



**FEDERAL
COMPETITION
AUTHORITY**
Fairness matters!

Commitment decisions

12th of April 2019, *Belgrade*

Dr. Natalie Harsdorf Endendorf, LL.M. (Brügge)

Deputy Managing Director, Austrian Federal Competition Authority

**The views and opinions expressed in this presentation are those of the speaker and do not necessarily reflect the official policy or position of the FCA*

Commitment decisions under European Law

Regulatory Framework

Art 9 Reg 1/2003: *“Where 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[...].”*

Rec 13 Reg 1/2003:

- ✓ *agreement or practice might be prohibited*
- ✓ *undertakings offer the Commission commitments such as to meet its concerns*
- ✓ *should find that there are no longer grounds for commitment*
- ✓ *decisions are without prejudice to the powers of competition authorities courts*
- ✓ *Courts of the Member States to make such a finding and decide upon the case*
- ✓ *Commitment decisions are not appropriate in cases where the Commission intends to impose a fine*

Commitment decisions under European Law

European Court of Justice; 29th June 2010, Case 441/07 P - Commission/Alrosa

Judicial review "light"?

Commitments are in fact offered "voluntarily" by the undertaking and Article 9 is inspired by "considerations of procedural economy"; EUCJ only checks for manifest errors of law

"commitments in question address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately. When carrying out that assessment, the Commission must, however, take into consideration the interests of third parties. Judicial review for its part relates solely to whether the Commission's assessment is manifestly incorrect"

Commitment decisions under European Law

European Court of Justice; November 23, 2017, Case C-547/16 Gasorba et al. v. Repsol

The commitment decision cannot ‘legalise’ the market behaviour of the undertaking concerned

“Since, as provided for in Article 9(1) of Regulation No 1/2003, read in the light of recital 13 of that regulation, the Commission may carry out a mere ‘preliminary assessment’ of the competition situation, without the commitment decision taken on the basis of that article subsequently establishing whether there has been or still is an infringement, it cannot be precluded that a national court may conclude that the practice which is the subject of the commitment decision infringes Article 101 TFEU and that, in so doing, it proposes, unlike the Commission, finding that an infringement of that article has been committed.”

Commitment decisions under European Law

DIRECTIVE (EU) 2019/1 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market

Rec 39:

- ✓ *“commitment decisions are not appropriate in the case of secret cartels, in respect of which NCAs should impose fines”*
- ✓ *“at the discretion of NCAs whether to accept commitments”*
- ✓ *“without prejudice to the powers of competition authorities and national courts to make such a finding of an infringement and decide upon a case”*
- ✓ *“effective means for the reopening of proceedings”*

Commitment decisions under European Law

DIRECTIVE (EU) 2019/1 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market

Art 12:

- ✓ *“formally or informally seeking the views of market participants“at the discretion of NCAs whether to accept commitments”*
- ✓ *“by decision make commitments offered by undertakings or associations of undertakings binding”*
- ✓ *“meet the concerns expressed by the national competition authorities”*
- ✓ *“may be adopted for a specified period”*
- ✓ *“shall conclude that there are no longer grounds for action”*
- ✓ *“effective powers to monitor the implementation of the commitments”*
- ✓ *“able to reopen enforcement proceedings”*

Commitments under Austrian Competition Law

Austrian Cartel Law Act

§ 27. (1) Instead of terminating an infringement pursuant to § 26, the Cartel Court may declare commitments made by the undertakings and associations of undertakings concerned to be binding if it is likely that such commitments exclude future infringements. By way of such decision, the proceedings shall be deemed to be closed.

(2) The Cartel Court shall reopen the proceedings where there has been a material change in any significant fact on which the decision was based, where the undertakings or associations of undertakings concerned act contrary to their commitments, or where the decision was based on incomplete, incorrect or misleading information provided by the undertakings or associations of undertakings concerned.

§ 29 The Cartel Court shall impose **fin**es as follows:

1. A fine not exceeding 10% of the total turnover achieved in the preceding business year shall be imposed on an undertaking or an association of undertakings that intentionally or negligently c) fails to comply with commitments declared as binding pursuant to § 27

Commitments under Austrian Competition Law

EXAMPLE

Nov 2018 128 Kt 4/18k-8

Distribution of medical products: commitment decision by the Cartel Court

- Binding commitments for two surgical instruments distributors to bring their exclusivity agreements in line with EU competition rules
- Preconditions clarified by Cartel Court:
 - ✓ No infringement has to be established
 - ✓ However, also no re-introduction of the notification system via the back door
- Appropriate
- No separate proportionality test

**Dr. Natalie Harsdorf Enderndorf, LL.M.
(Brügge)**

Head of Legal Service
Deputy Managing Director

Austrian Federal Competition Authority
(Bundeswettbewerbsbehörde)
A-1030 Vienna, Radetzkystr. 2

☎: +43 1 245 08-0

📠 +43 1 587 42 00

www.bwb.gv.at

twitter.com/BWB_WETTBEWERB

Thank you
for your attention!