

Negotiated and Imposed Remedies

Niamh Dunne
N.M.Dunne@lse.ac.uk

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THE LONDON SCHOOL
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Overview of Presentation



- What do we mean by ‘negotiated’ or ‘imposed’ remedies?
 1. 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)
- Subjective aspect: 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*