Summary note of the CMA roundtable on the use of commitments in competition enforcement – 18 September 2015

Introduction

1. This note provides a summary of the discussions at the roundtable on the opportunities and challenges of using commitments in competition enforcement, organised by the Competition and Markets Authority (CMA) on 18 September 2015.

2. The roundtable provided a forum to discuss the use of commitments with external participants and also to provide relevant and useful insights to inform the CMA in further developing its own approach to the use of commitments. The roundtable was attended by experienced practitioners within the competition community (including legal and economic advisers, academics, representatives from UK and European competition enforcement agencies as well as the Competition Appeal Tribunal).

3. The CMA is very grateful to all those who participated in the lively and informative discussion and to the speakers: Richard Whish (Kings College), Peter Freeman (Competition Appeal Tribunal) and Nicholas Banasevic (European Commission) who provided their own personal views to introduce the topics for discussion.

4. The CMA will carefully consider the views and comments expressed at the roundtable and which are summarised in this note to see how they can further inform our thinking and policy on commitments. In particular we will be taking into account the insights from the roundtable in considering whether, and if so what, further action on our part may be necessary including possibly updating current CMA guidance on commitments.

5. This note is intended to summarise participants' views, which as indicated in the summary below differed on a number of points. It does not set out the CMA's views or policies or those of the speakers' organisations.

Summary of the discussion

The use of commitments as an enforcement tool – positive outcomes and appropriate cases

6. Participants highlighted a number of positive outcomes for both authorities and consumers that can be achieved through the use of commitments as set out below and it was generally felt that commitments can be a useful enforcement tool.

7. Many considered it important that procedural efficiencies were achieved through commitments; thus freeing up authorities' resources to be deployed elsewhere. It was noted that this had also been recognised as an advantage of commitments by the Competition Appeal Tribunal in *Skyscanner*[1] (following the Advocate General in *Alrosa*).[2] However it was also felt that the nature of the commitments process - and the level of understanding of the market that was required - meant it could take time and as a result resource savings might be less than anticipated, in particular in contrast to other enforcement tools such as settlement where procedural efficiencies were considered paramount.

8. Equally participants highlighted the practical benefits of quicker elimination of harm through commitments and also factors that were not dependent on the speed of the outcome such as the possibility of more flexible remedies or even a 'better outcome' (ie improving market conditions) than could be achieved through directions in an infringement decision.

9. There were mixed views on commitments' impact on deterrence. In particular, several participants felt that commitments could provide some legal certainty or precedent value and regarded them in the same way as other 'soft law' guidance provided by authorities, such as published guidance. They felt that commitment decisions with clear and detailed reasoning could provide guidance on what an authority considered to be an example of acceptable conduct and that in practice this would inform businesses and their advisers when planning their commercial activities. It was also suggested that use of commitments could provide the opportunity for authorities to provide follow-on guidance specific to particular affected industries. Other participants felt that it could be difficult to interpret the meaning of some commitment decisions and know how to apply them to different factual scenarios, but that this was equally true of some infringement decisions.

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[1] Skycanner v Competition and Markets Authority [2014] CAT 16.
[2] Case C-441/07 P Commission v Alrosa [2010] ECR I-5949.

10. Participants also discussed the extent to which commitments could influence third party damages actions as they did not result in an infringement decision. It was suggested that authorities needed to bear this in mind when drafting the decision to accept commitments as the implicit acknowledgement of concerns may be enough for a stand-alone action.

11. It was also noted that commitments may have been used to tackle issues which it was felt would have been better addressed through a markets or regulatory regime. This was felt to be more apparent where there was a lack of other means of intervention or to achieve other policy goals such as market liberalisation. It was pointed out that consideration of commitments did not equate to a general assessment of a market (the scope of concerns identified and hence remedies may be quite narrow) and nor did the commitments process have the same supervisory role as the markets regime. There were also questions raised around the extent to which authorities could or should use commitments to take wider externalities into account, for example non-market considerations.

12. Participants considered the types of cases that might be suitable for commitments and in particular by reference to examples including the European Commission's commitment decisions in *Microsoft*[3] and *Samsung*.[4] Some argued that commitments should not be used for new areas of law, uncertain theories of harm or 'clear' cartel and abuse cases. Rather they would only be appropriate where there were clear concerns and simple, practical remedies. However, others also noted that in cases of a clear infringement it was less likely that significant procedural economies would be realised from accepting commitments, again in contrast to settlement.

13. Some suggested that commitments may be particularly appropriate in regulated industries where regulators had already extensive information about the industry. Others thought that it would be better for parties to offer commitments in dynamic markets where authorities had less experience and there was greater flexibility to amend or change commitments than for directions in an infringement decision. It was also noted that intervention in these markets could risk stifling innovation and so there needed to be sufficient time for adequate investigation given the potential implications for the market even at the cost of speed as well as frequent review once commitments were in place.

14. Participants also cautioned against authorities accepting commitments in cases where the evidence was weak or where cases had proceeded for a

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[3] Microsoft (tying) (2009) COMP/C-3/39.530.
[4] Samsung – Enforcement of UMTS standard essential patents (2014) C AT-39939.

long time and a no grounds for action or de-prioritisation decision would be more appropriate.

The appropriate judicial control of commitments – intensity and frequency of scrutiny

15. Many participants felt that the intensity of scrutiny offered by the existing judicial review standard was adequate for commitment decisions in ensuring fairness and propriety, and that a full merits review would not be desirable and might discourage parties from offering commitments. It was also felt that since commitments involved prioritisation decisions by authorities, this level of review was appropriate in allowing authorities the discretion to determine the best use of their resources.

16. As regards frequency of scrutiny, it was recognised that appeals had been rare – there were currently two relevant judgments, one at the EU level (*Alrosa*) and one at UK level (*Skyscanner*). Consequently the opportunity for judicial control was limited both as a counterbalance to the authority's decision to accept commitments and to create jurisprudence. In this context it was noted that there was currently no case law clearly explaining the substantive test for accepting commitments under the Competition Act 1998 ie 'for the purposes of addressing the competition concerns' (s.31).

17. It was felt that the lack of appeals was the result of a number of factors including that the parties had little incentive to appeal if they had offered the commitments and third parties would not usually have full access to the detail of the competition concerns. As a consequence it was suggested that authorities needed to give full consideration to the other parties affected by commitments, particularly as there was an element of chance as to whether third parties who may be affected would intervene and challenge the decision. It was felt that it was more important to ensure proportionality of commitments for the benefit of third parties rather than necessarily the parties (as they were offering commitments voluntarily). The discussion also touched on whether third parties could be granted further disclosure, similar to the markets regime.

18. There was no general consensus on the suggestion that commitments should be made subject to judicial approval prior to their implementation, similar to consent decrees in the USA or litigation settlements in the UK. Other suggestions included the implementation of a semi-judicial approval mechanism through an independent panel or additional safeguards for internal processes within authorities to approve commitments such as separation of decision making.

Use of commitments in practice – challenges and mitigation

19. The discussion identified a number of challenges that authorities should be mindful of when assessing the suitability of commitments. These included:

    (a) the time taken by the commitments process and in particular the resulting loss of procedural economy;

    (b) risks that authorities could be gamed due to information asymmetries about markets (especially for technology markets);

    (c) the need for parties to have more information and clarity about when and where commitments should be used; and

    (d) the need to ensure that third parties have the opportunity to give views and to assess the impact of commitments on third parties.

20. The discussion also touched on the benefits for businesses seeking commitments including quicker procedures, and the possibility of avoiding costs of ongoing investigations, bad publicity and damages actions. However, some participants flagged the risk that, notwithstanding that commitments offers are voluntary, authorities may seek to extract commitments from parties or push them to offer more. Others felt that this risk was overstated.

21. Participants cautioned that in multi-party cases authorities needed to be careful not to dilute concerns to suit all parties or that the process should not be held hostage by one delaying party. Questions were raised as to whether an authority could enter into commitments with some parties and expect the wider industry to follow. More practical questions were also raised, for example whether there would be scope for multi-party hearings.

22. In relation to national and international cooperation between authorities, some felt that divergences between commitment regimes across the European Competition Network (ECN) were problematic. For example the fact that some authorities could only accept commitments pre-Statement of Objections and some could only accept them post-Statement of Objections, could make it difficult to coordinate commitments offers where several authorities were investigating the same practices. However, others pointed to more visible benefits of ECN cooperation in terms of sharing of information and views.

23. There was no general consensus on the best stage in an investigation for discussions on commitments to begin and flexibility in this respect was seen as desirable where possible. Pre-Statement of Objections commitments would save more resource and may provide the parties with greater flexibility in terms of remedy. However, it was noted that too early regulatory intervention

prior to a clear theory of harm being identified could be problematic. Parties would be more focused post-Statement of Objections since they would have more detail of the competition concerns. There was a request for authorities to clarify in external guidance when it was appropriate for parties to offer commitments, for example at certain state of play meetings, or whether this could be done at an early stage on a no-names basis.

24. It was noted that a key factor determining the success of commitments in practice was a good faith process between the authority and the parties, both aiming to achieve a common goal. This required a mutual shift in engagement from potentially adversarial to one that was more consensual.

25. Further suggestions for mitigating the challenges included:

(a) the need for authorities to clearly articulate their concerns;

(b) the need to provide a clear structure and expectations for the process; and

(c) appropriate use of market testing/trialling including possible use of third party experts (although some people expressed doubts about the impartiality of third parties in the process).

26. Some participants felt that authorities should provide more explanation to parties why certain commitments offered did not address the competition concerns or conversely more explanation could be given to complainants as to why they did.

27. It was noted that the CMA could only apply for a court order to comply with commitments and some suggested that a legislative amendment to allow for fines for non-compliance, similar to the European Commission, would be beneficial.