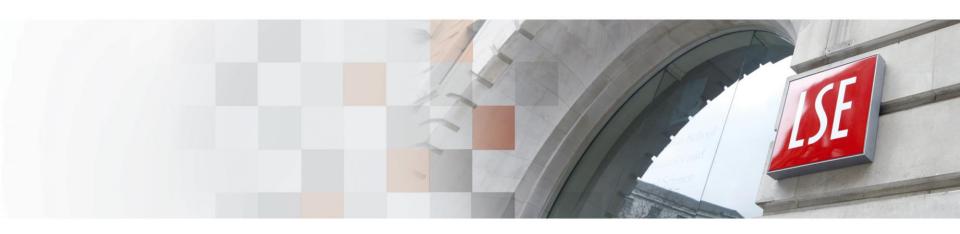
Negotiated and Imposed Remedies

Niamh Dunne

N.M.Dunne@lse.ac.uk

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Overview of Presentation



- What do we mean by 'negotiated' or 'imposed' remedies?
- What informs choice between coercion and cooperation
- 2. What can be achieved under settlement?
- 3. Scope of review/judicial control of remedies?
- 4. Longer terms implication of settlement?

From Coercion to Cooperation



- Article 7 Decision + no cooperation
- Article 7 Decision + cooperation
 - Leniency Notice
 - Cartel Settlement Procedure
 - Cooperation outside Leniency Notice
 - 'Quasi-consent decrees' under para.37 of Fining Guidelines (e.g. ARA Foreclosure)
 - Art.9 cases that revert to Art.7 (e.g. Google Shopping)
- Article 9 Decision (premised entirely on cooperation)
- Informal settlements
- Merger control commitments

1. What Informs choice between Coercion and Cooperation?



1. Voluntarism

- D must opt to cooperate
- Decision may be informed by, e.g., likelihood of discovery, size of (anticipated) sanction, internal dynamics of firm, legal advice, shareholder reaction, public reaction etc.

2. Nature of the Breach

- Objective aspect: type of conduct (e.g. Art.9 unavailable for hard-core cartels)
- <u>Subjective aspect</u>: nature & quality of D's participation (e.g. full immunity unavailable for cartel ringleaders)
- BUT distinctions may not be so clear-cut, e.g. treatment of constructive refusal to deal in Telekom Polska & energy Art.9 decisions; Hoffmann La Roche & Novartis as 'cartel'; differing treatment of Apple E-books case in EU & US

2. What can be Achieved under Settlement?



Links to overarching **purpose** of public enforcement: solving market failures, punishing transgressors, or deterring future breaches?

Article 7: Infringement

- Finding of breach
- Fines for intentional/negligent breach, except in 'exceptional' circumstances (Schenker), e.g. immunity, novelty
- Formal, largely unused power to impose 'behavioural or structural remedies' (Art.7(1))

Article 9: Commitments

- Commission precluded from making any finding on breach
- Commitments must 'meet Commission's concerns' explicit acknowledge of bargaining and compromise at issue (Alrosa)
- Formal enforcement power (e.g. Microsoft (Tying))

2. What can be Achieved under Settlement?



- Why the paucity of cases applying Art.7(1) power to impose behavioural or structural remedies?
 - Strict requirement of proportionality (necessary, suitable, least restrictive alternative)?
 - Where finding of breach is disputed, easier to put fines 'on ice' for duration of appeal?
 - Commission reluctance to 'pick winners' among potential options available to remedy breach? (but, see e.g. MasterCard, Google Shopping)
 - Cf. ARA Foreclosure voluntarism! offer to settle originating in D; explicit acknowledgement of proportionality

3. Scope of Review/Judicial Control of Remedies



- Broadly speaking, where Commission 'imposes' a remedy under Art.7, subject to rigorous review by Courts (Art.261 TFEU)
- Where Commission 'negotiates' a remedy under Art.9, by contrast, Courts adopt a far more deferential approach (Alrosa)
- Interesting case law emerging under Cartel Settlement Procedure
 - Commission's hands not tied where D eventually opts out of settlement procedure (*Timab*)
 - But must respect general legal principles when imposing fines on either settling party (*Printeos*)...
 - ...Or on non-settling party in hybrid procedure (ICAP)

4. Broader Implications of Settlement



Article 7

- Finding of breach as formal statement of competition law, regardless of level of cooperation
- (Limited) specific protections for leniency and CSP applicants under Damages Directive; strategic benefit of truncated infringement decision?

Article 9

- Perennial question of whether 'bargain' reflected in settlement can/should be interpreted as statement of competition law – an 'absence' of precedent?
- To what extent does settlement preclude subsequent enforcement by NCA, or facilitate private damages claims? > Gasorba