CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle

March 2013 (3)

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I. INTRODUCTION

Parties seeking dual settlements with the European Commission ("EC") and the U.S. antitrust agencies are challenged by their differing frameworks. Part of the complexity stems from their separate approaches to competition law enforcement, while other components of the problem relate to their respective settlement processes. Since Microsoft settled its Windows case in the United States in 2001, but was unable to achieve that result with the EC, parties seeking resolution of anticompetitive allegations by means of concessions must take into account the risk of diverging settlement opportunities across the Atlantic. A decade later, the stress of that concern is intensified by Google's recent settlement with the U.S. Federal Trade Commission ("FTC") and the prospect of the EC again not following suit.

II. DIFFERENT APPROACHES TO SETTLEMENT

A. The U.S. Approach

Negotiated settlements have long been an essential trait of U.S. antitrust enforcement policy. Over the past 20 years, over 90 percent of the cases initiated by the FTC and the U.S. Department of Justice, Antitrust Division ("DOJ") have culminated in settlement by "consent decree."[2] Consent decrees establish no decision on the merits and can include the defendant's general denial of the antitrust allegations. Such volume of settlements demonstrates a deep trust in the government's and private parties' ability to achieve a compromise tailored to the competition and business interests in the particular case. Microsoft settled the Windows claims within the consent decree framework, effective in 2001.

Last January, the FTC published for public comments its settlement terms with Google regarding claims that the company engaged in anticompetitive practices through its internet search utilities.[3] Although not by consent decree, the Google case is reminiscent of the Microsoft

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[2] Douglas Ginsburg & Joshua Wright, *Antitrust Settlements: The Culture of Consent* (Feb. 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2225894.

[3] Specifically, the FTC Section 5 investigation focused on the search engine demoting search results for competitors' websites, such as shopping or travel sites, and promoting Google's own in the results; and practices such as "scraping" and "multi-homing." *See* Google Press Conference Opening Remarks of Federal Trade Commission Chairman Jon Leibowitz (January 3, 2013), available at http://www.ftc.gov/speeches/leibowitz/130103googleleibowitzremarks.pdf. The investigation also covered whether Google has engaged in anticompetitive conduct through standard-essential patents. *See id.*

settlement a decade earlier, in that it arguably constitutes the most high-profile example of a settlement with U.S. regulators in that industry.[4]

B. The EC's Commitment Settlement

Compared to U.S. practice, the settlement of cases between the EC and defendants is much less common.[5] Indeed, such settlements rarely occurred prior to 2004, when Council Regulation 1/2003 entered into effect[6] to establish the procedures for the settlement of competition cases under European legislation. The Vice President of the European Commission responsible for competition, Hon. Joaquín Almunia, has explained the policy for commitment settlements: "A company under investigation can offer commitments before we establish an infringement. If the pledges are strong enough to allay our concerns, we stop the investigation and make them legally binding through an Article 9 decision."[7]

Pursuant to Article 9(1) of that Regulation,[8] in commitment settlements, there is no admission of liability by the defendant and the EC makes no determination as to a violation having been committed. For such settlements, the EC operates on a preliminary assessment that such a violation may have occurred, and the defendant voluntarily submits an undertaking (usually in the form of commitments to change business practices) intended to address the

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[4] *See* Statement of the Federal Trade Commission *In the Matter of Google Inc.*, FTC File No. 121-0120 (January 3, 2013), available at*http://www.ftc.gov/os/caselist/1210120/130103googlemotorolastmtofcomm.pdf* and *Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns In the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search*, FTC Press Release (January 3, 2013), available at http://ftc.gov/opa/2013/01/google.shtm.

[5] This discussion relates only to commitment settlements under Article 9, as opposed to the process for cartel settlements. The EC's process for the settlement of cartels is, in some ways, a closer homologue to the U.S. process. The EC process entails the finding of liability and the imposition of a fine (at a 10 percent reduction of the fine that otherwise would have been imposed). Such cartel settlements also require the adoption of a statement of objections. Although normally no hearing is held, the investigative file is made accessible to the parties as part of the discussions for the negotiated statement of objections. One difference, however, is that third parties have limited rights in the EC process for the settlement of cartels—they have no right to review the file or the statement of objections, or to appear in the proceedings. For two high profile examples of cartel settlements with the EC, *see* the *DRAM* case, *Antitrust: Commission fines DRAM producers € 331 million for price cartel; reaches first settlement in a cartel case*, European Commission - Press Releases, (May 19, 2010) (EC settled with computer chip manufacturers regarding allegations of anticompetitive conduct in the production and sale of memory chips), available at http://europa.eu/rapid/press-release_IP-10-586_en.htm, and the *Animal Feed* case, (*Antitrust: European Commission fines animal feed phosphates producers €175 647 000 for price-fixing and market-sharing in first "hybrid" cartel settlement case,* European Commission - Press Releases, (July 20, 2010) (animal feed phosphate producers settled price fixing allegations), available at http://europa.eu/rapid/press-release_IP-10-985_en.htm).

[6] Council Regulation No. 1/2003 on the implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1, available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32003R0001&model=guichett.

[7] Joaquín Almunia, *Speech: Remedies, commitments and settlements in antitrust*, (March 8, 2013), available at http://europa.eu/rapid/press-release_SPEECH-13-210_en.htm.

[8] Article 9(1) provides that "[w]here the commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the commission in its preliminary assessment, the commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the commission."

antitrust concerns. The commitment is market tested, then amended to incorporate such findings, and then turned into a binding decision. No fine is imposed on the defendant and no liability is established.

However, if the defendant fails to comply with the terms of the undertaking, the EC may reopen the proceedings and impose a fine,[9] as recently happened to Microsoft.[10] Usually (not always), the commitments are offered prior to the issuance of a statement of objections. Parties making such commitments do not have the right to a hearing. And third parties, usually the complainants, take active part in the process through comments on the proposed commitments during the market test. They may also appeal the EC's decision to accept the commitments offered.

During the first five years of Council Regulation 1/2003, the "Modernisation Regulation," the EC used commitment decisions in antitrust cases very cautiously. Yet, with the benefit of experience, in the last few years, the EC has issued more than a dozen commitment decisions, focusing on alleged abuses of dominant position. Going forward, there are indications that several ongoing investigations will also be resolved through such commitment decisions.[11]

III. DIVERGING APPROACHES TO SETTLEMENT

The U.S. and European competition enforcement agencies had engaged in effective cooperation and information sharing even prior to executing their formal agreement—the U.S.-Commission of the European Communities Cooperation Agreement—in 1991, amended in 1998. Per that Agreement, each is obligated to notify the other upon becoming aware of anticompetitive activities. Therefore, for many multinationals, competition law enforcement action on one side of the Atlantic will likely mean the same on the other.

In addition, defendants must assume that, sans a formal agreement otherwise, such as a confidentiality agreement, the enforcement counterparts in the United States and the European Union will have access to much (if not all) of the other's investigative files. Moreover, dual investigations heighten the potential for the uncovering of significant issues. Another important corollary is that a defendant may well opt to keep the respective enforcement agencies in both

[9] Pursuant to Article 9 of Council Regulation 1/2003, the EC may reopen the proceedings "(a) where there has been a material change in any of the facts on which the decision was based; (b) where the undertakings concerned act contrary to their commitments; or; (c) where the decision was based on incomplete, incorrect or misleading information provided by the parties." Council Regulation No. 1/2003 on the implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1.

[10] In fact, as recently as March 6, 2013, the EC announced its reopening of an investigation and imposition on Microsoft of a fine of U.S.$732M million for noncompliance with a 2009 settlement requiring the company to give Windows users in Europe a wider choice of web browsers (instead of pushing Microsoft's Explorer). *See* Vanessa Mock, *EU Fines Microsoft $732 Million*, The Wall Street Journal, (March 7, 2013), available at http://online.wsj.com/article/SB10001424127887323628804578343843582306944.html. Microsoft opted not to appeal the fine. *See* Ingrid Lunden, *Microsoft Will Not Appeal $731M Fine Over Browser Antitrust Violations: 'We Take Full Responsibility'*, Tech Crunch, (March 6, 2013), available at http://techcrunch.com/2013/03/06/microsoft-says-it-will-not-appeal-731m-fine-over-browser-antitrust-violations-we-take-full-responsibility/.

[11] For example, commitments from the Czech energy incumbent, CEZ, are currently being market tested to address concerns regarding the foreclosure of competitors from the Czech market for the generation and wholesale supply of electricity. Moreover, it would not be surprising if the two standard essential patent investigations initiated against Motorola Mobility are also concluded by means of commitment settlements.

jurisdictions appraised of all ongoing settlement discussions, in the hopes of a "global" resolution on favorable terms.

Despite inter-agency collaboration, a defendant seeking to settle with the U.S. agencies and the EC simultaneously may find each implementing a different timetable and/or analytic approach. Even if the U.S. agencies and the EC were to attend to the matter contemporaneously, and despite some general similarities in their competition laws and their sharing of investigative resources, they might assess the legal merits very differently. This has been a source of tension not only between defendant and regulator, but also between the U.S. and European regulators themselves.

That is, although the United States and European Union regularly cooperate with one another, a settlement result in one jurisdiction is by no means a guarantee of the same in the other. Over the past decade, some companies (in particular U.S. technology companies) engaged in antitrust disputes on both sides of the Atlantic have found themselves achieving settlement in the United States and their efforts frustrated in Europe.

Perhaps the most significant example is still the 2001 Microsoft case involving the company's method of bundling its Windows Explorer browser with its Windows operating system. Microsoft reached a settlement with the U.S. antitrust agencies, but not with the EC. Although the Microsoft case predated the adoption of Council Regulation 1/2003 and the formal EC settlement procedures, the case demonstrated the European regulators' unwillingness to follow the lead of their American counterparts in relation to a U.S. company. Since 2004, E.U. fines on Microsoft have reached roughly U.S. $2.91 billion, including a U.S. $1.17 billion penalty for violating the 2004 order to share information with competitors and a U.S. $723 million fine in early 2013 for Microsoft's failure to adhere to a settlement agreement it ultimately reached with the EC in 2009. This treatment of Microsoft has been generally criticized in the United States, especially by some U.S. antitrust regulators and members of the U.S. Congress.

The Microsoft case may have been indicative, however, of a trend in U.S.-E.U antitrust enforcement. Prevailing on or settling antitrust claims in the United States will not provide protection from EC regulators, and may not even be persuasive to them, as they reach their own conclusions on their own timetable. [12]

A decade after the Microsoft case, Google finds itself defending against antitrust allegations in both the United States and the European Union. Among other inquiries, the probes look into whether the internet search results from using Google favor the company's own content. Perhaps because, as some legal analysts had previously concluded, the FTC assessed that it could not prove that Google's activities amount to antitrust violations, Google achieved settlement terms in the United States earlier this year.

[12] Another example of this trend (although outside the settlement context) is the EC rejection of the GE-Honeywell merger in 2001, following its approval by the DOJ. This marked the first time foreign regulators prevented a merger between two U.S. corporations.

A noteworthy development is that the FTC accepted voluntary commitments from Google instead of a consent decree.[13] The proposed settlement has, therefore, been even more controversial than expected,[14] and there is wide speculation that, although Google has reportedly submitted a commitment settlement proposal to the EC, it will not follow the FTC's lead. The EC, which could fine Google an estimated U.S.$5 billion, is under pressure from industry competitors to reject Google's proposed settlement, as they argue the FTC settlement to be insufficient.

For companies seeking the settlement of antitrust allegations in both the United States and the European Union, the possibility of divergent results can be troubling. In both the Microsoft and Google settlements, the companies agreed to market concessions with U.S. regulators. The Microsoft settlement with the DOJ imposed broad requirements on Microsoft's business practices, including restrictions from entering into "exclusive dealing" agreements with PC manufacturers and the requirement to provide other software makers access to the Windows source code. In Google's settlement with the FTC, the company agreed not to seek injunctions to block rivals from using certain Google patents and to remove restrictions from hampering advertisers' management of their advertising campaigns across competing ad platforms. In both settlements, the U.S. regulators believed that the primary goal of antitrust enforcement—the protection of marketplace competition—had been attained.

The concessions by Microsoft and Google in the United States were arguably both far reaching in their potential market impact and structured to influence market activity in the United States and abroad. Further, it is not clear whether the United States would have achieved a similar result, or any change in the companies' business practices, had it let the regulatory process proceed without settlement.

This time around, the EC may close the loop for Google by reaching a commitment settlement. Regarding the EC investigation into Google's allegedly abusive practices in the online search market, the company and the EC have indicated their willingness to discuss and resolve the competition concerns without engaging in adversarial proceedings. According to reports, Google has already proposed a set of commitments, which the EC is examining and which could result in resolution by a commitment decision.

An additional factor to consider is the EC's predisposition towards Article 9 commitment settlements involving high technology markets. In the words of the Hon. Joaquín Almunia: "Why do we take many article 9 decisions? One reason is that we too prefer to conclude cases swiftly when this brings the most benefits to the markets. In certain industries—such as high-tech and

[13] By accepting Google's commitment to change some of its practices, as opposed to a formal consent decree, the FTC may be resurrecting a practice from its own history. Some analysts report that, in the 1960s, the FTC resolved about 10 percent of its cases through the companies' voluntary commitments. We note that the FTC settled a component of the Google case by means of a consent decree requiring Google to license certain patents on fair, reasonable and non-discriminatory terms.

[14] Ironically, and perhaps meaningfully, Microsoft is among those who have criticized the settlement, declaring that the FTC failed to achieve a binding agreement to preclude Google from the same accused behavior in the future. *See* Brian Bishop, *Microsoft Criticizes FTC Settlement with Google, Calls Outcome 'A Missed Opportunity,'* The Verge, (January 3, 2013), available at *http://www.theverge.com/2013/1/3/3833718/microsoft-calls-ftc-settlement-with-google-a-missed-opportunity.*

fast-moving markets—it is important that competition is restored quickly and effectively."[15] However, complainants against Google have voiced concerns about the EC's efforts to close the Google investigation through voluntary commitments, arguing that such concessions would fall short of resolving the competition issues. Thus, a settlement of the dispute is by no means assured.

In terms of macro policy, willingness by companies to engage in voluntary reforms may be diminished if they fear divergent results (*i.e.*, having to yield significant concessions in one jurisdiction and additional fines and/or binding commitments in another). At this juncture, the EC has initiated proceedings against Samsung, Motorola, and others in connection with their respective commitments to the European Telecommunications Standards Institute and alleged use of standard-essential patents to distort competition.[16] A similar allegation is one of the components of the investigation against Google. Additionally, two more U.S. technology giants, Apple and Facebook, are rumored to be in the crosshairs of the U.S. agencies and the EC. It remains to be seen how each will handle these cases, and whether the fear of divergent outcomes will affect the companies' willingness to offer voluntary business concessions.

IV. CONCLUSIONS

Multinational corporations should pay close attention to the resolution of the EC investigation into Google's search practices. A settlement of the case would be a positive development for parties dealing with the U.S. and European antitrust enforcement agencies. A failure to settle the case in Europe, on the other hand, would require multinationals to contemplate the effects the divergent decisions may have on these markets, and devise their legal strategy accordingly.

[15] *See* Speech by Joaquín Almunia, *supra* note 7.

[16] *See Antitrust: Commission opens proceedings against Motorola*, European Commission - Press Releases, (April 3, 2012), available at http://europa.eu/rapid/press-release_IP-12-345_en.htm (EC proceedings against Motorola; and *Antitrust: Commission opens proceedings against Samsung*, European Commission - Press Releases, (January 31, 2012), available at http://europa.eu/rapid/press-release_IP-12-89_en.htm (against Samsung)). Indeed, last December the EC issued a full-fledged statement of objections against Samsung. *See Commission sends Statement of Objections to Samsung on potential misuse of mobile phone standard-essential patents*, European Commission - Press Releases, (December 21, 2012), available at http://europa.eu/rapid/press-release_IP-12-1448_en.htm. At this time, it is unknown whether this case will be resolved by a commitment settlement or an infringement decision against Samsung.