

Too much of a good thing?

Arguably, article 9 commitments are being overused

by *Greg Olsen and Chandralekha Ghosh**

A debate is raging about the European Commission's exercise of its discretion to accept commitments under article 9 of Council Regulation (EC) No 1/2003 (the Regulation) to resolve investigations of potential infringements of competition law. While it is recognised that the article 9 route is an efficient course that offers real benefits to both interested parties and the Commission in achieving an expedited resolution, there is also growing unease that its use in some instances could be to the detriment of the development of the law. This calls for a reassessment of either the nature and process associated with article 9 decisions or a curbing of their use in certain cases involving novel issues.

How did we get here?

A decision under article 9 is an alternative to a decision under article 7 of the Regulation prohibiting behaviour that infringes article 101 and/or 102 of the treaty on the functioning of the European Union. The Commission has also, on occasion, closed an investigation without a formal decision where the relevant party has unilaterally changed its conduct so that there is no longer a reason for action: see, for example, COMP/C-2/39154 (PO/iTunes) and COMP/C-2/39174 (Which/iTunes) and Commission press release IP/08/22, 9 January 2008. While the informal approach has its obvious attractions, it is rarely accepted since it does not provide the Commission with a legally binding resolution, now overseen by a monitoring trustee, that can be directly enforced should there be a failure to comply.

A key characteristic of the article 9 route is that the Commission's decision does not include a finding of infringement. Instead, the Commission puts forward its preliminary assessment of the facts and the possible competition concerns, to which the parties respond by offering commitments to address the perceived issues. Without the finding of an infringement, fines cannot be imposed and therefore, article 9 decisions are unlikely to be taken for cartels or other cases involving very serious infringements. Commitments will also not be taken where it would simply involve an undertaking to cease the relevant behaviour. Importantly for the purposes of the current debate, a factor that will weigh in the Commission's exercise of its discretion is whether it is important to establish a precedent.

On adoption of the Regulation, it was generally expected that article 9 would be used sparingly. Indeed, this is supported by the fact that only five article 9 decisions were taken in the first five years of the Regulation (with the same number of article 7 decisions over the period). However, the number of decisions under article 9 have increased significantly in recent years – of 31 decisions since 2005, 17 decisions have been made since 2010. In 2013 alone, there were five article 9 decisions as against one article 7 decision. Recent high-profile

cases such as the investigations into ebooks and Samsung's practices in relation to standard essential patents were resolved through commitments, and Google has also offered commitments seeking to bring to an end the Commission's investigation into its search and search advertising practices.

The popularity of the article 9 route may be explained by the significant advantages it offers to the parties being investigated and the Commission alike, as summarised below.

■ **A quicker process.** The length of an investigation (and the accompanying cost, uncertainty and distraction to the company) may be significantly curtailed by the offer of commitments. The parties may remain resolute in the defence of their conduct but the prospects of success before the Commission and the European Courts may be difficult to gauge and, when measured together with the necessary costs and delay, may often be less attractive than a swift resolution. Moreover, there may be a strong desire to remove any overarching uncertainty arising from the investigation that may impede the parties' commercial progress.

■ **No finding of infringement.** Since an article 9 decision does not involve a finding of infringement, it is better for parties in the context of potential follow-on damages actions by third party claimants. In investigations involving a potential breach of article 102, it may also avoid a finding of dominance, which could prove detrimental should there be future claims of abusive behaviour.

■ **Other advantages.** The faster resolution of concerns under the article 9 route offers benefits to the Commission both in terms of more swiftly implementing effective remedial action and freeing up limited Commission resources for use on other matters. There is also some benefit to the Commission from the reduced threat of appeal to the European Courts.

Is there a problem?

There are concerns that, in exercising its discretion in favour of the article 9 route, the Commission may be giving more weight to the benefits of fast-track resolution at the expense of creating rigorous precedent with fewer reasoned article 7 decisions and subsequent appeals to the EU courts in relation to article 101/102 matters. This arguably slows down the evolution of jurisprudence and leaves businesses and practitioners with less clear guidance. The lack of reasoned decisions also leaves the Commission open to criticism that its intervention might not have been warranted in all situations. Moreover, when faced with ambiguity regarding the legal position on particular practices, it is not unreasonable to expect businesses and practitioners to take a more cautious approach than may be necessary.

Against the above, it is reasonable to ask why parties encountering novel issues should routinely be denied the benefits of the article 9 process. Indeed, a number of the Commission's recent article 9 decisions have been in sectors involving fast moving technologies, where delayed or heavy-handed

* *Greg Olsen is a partner in – and Chandralekha Ghosh is an associate with – Clifford Chance LLP (London)*

intervention may be particularly detrimental. A sensible alternative solution may therefore be to examine the article 9 process and consider whether it could be enhanced so as to ensure that it both retains the present benefits of speed while also providing an assurance about the quality of outcome and degree of transparency.

What can be done?

In considering whether reform of the article 9 process is needed, it is useful to start with an examination of the two main constraints on the Commission's use of the tool. First, the system is dependent upon parties' voluntarily offering a proposal (they cannot be compelled to do so) and, secondly, the Commission must be satisfied in accordance with the terms of article 9 that the commitments "meet the concerns expressed to them by the Commission in its preliminary assessment". In both of these areas, there is scope for things to go awry unless the standard applied by the Commission in assessing the case and building a solid theory of harm is sufficiently high. While a decision under article 9 must relate to concerns that are based on a plausible theory of harm for which the Commission has evidence, in practice it is probably safe to assume that a higher level of qualitative and quantitative analysis, and evidence, would be required for the Commission to be able to conclude that there was an actual infringement, as opposed to demonstrating the likelihood of a possible infringement. This may be particularly troubling where the subject matter of the case involves novel or uncertain areas of the law and leads to a question of whether more rigorous standards should be formally required before an article 9 decision is considered acceptable in such areas.

The above concern is exacerbated if the Commission's assessment is not sufficiently developed and articulated to the parties in order for them to frame correctly the commitments offered. Accordingly, it is possible that the parties may commit to do more than might otherwise have been required as a consequence of an infringement decision. Commentators have also noted that the Commission could be tempted to go beyond the scope of its legal powers to obtain desired results through commitments, given the reduced risk of annulment by the European courts. It is to be hoped that the Commission would not be drawn to the use of the article 9 procedure when it has doubts as to whether its theory of harm would stand up to judicial scrutiny. The potential adverse effect of such overreaching is increased if the form of the commitment is treated as guidance for the industry.

There is also a need for third parties to be sufficiently aware of the Commission's assessment of the concerns in order to be able to comment effectively during the market testing process. Careful co-ordination between the Commission case team, the parties and interested third parties – both in progressing the substantive assessment and the framing of the commitments – should enhance the process and the prospect of more robust outcomes. While the Commission is already subject to a duty under article 27(4) of the Regulation to publish a concise summary of the case and the main content of the commitments, allowing interested third parties to comment, current procedures could be improved. This might involve, for example, the use of triangular meetings at an early stage, where all parties' views might be debated and verified more effectively than through the

Commission's current preference for bilateral engagement with the parties and interested third parties respectively.

The Google case is an interesting example of the challenges in engaging with third parties. Following feedback from the market test of its initial commitments, Google offered revised commitments in October 2013 in connection with the Commission's investigation into its search and search advertising practices. These were not published or subjected to a second market test; instead the Commission sent the revised proposal only to the complainants and the respondents to the first market test. Following widespread criticism of the revised proposal, Google offered a third set of commitments in February 2014; these were not subject to a market test and were made public only after they were provisionally accepted by the Commission. The Commission has said it intends to send the complainants a pre-rejection letter, explaining why it considers the commitments capable of addressing its concerns, and the complainants would then have an opportunity to give their views before the Commission's final decision.

An area for further thought is the nature of the decision published in an article 9 case, and whether it could be enhanced so as to provide more insight into the Commission's analysis and the manner in which the commitments meet the concerns identified. While this may impose greater discipline and assist in ensuring a high standard of decision-making, the challenge would lie in ensuring that such action did not undermine the efficiencies that are core to the article 9 process.

There is an element of *déjà vu* in the current debate as to the use of article 9 decisions. Seasoned practitioners will recall the Commission's use of comfort letters as a means of addressing the workload of voluntary notifications prior to adoption of the Regulation. It should really come as no surprise that another system to expedite the resolution of lengthy investigations, in the interests of both the parties and the Commission, should subsequently flourish. While it seems unlikely that the present expansion in the use of article 9 decisions will usher in a variation of the old notification system, article 9 decisions do have a role in providing a solution for cases where Commission involvement in assessing the arrangement or conduct is warranted but penalties are not on the horizon. Accordingly, in the recent airline alliance cases (Oneworld, StarAlliance and Skyteam) the article 9 procedure provided a flexible means for the Commission to provide assurance to the participants while also securing beneficial modifications to the co-operation agreements.

In summary, article 9 decisions are an important and largely beneficial aspect of current European competition law. They fulfil a critical role in the efficient resolution of cases. However, fears about the impact of increased use on the proper development of the law merit consideration with a view to (1) either a reform of the process in the interests of guaranteeing the quality of decision-making and providing for increased transparency; or (2) tightening the criteria by which the Commission selects cases as suitable candidates for resolution by way of article 9.

References

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