St.Gallen ICF 2016

Commitments and settlements – benefits and risks

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The 2016 St.Gallen International Competition Law Forum ICF will serve as the backdrop for discussions on a variety of current competition law, economics and policy topics. One of the panels is going to focus on commitments and settlements and their role in the antitrust enforcement system of the European Commission. What kind of benefits do these instruments have? What are the problems and issues?

The following interview between PROF. DR. HEIKE SCHWEITZER (Professor and Managing Director, Institute for German and European Economic Law, Competition Law and Regulatory Law, Freie Universität Berlin) and MATTEO BAY (Partner and Attorney-at-Law, Latham & Watkins) offers you some food for thought and a starting point for our panel discussion. During the St.Gallen ICF itself, additional input will be offered by CÉLINE GAUER (Director Energy and Environment, DG Competition, European Commission) and CATRIONA MUNRO (Partner and Attorney-at-Law, Maclay Murray & Spens).

Join us in St.Gallen on May 19th and 20th for the "COMMITMENTS AND SETTLEMENTS – BENEFITS AND RISKS" panel. More information about the conference and a list of the remaining panels and speakers is available on www.sg-icf.ch.

HEIKE SCHWEITZER: Regulation 1/2003 has introduced commitment decisions as a new enforcement instrument at the European Union level. In 2008, settlements have been introduced for cartel cases. According to your experience, do these new instruments stand for a new enforcement style of the EU Commission in the field of competition law? Do we see a shift from an antagonistic towards a more cooperative enforcement style at the Commission level?

MATTEO BAY: Settlements have been introduced by the Commission as an "efficiency tool". By trimming down the administrative procedure and ultimately having a significantly more limited number of appeals (very few settling parties have appealed so far), the Commission merely intended to free up resources that could be devoted to other investigations. It is not immediately apparent that the Commission would have intended to introduce a less confrontational style or

procedure to wrap up cartel investigations. Even with settling parties (particularly those that are not already leniency applicants), discussions on the merits of the Commission's allegations and the value of the evidence supporting them can be fairly "animated". If you add that Commission officials have routinely stated that settlement discussions are not "negotiations", the overall picture is in my view that of a confrontational process by other means. The strong interaction between each of the settling parties and the case team at times could remind you of the interaction you have in complex merger investigations. In both cases, the interaction is frequent, substantive and with high stakes. In merger investigations you generally do not achieve a "temperature" in the room similar to what you have in the context of the initial meetings held in the context of cartel settlements (again, particularly if the settling party is not already a leniency applicant). However, not unlike merger control proceedings, settlement discussions allow for a more meaningful discussion with the Commission staff than what would be possible in a standard procedure. Ultimately, you have a higher likelihood to have these discussions affect the outcome.

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In contrast, perhaps, in case of Article 9 proceedings, there is more a desire on the Commission part to reach an outcome that is perceived as more appropriate than with an Article 7 decision. After all, unlike in cartel settlements relative to standard decisions, the outcomes of Article 7 and 9 decisions are materially different. The Commission's desire to reach more quickly a solution that is considered more appropriate may be one of the reasons why, at times, discussions in the context of Article 9 cases are less confrontational, particularly if the undertaking under investigation shows fairly early on willingness to offer commitments that the Commission views as appropriate.

HEIKE SCHWEITZER: Related to the previous question, did the introduction of these two new instruments enhance the efficiency and the effectiveness of the Commissions' antitrust enforcement?

MATTEO BAY: According to official speeches, it seems that both instruments have been very successful and achieved their objectives of greater and swifter enforcement. However, though perhaps they have marked a change in enforcement style, I have not personally perceived the enforcement level of the Commission to be very different from previous periods.

Overall, the average number of commitment decisions adopted every year is not higher than the corresponding number of cases closed with exemptions or negative clearance decisions following commitments in the years before the entry into force of Regulation 1/2003. Similarly, cartel settlements – though now fairly widely used in cartel cases, in well over half of the cases – have not resulted in a greater number of cartel decisions: the average number of cartel cases decided every year has been constant at about 6 since 2000.
As regards commitment decisions, however, improvements have certainly been introduced with the Article 9 procedure: the procedure, which is now more formal, is also more "democratic", in that it offers greater and better opportunities for third parties to be actively involved in respect of the market testing of the proposed commitments. In addition, in contrast with the pre-2004 commitment decisions, Article 9 decisions are now always published, in full. Moreover, since 2004 compliance with commitment decisions can be better enforced (see Articles 9(2)(b),

23(2)(c) and 24(1)(c) of Regulation 1/2003, and the *Microsoft II* case).

Settlement proceedings should generally result in a quicker resolution of cases (though the average duration of settlement cases is perhaps still too close to the duration of standard cases, in particular due to the need to first properly investigate the case, prior to even offering the parties under investigation to enter into settlement discussions). In this respect, perhaps, a greater benefit from an efficiency perspective is the dramatically reduced number of appeals by the settling parties (only two appeals since 2010, cases T-98/14 – subsequently withdrawn – and T-95/15), something that has certainly freed up significant resources even within the Cartel Directorate, and not just the Commission's Legal Service.

HEIKE SCHWEITZER: You are experienced both in the public enforcement of EU competition law and of Italian antitrust law. Does the use of settlements (including commitment decisions) differ in both jurisdictions – regarding procedure and enforcement style?

MATTEO BAY: In 2006, Italy also introduced the equivalent of Article 9 decisions, using the EU framework (and objectives) as a model. The general outcome of a commitment decision is virtually identical: no finding of infringement, no sanctions, market-tested commitments. However, the front end of the procedure is accelerated. The undertaking under investigation should propose a set of commitments within 3 months from the opening of the investigation (which in Italy takes the form of a preliminary Statement of Objections (SO), often prompted by a complainant, setting out the facts, identifying the market(s), describing the conduct in question). One important element to consider is that the Italian Antitrust Authority seems to be prepared to adopt commitment decisions in situations that one would not necessarily consider as the most appropriate, at least on paper, for such outcome. In Case A375 of 2008, "*Winback practices*", the Italian Antitrust Authority (IAA) accepted commitments by a repeat offender, following a fully negative market test and in respect of well proven conduct that was contrary to a Milan Court order and sector-specific regulations and which continued after the IAA opened its investigation. In Case I681 of 2007, "*Petrol retail prices*", the IAA accepted commitments in respect of "cartel-like" conduct consisting of regular information exchanges about new price lists.

In contrast, Italy has not yet introduced the equivalent of settlements in cartel cases. In this respect, however, I can compare the French experience with the EU procedure, having recently been involved in two of the largest cartel investigations in France in the last several years (*Cleaning and Personal Hygiene Products* of 2014 and *Courier Services* of 2015) which involved hybrid settlements. First, the French procedure does not appear to be geared towards efficiency savings: a full-fledged SO is issued, and a standard access to the file is offered. While in Brussels, it is for the Commission to choose whether to offer the possibility of a settlement before issuing any SO, in Paris the parties can offer to settle after they have received a standard SO. Second, while the EU procedure reduces dramatically the number of appeals by settling parties, in France almost all settling parties will appeal the decision in respect of the fine calculation. In France a settlement only involves accepting the facts and their legal qualification by the Authority, with no discussion about the fine and its calculation: the part of the procedure dealing with the fine starts after the parties have already accepted to settle (the merits of) the case. This results in appeals by the settling parties that resemble those by non-settling parties (in standard

cartel cases) lodging appeals in Luxembourg in respect of all issues related to the fine and its calculation. Further, while in Brussels settling requires an acknowledgment of liability, in France a settlement does only involve an acknowledgment of the facts and their assessment. Finally, one of the main features of the French settlement system is that, in addition to a flat 10% discount for settling, the Authority can grant an additional discount of up to 10% as a reward for commitments offered. In cartel cases, such commitments are typically (if not invariably) enhancements to any existing compliance program.

HEIKE SCHWEITZER: Despite the controversies surrounding commitment decisions, the real issue is probably not: Commitment decisions yes or no. Rather, we should ask: In which cases are commitment proceedings a good instrument? Could you offer some suggestions which types of cases lend themselves to commitment proceedings and in which types of cases they should rather not be used?

MATTEO BAY: A lot has been said and written about the "generous" use by the Commission of Article 9 commitment decisions. I must agree that an overly generous use of them would likely undermine a full development of the law, especially in connection with Article 102 TFEU cases. Commitment decisions do not contain a full analysis of the conduct, and its assessment. Further, commitment decisions are rarely challenged (including by third parties) and therefore do not give rise to that body of case law that would also contribute to the development I just mentioned. Against this background, I should first note that the percentage of non-cartel cases closed with Article 9 decisions since 2004 is similar to that of the cases closed in 2000-2004 (the "Monti period") with exemptions or negative clearance decisions following commitments (several more cases have been closed informally with commitments, e.g., in the gas sector, MEMO/03/159).

Commitment decisions are generally more appropriate in cases where the speed of the procedure is of the essence and results in important benefits in contexts where the markets or competitive forces evolve very quickly and a quick resolution resulting in a better and swifter implementation of commitments is particularly apt, or when the primary target is not the punishment of past behaviour but correcting future behaviour. In contrast, when the case raises complex and novel issues that would be left "unresolved" with an Article 9 decision, I think that the Commission should give preference to classic Article 7 decisions (even Commissioner ALMUNIA, who appeared to be in favour of a settlement with Google in the Search case, recognized that a settlement may not have been the best outcome for that particular case considering its novelty, its requiring a more complex theory of harm and its potentially very wide impact). Further, cases that seem to be more appropriate for Article 7 decisions are those where remedies would substantially be limited to a promise to comply with the law (which applies anyway, of course!), such as a commitment not to implement RPM.

HEIKE SCHWEITZER: Commitments are also broadly used in merger cases. In the field of mergers, they are relatively uncontroversial. At the same time, the use of Article 9-commitment decisions has remained highly controversial. Why is this so?

MATTEO BAY: The fact that Article 9 decisions remain fairly controversial is due in my view to several factors. First, and unlike for remedies in merger cases, there is a perception by those aggrieved by the conduct of the undertaking under investigation that the Commission should have done more, and in

particular it should have found an infringement and imposed a fine. While the fine relates to a sense that "justice" is being done, the finding of an infringement in a fairly detailed decision would help plaintiffs in follow-on damages actions.

Second, the fairly generous use of Article 9 decisions, at least during the first 10 years since 2004, may have given the impression that now the Commission prefers efficiency over deterrence, without elaborating much on the legal theories underpinning its concerns. In contrast, it is precisely with conditional merger decisions that the Commission will generally provide a more elaborate reasoning in respect of its concerns justifying the merger remedies.

Third, since the novelty of the legal theories of harm underpinning a case are not a limit to the use of Article 9, the Commission has used this new mechanism for the application of new theories thus effectively avoiding judicial scrutiny (see the *Rambus* case of 2009, where the Commission based its Article 102 TFEU case on the concept of "patent ambush"). The Commission has also used Article 9 to in cases that are generally disfavoured by enforcers and considered difficult to prosecute successfully under the standard procedure, such as in excessive pricing cases (see, e.g., *Standard & Poor's* of 2011) or essential facilities cases (e.g., *RWE Gas Foreclosure* of 2009, or *E.ON Gas* of 2010). Some think that Article 9 proceedings have been a convenient means of closing particularly difficult cases.

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Fourth, in Article 9 cases the Commission has imposed remedies that go beyond what could be imposed in Article 7 cases and extracted from the parties very significant concessions (from divestments of business units in *ENI* of 2010 to the commitment of additional investments in *Swedish Interconnectors* of 2010, from quasi-regulated pricing in *Rambus* and *Standard & Poor's* to commitments regarding cooperation with competitors in *E.ON Gas*). Criticism has been voiced on rule-of-law grounds. However, the use of a wide margin of discretion has now been endorsed by the ECJ in *Alrosa*, where the Court also indicated that a remedy that would be disproportionate under Article 7 may be acceptable under Article 9 (*Alrosa*, para. 46-48). Thus, the Commission's expansive approach is after all in compliance with EU law.

HEIKE SCHWEITZER: Regarding cartel settlements: There have been complaints that the Commission is unwilling to consider the existence of compliance programs in an undertaking when imposing fines. Would it make sense to restrict the availability of settlements to undertakings which have implemented a state of the art compliance program in order to better honour the effort to comply?

MATTEO BAY: There is indeed an ongoing debate concerning the Commission's "disregard" of existing compliance programs when imposing fines, irrespective of whether this is done in the context of settlement proceedings or a standard investigation. I am not sure I would restrict the availability of a cartel settlement to those parties which have already implemented top quality compliance programs. In essence, we would be "rewarding" those whose best efforts have actually failed. Also, the introduction of this criterion would probably be unwelcome by the Commission, as it would tend to limit their discretion and the number of cases that could be considered suitable for a settlement. While granting a reduction of the fine (on account, say, of a "mitigating factor") to any party who has tried and failed to comply with antitrust law may be perceived by some as too

generous, I think that a more effective solution would be that of granting a fine reduction to those who commit to introduce a strong compliance program or to significantly strengthen an existing one. In France, there is a similar system. On top of the flat 10% reduction, settling parties can obtain up to an additional 10% discount as a reward for their efforts in respect of future compliance. Based on the practice of the Autorité de la concurrence, a greater reward (closer to 10%) is generally granted to those offering to extend their new or revamped compliance programs to businesses beyond those affected by the cartel under investigation. Thus, in France the system is effectively bolstering stronger compliance. The French system also contains the requirement to accept some form of monitoring. The role of the Autorité is generally limited to that of receiving an annual report about the actual implementation of the commitments, along the lines of what the Commission accepted, for instance, in the Article 9 *Coca-Cola* case in 2005. Indeed, in a sense the French system of commitments in cartel settlements is not very different from the Article 9 mechanism as regards behavioural commitments. From a policy perspective, I find the "French way" particularly attractive because it rewards those who commit to do better in the future, and not just those who have tried to comply with the law without much success, with specifically higher rewards for those who commit to introduce a better and stronger compliance culture throughout their undertaking, and not only in respect of the business that was directly involved in the infringement.

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Matteo Bay is a member of Latham & Watkins' global Antitrust & Competition Practice. His practice focuses primarily on EU and Italian competition law. A former senior clerk (référendaire) at the Court of Justice of the European Union, he also advises clients on other areas of EU law, such as the Internal Market. In his competition and regulatory practice, he regularly represents clients before the European Commission, the Italian Antitrust Authority, the EU courts in Luxembourg and the Italian Courts (including private actions for damages before the domestic courts). In his cartel defense work, in particular, Mr. Bay regularly represents large multinationals involved in global cartel investigations. He was actively involved in the first ever settlement case of the European Commission in a cartel matter (the DRAM case).