temple Lang in the ground breaking paper on this subject, in 2003.
Committing to Commitment Decisions—
Unanswered Questions on Article
9 Decisions

Miguel Sousa Ferro

I. Introduction

With the entry into force of Council Regulation 1/2003, the Commission was given the power to adopt Decisions through which it makes commitments offered by com-

petition law; EC law: Enforcement; National

The author would like to thank factory Temple Long for his patience and

interest in discussing this issue. Thanks also to Nuno Raga, for his

correspondence email: info@cevrolealmeida.pt

II. General characteristics of Commitment

The Regulation 1/2003 Commitment Decisions

were inspired by the American consent decrees. Some
defendants instead to look upon Art.9 Decisions as

cases of the equivalent system in the European Community

merger regulation.2 However, as was highlighted by John

1 Temple, Long, John, “Commitment Decisions Under Regula-
tion 1/2003—Legal Aspects,” in A New Kind of Compe-

2 Schmitz, Alexander, “The Commission’s Position within the

European Union’s Antitrust Enforcement System: A New

Challenge for Advanced Economies,” in Van Humbeeck (ed.),

2002 EU Competition Law and Policy Workshop/Proceedings,

Amsterdam: Kluwer, 2003, p.531, Bottile, Philippe,

Commission’s powers under Regulation 1290/2000,” Competition

Law, vol. 40, December 2001, pp. 198-202 (hereinafter “Ruk-

ky”), p.29, For a specific analysis of the relation with the

American consent decrees see Furse, Mr. “The Decision to

Consent: Some Proposals from the US” [2001] E.C.L.R. (interim:

Future), p.158


himanaher “Rukky”, p.256

2003] E.C.L.R. 347 (hereinafter “Temple Long”), p.531, Bottile, Phil-

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himanaher “Rukky”, p.256
ment Decisions; Czech Republic, Finland, France, Lux-
embourg, Poland, Sweden and the UK. The proposed
Seventh Amendment to the German Act against
Restrictions of Competition apparently also favours
this possibility (new Art 32b).

The national versions of Commitment Decisions vary
somewhat. In the Czech Republic, it seems that the
NCA is precluded from adopting a Commitment Deci-
sion in cases where the unlawful agreement in ques-
tion has already been put into practice and where this
agreement, or the abusive practice, has resulted in
substantial distortion of competition, it remains to be
seen whether this limitation will not render Commit-
ment Decisions in this state a more theoretic possibility.
The most elaborate regime is that of the UK, where
particular care was taken in protecting the rights of
companies offering commitments (inclusively through
the introduction of the concept of "reasonable excuse"
for failing to adhere to the commitments and the express
provision that decisions not to release commitments,
following a request from the company in question, are
subject to appeal).

The Member States' national legislation does very
little to answer the controversial issues mentioned in
the introduction to this paper.

Considering that Art 3 of Regulation 1/2003 empow-
ners NCAs to apply Arts 81 and 82 EC, merely through
the adoption of Commitment Decisions, it may be
argued that, regardless of national legislation pro-
visions, Regulation 1/2003 is enough for NCAs to be
competent to adopt such decisions when applying Com-
munity's competition law.10 This would make all the
more relevant for the NCA to determine if the applica-
tion law is the Community or the national one. But
the problem would remain of how to enforce Commit-
ment Decisions adopted by NCAs when applying Arts
81 or 82 EC, considering the apparent silence of most
national laws at that respect.

IV. Third party claims for compensation
before national courts

Unlike in the USA, where "the majority of cases are
resolved by way of civil actions, and in the majority of
these, without recourse to litigation," 11 in Europe pri-
vate enforcement of competition law is extremely rare.

According to the recent study conducted by Aslund,
there have been "only around 40 judged cases for
damages actions (12 on the basis of EC law, around
33 on the basis of national law and 4 on both). Of these
judgments 28 have so far resulted in an award being
made (18 on the basis of EC competition law, 16 on
national law and 4 on both)." 12

Nonetheless, the situation should be expected to
change in the medium to long-term, as the Commission
"is now publicly stating that the development of private
enforcement of competition rules is its number one
classification." 13

One should keep in mind that, in the few cases of this
sort that have emerged, some EC national courts have,
so far, often shown themselves reluctant to accept that
the third party has sufficiently demonstrated the causal link
between the behaviour and the damages, and that it has
sufficiently quantified the damages.

If the company abides by the Commitment Decision
assumed that the company that accepts the Commit-
ment abides by it in full, there are three distinct scenar-
io for third party claims for compensation based on
practices which were the subject of a Commitment
Decision adopted by the Commission:

(1) Compensation for unlawful behaviour prior to
the period analysed by the Commission's Art 27(4)
Notice — general rules applied; 14
(2) Compensation for unlawful behaviour within
the period analysed by the Commission's prelimi-
nary analysis contained in the Art 27(4) Notice —
the preliminary analysis and the Commitment
Decision will no be erudite now create a presump-

10 For more thoughts on the difficulty of implementing Art 81 in
what constitutes issuance of Commitment Decisions by NCAs, see
http://lettering-a-lynn.com, "A necessary step forward, common procedural
standards of implementation for Articles 81 and 82 EC without the
Workshop/Proceedings (hereinafter "81st"), p.9.

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Workshop/Proceedings (hereinafter "81st"), p.9.
FT, in the UK, only considered enforcement of commitment decisions adopted by the UK authorities.

Fourthly, Art.5 of Regulation 1/2003, concerning the powers of the competition authorities of Member States, makes no reference to the implementation of Commitment Decisions. This article easily allows the imposition of “fines, periodic penalty payments or any other penalty” if these are “provided for in their national law”. Rightly, a NCA may only impose a fine or any obligation on a company if the national law (or community law) attributes this competence to that authority. To the best of my knowledge, none of the Member States’ national legislation foresees this competence and, in view of the interpretation restrictions on this sensitive area of the law, extensive or analogical interpretation should not be permissible.

Arguments for

In light of the Simonsen/26 case, and the more recent Festmif Verm Fetz/27 case, it must be argued that, even though there might not be a national law attributing competence to the NCA to enforce a Commitment Decision adopted by the Commission, such competence must be derived from the fact that Community law imposes on the national authority a duty to act.

So the question then becomes: does Community law impose a duty on NCAs to react to the infringement of a Commitment Decision adopted by the Commission (assuming that the infringement takes place within the territory of the NCA’s Member State)? Article 10 of the EC Treaty, as well as Art.11(1) of Regulation 1/2003, impose on the national competition authorities a duty to closely co-operate with the Commission in applying Community competition law. From this general duty, one can derive the duty of the NCAs to assist the Commission in ensuring the enforcement of Commitment Decisions. In the least, it must be recognised that a NCA would have a duty to react, in some way, to a complaint submitted to it by a third party, alleging a violation of a Commitment Decision adopted by the Commission. It might certainly be more efficient, and within the spirit of the co-operation in the European Competition Network, for a NCA to enforce a Commitment Decision itself, when the infringement only relates or relates mainly to that Member State.28

But this line of arguing may not be enough to get around the difficulties described in the fifth “against” argument (until Member States produce legislation specifying sanctions for these violations and attributing the NCAs a national court competence to impose them).

In light of all the above, the only safe statement is that it is as yet uncertain whether NCAs are competent (will have the duty) to enforce Commitment Decisions adopted by the Commission.30

VII. Are companies protected from further investigations into the same practices by NCAs?

Recital 13 states that “Commitment Decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case”. Recital 22 adds: “Commitment Decisions adopted by the Commission do not affect the power of the courts and the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty.”

According to John Temple Lang, this means that, despite the adoption by the Commission of a Commitment Decision, NCAs will not be precluded from conducting investigations into the practices in question and arriving at decisions of their own.31 The Commission seems to be broadly following John Temple Lang’s interpretation, with some reserves, given its statement that “companies may still face enforcement action before Member States’ authorities and courts, provided that the uniform application of the competition rules throughout the EU is not jeopardised”.32

This issue is far from being settled. To Richard Whish, that passage of Recital 13 is “a strange provision which sits oddly with Article 16”.33 Indeed, several arguments may be presented to sustain that companies who accept commitments will be protected from further investigations into the same practices by NCAs. And it should be highlighted that this was at least the original intention of the Commission. The sentences of Recital 13 and 22 quoted above were not present in the original proposal of Regulation 1/2003,34 the White Paper that preceded

28 Without prejudice to the duty of prior notification of the Commission—see Art.11(1) and 11(2) of Regulation 1/2003, para.44 of Competition Notice, O.J. 2904, C1013.
29 In the subsequent Raytoy, cited above at n.2, p. 29
31 Whish, cited above at n.3, p.237. Offering a similar opinion, Lord, cited above at s.12, para.292.
32 Proposal for Council Regulation, cited above at n.9, p.34.
Furthermore, if the practices affect more than three Member States, it is not within the logic of Regulation 1/2003’s articulation of competences to allow the National Competition Authorities to take any Decision, no matter what the circumstances. The question would arise of how the NCA would define the practice—it if defines it as affecting several Member States aside from its own, then it would not be competent under Regulation 1/2003; if it limits the definition of the practice to the part that was felt within its Member State, it would be purposely leaving our factual elements in order to attribute itself competences, which would be strange, in the least. A different interpretation would imply that the Commission would not have any privileged position within the network of Competition Authorities, it would deprive Art.11(1) of any possible sense, and it would also make it impossible to achieve the objective of avoiding “brussel-shopping” between the Commission and the NCAs.

Finally, the adoption of a Commitment Decision does not equal a detachment of the Commission from the practices and the situation it had just investigated. On the contrary, aside from the possibility of fine in case of infringement, Art.9(2) of Regulation 1/2003 foresees the possibility for the procedures to be reopened by the Commission if there is a material change in the facts of the case, if new relevant information is untravelled, or if the commitment is infringed. This mechanism is inconsistent with the severest distancing of the Commission that would be necessary to sustain that a NCA could act upon the practices once the Commission had decided to adopt “nothing more than” a Commitment Decision. A NCA might consider that the Commitment Decision didn’t go far enough, that there are specific problems in its Member State which the Commission did not address or did not find important enough to include in the Community level Commitment Decision, or it might simply disagree with the Commission’s decision not to attempt to follow through and fine the company. But this accounts only for the NCAs’ motivation to act, not for its competence. Furthermore, if there are indeed specific problems in that Member State, then there won’t be competence limitations deriving from the practice affecting several Member States. And it’s likely that those specific problems will be substantiated in behaviours which were not the subject of the Commission’s preliminary analysis—therefore, the question of the NCA being precluded from acting, because the Commission had already done so, would no longer exist. Finally, a NCA may bring up any disagreements or specific concerns of its Member State in the Advisory Committee, before the Commitment Decision is adopted.

(ii) Interest of Article 9 Decisions to companies
If John Temple Lang’s interpretation were to prevail, Commitment Decisions might lose a substantial part of their attractiveness to companies. Instead of reassuring the company offering the commitments that it would no longer be under the threat of a fine by the European Competition Authorities, in what concerns those specific practices (even though it would always be exposed to claims for compensation from third parties before national courts), it would simply get the Commission “off its back”, and allow the company to continue in fear of one of the NCAs deciding it wants different commitments, or that it would rather apply a fine. This seems difficult to conciliate with the substantial risk a company takes in accepting a Commitment Decision whereby it becomes that much easier to fine it if it steps out of fine; not to mention that it may accept obligations which go beyond those normally applicable through European competition law.

In light of all the above, I would argue that, in light of Art.10 EC and in order for Regulation 1/2003’s rules concerning distribution of competences to be respected, NCAs must be considered to be precluded from further investigating and arriving at decisions of their own, concerning the same practices, once the Commission has adopted a Commitment Decision.41 The current uncertainty should be clarified by the Commission. Until then, it might be wise for companies negotiating Commitment Decisions with the Commission to discuss this issue and obtain assurances of what the Commission’s interpretation is, before they enter into a Commitment which may not be as advantageous as they imagine. The Commission’s interpretation will be particularly valuable as it may always decide to exercise its right to step in, in case a NCA opens an investigation into the same (or some of the same) practices.

41 Vicec concludes: “national competition authorities should sign with the Commitment decision in order to assure a truly uniform application of EC competition law” [Vicec, cited above at n.5, p.7].
statement of objections, something which probably falls within the remit of the Committee. In any event, the question of procedure is not a subject upon which the Standing Committee, or any Standing Committee, would have powers of decision. This means that, in order to decide whether to accept the objections, it would be necessary for the Standing Committee to consider the objections in question. In view of the fact that the Standing Committee has not considered the objections, it is not possible to determine whether the Standing Committee has made a decision which would be open to the Standing Committee to decide, or whether the Standing Committee has made a decision which is open to the Standing Committee to decide, or whether the Standing Committee has made a decision which is open to the Standing Committee to decide. 2. Right of appeal by third parties

Some authors believe that Art 91(3) of Regulation (EC) 1995 requires the Standing Committee to consider the objections raised by third parties. This is because the Standing Committee is not required to consider the objections of the parties to the contract. However, this argument is flawed for two reasons. First, the Standing Committee is not required to consider the objections of the parties to the contract. Second, the Standing Committee is not required to consider the objections of the parties to the contract.
protective attitude of the Commission, in line with Autoomal II.

IX. Article 9—an open door for abuse of power?

Commitment Decisions have been raising concerns that they may be used to take European Competition Law several steps forward, to a level it was not intended to reach. One may oppose these concerned views by stating that, while it may be true that there is a good chance that commitments accepted in these conditions will go beyond what the Commission would otherwise be able to impose, it's also true that Commitment Decisions haven't really changed anything in this respect. The same problem existed with merely informal undertakings and with undertakings formalised under the Merger Control Regulation.

In the end, the best safeguard against an abuse of power may be the companies' predisposition to go only so far. Still, concerns may be raised as to the level of protection offered to companies at a later phase, namely in what concerns requests for revision.

Adding to the vague language of Regulation 12/2003 on this matter, and to the application of the Autoomal II principle, the Commission's restrictive approach to justifying a Commitment Decision (mere adoption of Art.27(4) Notices) may make it quite difficult for the Court to exercise any control whatsoever (in which case the CFI may come to require a higher level of reasoning of these Decisions).

Negotiating a short duration for commitments may be one possible safeguard, as well as the inclusion in the Commitment Decision of the characteristics of the marker (because they evolved or were unknown before) that would justify releasing the company from its commitments, partly or in whole.

X. Conclusion

Commenting on the first use of Art.9 Decisions in the German Bundesliga case, Commissioner Mario Monti stated: "the fact that we have been able to make swift and effective use of a new legal instrument in a difficult area shows how successful modernisation has been" 54. The Commissioner also stated that the Coca-Cola settlement "shows the new modernised regime working effectively". 55

I would argue, however, that Commitment Decisions have so far not been a brilliant example of success in the modernisation process. Whatever success Commitment Decisions may have already obtained is probably more due to the inherent merit and usefulness of the instrument, than to the way the Commission has gone about the introduction of this new Decision.

The legal uncertainties surrounding Art.9 Decisions are numerous and important. It's crucial, both to companies thinking of offering commitments and to their competitors, not to mention the National Competition Authorities, to clarify the issues concerning the effects of these Decisions. The publication by the Commission of a thorough and careful Notice on these issues is the only way to ensure the legal certainty that will allow Commitment Decisions to definitely step out of the shade.

Such a Notice should also focus on clarifying the procedure for proposal and acceptance of commitments, taking into account the need for protection of interested third parties and, particularly, the possibility of appeal.

It would also be advisable to promote the harmonisation of the Member States' legislation in this respect. Specifically, the Commission should clarify whether it intends to allow NCAs to enforce Community Commitment Decisions (and under what conditions) and, in the affirmative, it should promote the inclusion of the necessary provisions in the national competition legislations.

The four cases already settled through Art.9 Decisions have shown that companies do not usually suffer from "commitphobia". All that is required now is a clear commitment from the Commission for Commitment Decisions to achieve their full potential.

55 Monti, Mario, "Competition for consumers' benefit" speech delivered during the European Competition Day, Amsterdam, the Netherlands, October 22, 2004.