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Paul McGeown & Juliette Orologas
Wilson Sonsini Goodrich & Rosati LLP

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I. INTRODUCTION

Until the European Commission slapped a U.S. $730 million fine on Microsoft at the beginning of March 2013 for failing to comply with the "choice screen" commitment that it had made in 2009 to close the Internet Explorer case, part-time antitrust watchers could have been forgiven for believing that a European Article 9 decision was akin to a settlement. The result was, after all, a textbook "win-win." The Commission could close its file without needlessly expending scarce resources on the prosecution of an investigation; it could assert that it had corrected the perceived—though not proven—anticompetitive effects of certain behavior quickly through a tailored remedy; and it could repeat its claim to being a consumer-champion, all without undue fear of its decision being overruled in the courts. Back at corporate headquarters, meanwhile, the boards of the companies concerned could announce that they had spared the business a costly, drawn-out procedure—the outcome of which was unpredictable—and avoided a formal ruling that the company had infringed the competition rules; they could also be confident that for all practical purposes they had side-stepped costly follow-on damages actions before national courts.

But, as the Microsoft case reminds us, it never was thus.

People talk colloquially about European competition law "settlements," but often confuse "remedies" imposed by the Commission, "commitments" offered by the parties, and "settlements" where a member of cartel admits liability in return for a reduced fine. Indeed it is reported that in December 2012 even Commissioner Almunia misused the "s" word, when speaking about the "constructive discussions" that DG COMP was having with Penguin Books about "a possible settlement" of the e-Books case. That is not what an Article 9 decision is. It is a commitments decision, a promise by a corporation to do or not to do something. And its failure to keep its promise is actionable. So why on balance do so many corporations sign up to them?

II. PRE-MODERNIZATION

A potted history lesson to start with: "Settlements" of one kind or another have been part of the enforcement landscape in the European Union for many years. Prior to the adoption of Regulation 1/2003, the Commission used a variety of tools to dispose of antitrust cases: comfort letters, discomfort letters, opposition procedure notices under various block exemptions, and formal decisions incorporating voluntary commitments (which the Commission had no basis formally to accept).

Indeed, as the Commission's procedures became more sophisticated, it was not unusual for commitments packages to be the subject of one or more market tests before a final decision

[1] Paul McGeown is an antitrust partner in Wilson Sonsini Goodrich & Rosati's Brussels office; Juliette Orologas is an associate in the same practice.

was adopted. While a grey cloud hung over the legality of some of these constructs, the reality is that—however imperfectly—they served a purpose and allowed competition policy to evolve. The Commission's primary concern, however, was that breaches of voluntary commitments were not readily actionable.

III. THE REGIME ESTABLISHED BY REGULATION 1/2003

Regulation 1/2003 marked a clean break with the past, from both an institutional and procedural perspective. The Commission surrendered its exclusive right to authorize agreements that infringed Article 101(1) but satisfied the conditions for exemption, and national competition authorities and national courts were vested with the power to apply Article 101(3) as well. Businesses were made responsible for assessing the compatibility of their commercial agreements with the competition rules. Out went notifications to the European Commission and in came self-assessments.

Regulation 1/2003 also made good a number of deficiencies in the legislation governing the enforcement of the competition rules. Specifically Article 9 provides that, when the Commission intends to adopt a decision requiring that an infringement of Article 101 or 102 be brought to an end but where the undertakings concerned offer commitments to meet the concerns articulated by the Commission, the Commission may by decision make those commitments legally binding on the businesses concerned. When adopting such a decision, the Commission does not take a final position on whether there has been an infringement, whether the companies involved could satisfy the four conditions of Article 101(3), or whether a firm is dominant on any defined market and whether it had an objective justification for its conduct.

Commitments decisions have been used in more than thirty cases since May 2004 (although admittedly a handful of cases had been initiated under the former regime). Some commitments packages have been used to close Article 101 investigations, others Article 102 cases. Some of the commitments have been behavioral, others structural—with the Commission (perhaps unsurprisingly) expressing a preference for structural commitments. In almost nine years, markets from energy to financial services, from rough diamonds to airlines services, from datafeeds to carbonated soft drinks have all been affected.

The system nonetheless has its critics. Some say that it fails to deliver legal certainty; a second group suspects that the design of Article 9 commitments gives too much power to the corporations under investigation; and others still that the system has a chilling effect on private enforcement.

IV. LEGAL CERTAINTY

As an Article 9 decision does not require—or indeed permit—a finding that there has been a breach of competition law, there are those who express dissatisfaction that the Commission's analysis does not meet the rigorous standards required for a negative decision (robust statement of objections with a clear theory of harm, access to file, right of reply) and therefore that the decision or the analysis in the decision may in some way misinform or misguide the market. In a speech in March 2013, Commissioner Almunia himself rejected this criticism, saying that decisions pursuant to Article 7 (negative/prohibition decisions) and Article 9 "are supported by solid evidence and theories of harm." But rumblings persist and are

reinforced by the fact that Article 9 decisions are, all else equal, less likely to be challenged at court in Luxembourg than Article 7 decisions.

It is a moot point whether intermittent judicial review of Article 9 rulings acts as a brake on the evolution of the Commission's enforcement of competition policy. (The opposite may be true.) What is clear is that the combination of no statement of objections (often skipped in practice) and irregular in-depth judicial scrutiny of Article 9 decisions (no longer the norm after *Alrosa*) prevents clarification as to the types of "borderline" behavior that are, at least in DG Competition's view, illegal.

Published Article 9 decisions set forth the *provisional* position that the agency adopted at the time that it was conducting its inquiry in a given case, sometimes (and understandably so) telescoped into a short paragraph. The parties, which have by this time negotiated the commitments package with the Commission's services, have no overriding interest in challenging the provisional findings—their focus has shifted to the commitments; often there is no oral hearing at which theories can be tested; and the ruling may never be tested at the General Court (unlike a consent decree in the United States). From an intellectual and pedagogical perspective, therefore, it is no doubt true that Article 9 decisions can be viewed as sub-optimal.

Ironically, there is also a risk in certain scenarios that the ruling puts the corporation offering the commitments in a privileged position compared with its peers going forward. This could be the case for instance where the conduct that has offended the Commission is, to a greater or lesser degree, common practice in the industry. Here, the party offering the commitments may—after several months' dialogue with the Commission's services—find that it has a unique sense of which practices are considered by the Commission to be vulnerable under Article 101 or 102 and why.

On the other hand, its competitors will find themselves in legal limbo: knowing what the Commission's provisional findings were, understanding that they are no more than provisional but also having to deal with the veil of authenticity bestowed on the provisional findings *because* they appear in a published decision. Of course, even if some of the finer points of the analysis may be picked up by direct competitors of the parties, there is likely to be an information deficit for businesses in other industries for which the decision may be relevant.

The reality is that DG Competition simply does not have the resources to investigate all cases to a litigation standard, and that, in any event, one of the expressed aims of the Article 9 procedure at its inception was to allow the Commission to close suitable cases early and reallocate resources to the prosecution of cartels and more egregious breaches of Article 102.

The most that can perhaps be asked of the Commission is that it communicates more extensively on Article 9 cases. As things stand, commitments decisions are publicized through press releases and Qs and As with the commissioner, the full texts of the decisions are posted (eventually) on DG Competition's website, and summaries are printed in the *Official Journal*. These official texts are, however, bereft of detail and there is surely room for senior officials or members of the case team to flesh out the Commission's thinking in presentations or articles in the house magazine, *Competition Policy Newsletter* (especially once the two-month time limit for appeals to the General Court has elapsed).

V. REMEDY DESIGN AND TRANSPARENCY

A second criticism that is sometimes levied at Article 9 decisions is that they give the parties offering the commitments excessive leeway in designing the proposal that they are then bound to implement, and that the Commission should take a more aggressive stance in the negotiation process. (Critics of the Article 9 decisions in the German energy cases say that the Commission exceeded its powers in using Article 9 to restructure the domestic energy market, but that controversy is beyond the scope of this paper.)

It is broadly accepted that Article 9 negotiations are characterized by a less adversarial climate and decisions are normally taken on a faster track. Compared with remedies imposed by the Commission under Article 7, negotiated commitments are more likely to be found to make sense by the undertaking concerned—because it has a hand in their drafting. Advocates of the use of Article 9 procedures say that, as a result, there is a better chance that they will be implemented more quickly, leading to the early correction of any anticompetitive effects which the practice under investigation may have caused. Another frequently touted advantage of commitments is the greater flexibility that they offer in the design of remedies tailored specifically to the problem at hand, compared with a broad and sometimes blunt instrument of an Article 7 cease and desist order. These features might suggest that the regulatory burden on corporations drafting commitments is indeed lighter.

But others disagree, for while, formally, commitments are offered by the business under investigation, staff in DG Competition and (later in the process) the Legal Service play a significant role in the drafting of commitments. The case team will invariably comment on consecutive drafts of the proposal and formally or informally consult complainants and interested third parties on the scope and likely efficacy of the proposed commitments *before* the Commission agrees to post the draft commitments for comment in the *Official Journal* and on its website.

The maneuverings of third party complainants in a recent case involving Google highlight the dangers associated with calls to shift responsibility for the drafting of commitments from the firms under investigation to complainants. In that case, according to mlex, complainants asked the Commission not to insist upon specific commitments from the technology company but instead to accept high-level principle commitments not to discriminate against anyone in any way.

Such an outcome has no place in European competition law where the obligation on dominant businesses not to discriminate is qualified and does not apply, for instance, where there is an objective justification for its conduct. The principle of legal certainty requires that behavioral commitments be "crystal clear and self-executing" (Commissioner Almunia's words), detailed enough to help distinguish competition on the merits from, say, exclusionary abuse, and yet not too easy to circumvent. Were catchall commitments to be accepted, it would be impossible for the business under investigation to know what it had or had not committed to do (or refrain from doing).

VI. THE CHILLING EFFECT OF ARTICLE 9 DECISIONS ON PRIVATE ENFORCEMENT

A third often-cited shortcoming of Article 9 decisions—and therefore a third reason for the enthusiasm of companies under investigation to agree to Article 9 packages—is that, since there is no finding of an infringement, the prospects of aggrieved third parties successfully suing for damages before national courts are modest. Distributional justice, the argument goes, will be much harder to achieve if there is a proliferation of Article 9 decisions and so fewer infringement decisions.

Superficially attractive, this criticism of Article 9 decisions is, we would suggest, at the very least exaggerated. First, for as long as there are—Article 7 decision or not—many unsolved obstacles to private damages actions in the European Union based on a breach of competition law, for the foreseeable future any welfare loss that society might suffer is likely to be outweighed by the quicker correction of anticompetitive effects on the market through Article 9 commitments. Second, the cases in which victims of alleged anticompetitive behavior should, using any metric, be entitled to seek and recover damages—cartels—are simply not eligible for the procedure set out in Article 9 in the first place. As spelled out in the preamble to Regulation 1/2003, the adoption of a commitment decision is "not appropriate in cases where the Commission intends to impose a fine." The increased use of commitment decisions as a public enforcement tool should therefore not have an appreciable impact on follow-on actions as a private enforcement tool.

VII. BREACH OF MICROSOFT'S CHOICE-SCREEN COMMITMENT

The Commission's recent decision to impose a substantial fine on Microsoft for failing to comply with its choice-screen commitment will not silence critics of the Article 9 procedure, but it will temper their criticisms of the regime and should serve as a salutary reminder to businesses (and their counsel) that closing a case with an Article 9 decision is not a soft option.

There is no suggestion in Commissioner Almunia's remarks that Microsoft's failure over a period of 15 months to offer new customers a choice of browsers when they acquired a new computer was deliberate or ill-intentioned. (Incidentally, in such a closely monitored industry, it is remarkable that the infringement went unnoticed for so long.) Microsoft was chastised for false declarations to the Commission, but Commissioner Almunia accepted that what happened seemed to be the result of a technical glitch. The hammer nonetheless came down hard. The offense was classified as "serious" and a substantial nine digit fine imposed.

In the wake of the Microsoft ruling—which, it should be stressed, does not *change* the law in any way—it is legitimate to ask whether a dampener will be poured over the enthusiasm of corporations under investigation to negotiate Article 9 decisions.

Several of the benefits of an Article 9 decision over an Article 7 decision for companies under investigation are unaffected by the Microsoft case. An Article 9 procedure is still likely to be shorter and less costly in terms of management time; no fine will be imposed nor will there will be a finding of an infringement, and so the litigation risk will be no more than moderate. Article 9 procedures should not all of a sudden become less popular. For as long as the commitments offered are structural, and so likely to be perfected within a relatively short period

of time under the supervision of a trustee, any impact of the new Microsoft ruling is likely to be limited.

However the businesses that do need to look most closely at their risk profile are those which offer behavioral commitments to the Commission, because, without ever using the term in any press release or communiqué, the Microsoft decision has a whiff of "strict liability" about it. First, companies should resist pressure from the case team to prepare a first draft based on a commitments package offered by another player in the same industry (far less the Commission's model text for divestitures). It is not because a company in a previous case was able or prepared to make certain offers to the Commission that a business—even one in the same industry—should be required to do the same in a subsequent case. The Commission will be anxious to ensure equality of treatment in certain cases but, given the sanctions for breach, no firm can fairly be forced to sign up to precedent if it has reservations about *its* ability to comply with the letter of the package.

Second, the management of companies that offer commitments may want to consider removing the word "settlement" from their vocabularies. From a public relations perspective, it is important for listed companies to be able to reassure markets that a potentially costly antitrust file has been closed, but the word "settlement" has "consensual" connotations that, if misunderstood within the business, may lead to sloppy practices (because staff believe erroneously that the case has gone away) and ultimately the failure of the corporation to make good on the promise it made in its commitments.

On March 20, 3013, it was reported that EFAMA (an association representing fund managers) had complained to DG Competition that Standard & Poors was not honoring the promises that it gave in November 2011 to offer licenses for free to indirect end-users of international securities identification numbers used in securities trading. We are perhaps witnessing the first lines on a new page about the enforcement of the European competition rules.