

Deciphering Competition Regime of Pakistan: Analyzing Commitment Decisions

Dr. Sayyeda Fatima

Assistant Professor, Department of Law, International Islamic University Islamabad

sayyeda.fatima@iiu.edu.pk

Abstract

One of the fundamental aspects of Pakistan's competition regulatory framework is the provision for undertakings to propose commitments as a means of addressing competition concerns raised by the Competition Commission of Pakistan. Commitment decisions offer a pathway for undertakings to resolve such concerns without admitting to any violations of competition law or facing financial penalties. Some experts view this approach as promoting a more efficient and flexible enforcement process, while others hold opposing views. This article examines whether the advantages of commitment decisions outweigh any potential disadvantages they might carry. It outlines the key characteristics of the commitment mechanism applied by the Competition Commission of Pakistan and assesses whether the existing provisions are sufficient in achieving the intended outcomes. Additionally, this article investigates Pakistan's current commitment mechanism and, when relevant, draws comparisons with the commitment provisions in the European Union. It underscores the importance of ongoing evaluation and improvement of the commitment decision process.

Keywords: Commitments, Competition Concerns, Financial Penalties, Enforcement Process, Competition Commission of Pakistan.

1. Introduction

The updating of competition laws granted competition authorities the discretion to implement the decisions known as “commitment decisions”. Typically, undertakings being investigated can suggest commitments that would effectively address the competition concerns raised by a competition authority. The competition authority retains the discretion to evaluate whether accepting these commitments is suitable or not.

1.1 Research Questions and Research Objectives

Commitment decisions expedite the resolution of anti-competitive activities, which typically involve long term exercise to investigate and prosecute these activities. These decisions can effectively rectify distorted competition in a relevant market. This article seeks to explore several key questions: Assessing whether the benefits of commitment decisions outweigh the drawbacks they may entail. Identifying the prominent characteristics of the commitment mechanism employed by the Competition Commission of Pakistan. Evaluating whether the current provisions are adequate in achieving the desired outcomes. Additionally, this article aims to scrutinize Pakistan's existing commitment mechanism and draw comparisons, when relevant, with the commitment provisions in the European Union.

1.2 Legal Basis of Commitment Decisions

The Competition Act of 2010 (CA 2010) grants the Competition Commission of Pakistan (CCP) the authority to adopt regulations essential for achieving the goals of CA 2010.¹ The CCP has adopted “Competition Commission General Enforcement Regulations 2007” (General Enforcement Regulations 2007)² as an implementing regulation for competition provisions as laid down in Chapter 2 of the CA 2010. The CCP is the competent authority responsible for engaging in commitment discussions.

In the European Union, following the Treaty on the Functioning of the European Union (TFEU), Regulation 1/2003 serves as the implementing regulations for enforcing the competition rules.³ The European Commission is the authorized body in charge of participating in commitment

¹ Competition Act No. XIX of 2010 (Published in the Gazette of Pakistan, Extraordinary, 13 October 2010) [CA 2010], § 58.

² Competition Commission (General Enforcement) Regulations 2007, SRO. No 1189(I) 2007 (Published in the Gazette of Pakistan, Extraordinary, 8 December 2007) [General Enforcement Regulations 2007].

³ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty, OJ L 1, 4.1.2003, p. 1 [Regulation 1/2003].

deliberations. Article 9 of Regulation 1/2003 stipulates that the European Commission has the authority to issue commitment decisions. Numerous investigations, barring those related to cartels, concerning suspected violations of the EU competition rules are often resolved through such “commitment decisions”.⁴ Wils presents statistical data from the initial decade of implementing Regulation 1/2003.⁵ He highlights that, during the period of 2005 to 2014, the European Commission issued “29 commitment decisions under Article 9 of Regulation 1/2003” and 17 decisions prohibiting non-cartel activities⁶ under Article 7 of Regulation 1/2003.

It can be observed that there has been a significant change in the Commission’s decisions since 2004. The majority of inquiries into alleged breaches of EU competition rules are now settled through “commitment decisions”. Nonetheless, in order to enhance transparency and provide greater clarity, there should be a requirement for the European Commission to disclose comprehensive information regarding its theory of harm in commitment decisions.⁷

2. Scope and Nature of Commitment Decisions

2.1 Nature of Commitments Offered

Commitments can take two forms: behavioral commitments and structural commitments.⁸ Behavioral commitments encompass obligations such as an undertaking’s commitment to deliver

⁴ For a detailed discussion of this topic, see Choné, P., Souam, S. and Vialfont, A., “On the Optimal Use of Commitment Decisions under European Competition Law”, *International Review of Law and Economics* 37, Issue C (2014): 169-179.

⁵ Wils, W.P.J., “Ten years of commitment decisions under Article 9 of Regulation 1/2003: Too much of a good thing?”, *New frontiers of Antitrust Concurrences Journal* 6th International Conference, Paris, 15 June 2015, Table 1, <http://ssrn.com/author=456087> (last consulted on 16.3.2023).

⁶ Ibid. During the same time frame, the European Commission made 55 decisions related to cartel cases, where the commitments mechanism was not an option.

⁷ McMahon, C., “Commitment Decisions: Empirical Evidence from EU Competition Policy”, *European Competition Journal* 6, Issue 3 (2010):497-525.

⁸ European Commission, Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C 308, 20.10.2011, p. 6, point 127; European Commission, “Commitment decisions” (Article 9 of

certain services or products under specified circumstances. For example, in *International Business Machines Corporation (IBM) Maintenance Services*, the European Commission raised concerns about potential unreasonable conditions imposed by IBM when supplying its competitors in the mainframe (mainframes are robust computing systems employed by sizable corporations and governmental organizations for the storage and handling of vital business data) maintenance services market, in contravention of Article 102 of the Treaty on the Functioning of the European Union (TFEU). IBM responded by proposing commitments to offer spare parts and technical documentation to independent mainframe maintenance providers in a timely manner and under terms that are commercially fair and impartial. Upon the Commission's satisfaction that these commitments adequately addressed the competition issues, they were formalized as legally binding obligations imposed on IBM.⁹

Structural commitments encompass actions such as asset divestitures, for example sale of an electricity transmission network. In the case of the *German Electricity Wholesale Market*, the European Commission expressed apprehensions about E.ON AG, Düsseldorf (E.ON) potentially considering the possibility of removing their existing "electricity generation capacity" from the "German wholesale electricity markets" with the intent of influencing prices and discouraging prospective generation investors. Additionally, the European Commission had reservations about E.ON exhibits preferential treatment towards its production subsidiary when it comes to offering balancing services, shifting the resulting costs onto end consumers and obstructing other electricity producers from exporting balancing energy into its transmission zone.

Council Regulation 1/2003 providing for a modernised framework for antitrust scrutiny of company behaviour), MEMO/04/217, 17 September 2004, <http://europa.eu/rapid/> (last consulted in 24.5.2023).

⁹ European Commission, Summary of Decision of 13 December 2011 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement, Case COMP/39.692 - IBM Maintenance Services, OJ C 18, 21.1.2012, p. 6.

To address these concerns raised by the Commission, E.ON put forward a proposal to divest approximately “5000 MW of its generation capacity”, thus addressing the issues related to the generation market. E.ON also made a commitment to sell its extra-high voltage network as a response to concerns in the electricity balancing market. Following this, the Commission issued a legally binding decision that obligated E.ON to fulfill these commitments.¹⁰

1.2 Cases where Commitments are Considered Appropriate

In Pakistan, there is no specific provision that defines the scope of commitment decisions. In contrast, within the European Union, Regulation 1/2003 explicitly clarifies that commitment decisions are not suitable when the Commission intends to impose a financial penalty.¹¹ Commitment decisions are therefore appropriate in all competition prohibition cases but are excluded in cartel cases.¹² However, a settlement procedure is available for cartels.¹³

Commitment decisions do not conclude whether there has been or still is a violation of competition law. They do not undermine the authority of competition authorities and courts to make such determinations and render judgments in the case.¹⁴

Article 27(4) of Regulation 1/2003 mandates that the European Commission, when it intends to issue a decision under Article 9 of Regulation 1/2003 (referred to as a commitment decision), must

¹⁰ European Commission, Summary of Decision of 26 November 2008 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement, Cases COMP/39.388 - German Electricity Wholesale Market and COMP/39.389 - German Electricity Balancing Market, OJ C 36, 13.2.2009, p. 8.

¹¹ Regulation 1/2003, consideration 13.

¹² European Commission, “Commitment Decisions” (Article 9 of Council Regulation 1/2003 providing for a modernised framework for antitrust scrutiny of company behaviour), MEMO/04/217, 17 September 2004, <http://europa.eu/rapid/> (last consulted in 24.5.2023); Lianos, I., “Competition Law Remedies in Europe”, in *Handbook on European Competition Law: Enforcement and Procedure*, Edited by Ioannis Lianos and Damien Geradin, Cheltenham: Edward Elgar Publishing (2013): 451.

¹³ European Commission, notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation 1/2003/EC in cartel cases, OJ C 167, 2.7.2008, p. 1; Fatima, S., “Introducing Settlement Program for Cartel Cases in Pakistan Competition Regime: An Appraisal”, *Journal of Law and Social Studies* 5, Issue 2 (2023): 203-210.

¹⁴ Regulation 1/2003, consideration 13.

release a brief overview of the case and the key details of the commitments (while upholding professional secrecy obligations) or the suggested course of action.¹⁵ The Commission, in accordance to Article 27(4) of Regulation 1/2003, is required to “conduct a market test of the commitments” before formalizing them through a binding decision. The Commission initiates a “market test” solely if it deems that the commitments presented initially satisfactorily address the competition concerns that have been identified.¹⁶ In cases originating from a complaint, the Commission also notifies the complainant regarding the market test and extends an invitation to the complainant for submitting comments. Likewise, interested third parties are provided an opportunity to provide comments within a specified time frame, which is set at a minimum of one month.¹⁷ Article 30(1) Regulation 1/2003 mandates that the Commission must make its commitment decisions (in accordance with Article 9 of Regulation 1/2003) publicly available.¹⁸ The Commission releases the complete text of the commitment decisions in their original language on the competition website.¹⁹

In the European Union, the Court of Justice, in *Commission v Alrosa Company Ltd*, held that Articles 7 and 9 of Regulation 1/2003 serve distinct purposes. Article 7 aims to determine an identified infringement, whereas Article 9 addresses the Commission’s concerns following its initial assessment.²⁰ Substantial evidence is required to underpin decisions made under both

¹⁵ European Commission, Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C 308, 20.10.2011, p. 6, point 129.

¹⁶ Ibid.

¹⁷ Regulation 1/2003, Art: 27 (4), read with European Commission, Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C 308, 20.10.2011, p. 6, point 129; Fatima, S., “Rights of Complainant in the Competition Regime of Pakistan: An Appraisal”. *Pakistan Journal of Law, Analysis and Wisdom* 2, Issue 1 (2023):247-270.

¹⁸ Regulation 1/2003, Art: 30 (1).

¹⁹ European Commission, “Commitment decisions” (Article 9 of Council Regulation 1/2003 providing for a modernised framework for antitrust scrutiny of company behaviour), MEMO/04/217, 17 September 2004, <http://europa.eu/rapid/> (last consulted in 24.5.2023).

²⁰ Case C-441/07 P, *Commission v Alrosa Company Ltd.*, ECLI:EU:C:2010:377, paragraphs 38, 46.

provisions. Nevertheless, decisions made under each of these provisions are uniformly subject to the “principle of proportionality”. However, the application of this principle varies depending on which of the provisions is applied.²¹ The European Commission is not compelled to equate the remedy proposed when accepting a commitment under Article 9 of Regulation 1/2003 with a measure it could have imposed under Article 7 of Regulation 1/2003. Therefore, The Court of Justice applies a more stringent “proportionality test” when assessing the remedies imposed by the European Commission in a prohibition decision, in contrast to the commitments voluntarily accepted by the parties involved in a commitment decision.

Thus, when the European Commission opts to pursue a case, it has the option to issue a “prohibition decision” under Articles 7 of Regulation 1/2003. In cases not related to cartels, there is also the possibility of adopting a “commitment decision” under Article 9 of Regulation 1/2003. The first option entails the Commission formally establishing an infringement and mandating the involved undertaking to cease the violation. The Commission may then impose remedies and/or impose fines on the concerned undertakings. The second option allows undertakings to propose commitments aimed at resolving the competition concerns raised by the Commission. Upon accepting these commitments, the Commission issues a commitment decision, thereby rendering them legally binding on the parties, without, however, establishing any violation.

3. Steps and Procedure Involved in Making Commitment Decisions

3.1 Preliminary Assessment, Proposal for Commitments and Time Frame for Negotiation of Commitments

²¹ Ibid, paragraph 47; Whish, R. and Bailey, D., *Competition Law*, 8th Edition, Oxford: Oxford University Press (2015): 269.

In Pakistan, according to Regulation 30 of the General Enforcement Regulations of 2007, it is stipulated that the CCP has the prerogative to receive commitments from the involved undertakings at any point in time, after the issuance of a Show Cause Notice, with the purpose of rectifying a situation where competition has either been distorted, reduced, or is anticipated to be impeded within the relevant market.²² For instance, during a hearing related to a “Show Cause Notice” that had been issued to Shangrila (Private) Limited due to *prima facie* violation of Section 10 of CA 2010, which deals with “deceptive marketing practices”, the CCP accepted the undertaking’s commitments and resolved the matter. Shangrila (Private) Limited’s representative submitted commitments under Regulation 30 of the General Enforcement Regulations of 2007, explaining that the marketing campaign, which included the tagline “Pakistan's Number One”, had already been discontinued. Their opponent, National Foods had argued that its market share exceeded that of Shangrila, making the tagline false. Shangrila (Private) Limited further assured compliance with CA 2010 and the directives of the CCP in this matter. Consequently, the CCP concluded the case by accepting Shangrila (Private) Limited’s commitments to ensure compliance.²³ This case shows that commitments can be behavioural.

After conducting an initial assessment, the CCP communicates its competition-related concerns to the concerned undertakings using a notice or letter. These undertakings then have the option to provide commitments aimed at addressing the concerns identified by the CCP. The CCP abstains from taking action against the implicated undertaking when it receives a commitment proposal.²⁴ If the CCP has already initiated proceedings, it has the option to suspend the action during the

²² General Enforcement Regulations 2007, Regulation 30 (1).

²³ Competition Commission of Pakistan, Press Release, “CCP Disposed of the Show Cause Notice issued to Shangrila (Private) Limited”, 2 December 2013, <https://cc.gov.pk/home/viewpressreleases/235> (last consulted on 18.5.2023).

²⁴ General Enforcement Regulations 2007, Regulation 32 (1).

“negotiation process” between the CCP and the concerned undertakings.²⁵ When an agreement on commitments cannot be reached within a reasonable timeframe, the CCP maintains the power to conclude negotiations and proceed with the decision-making process.²⁶

In the European Union, under Article 9 of Regulation 1/2003, there is no requirement for the European Commission to issue a “Statement of Objections”. Instead, the Commission is obligated to communicate its competition concerns to the concerned undertakings through a “Preliminary Assessment”. The “Preliminary Assessment” may be shorter or less formal than a Statement of Objections. It provides a concise overview of the key case facts and outlines the identified competition concerns. The “Preliminary Assessment” can be delivered in the form of a letter or “may be sent as an independent document”.²⁷ The “Preliminary Assessment” serves as a ground for the parties to propose suitable commitments or refine commitments that were previously discussed. Additionally, it grants the concerned undertakings a specific timeframe within which they can address the Commission’s concerns and present draft commitments.²⁸

Thus, undertakings under investigation can express their intent to the competition authority at any point to initiate discussions regarding a potential commitment decision.²⁹ The authority strongly urges undertakings to initiate such contact at the earliest opportunity. When the authority is convinced that an undertaking is genuinely dedicated to suggesting measures that will efficiently resolve the competition concerns, it formulates a “Preliminary Assessment/Show Cause Notice”

²⁵ Ibid, Regulation 32 (2).

²⁶ Ibid, Regulation 32 (3).

²⁷ Whish, R. and Bailey, D., *Competition Law*, 8th Edition, Oxford: Oxford University Press (2015): 273.

²⁸ Ibid.

²⁹ Schweitzer, H., “Commitment Decisions under Art. 9 of Regulation 1/2003: The Developing EC Practice and Case Law”, European University Institute Working Papers, EUI LAW; 2008/22, 2008, http://cadmus.eui.eu/bitstream/handle/1814/9449/LAW_2008_22.pdf?sequence=1 (last consulted on 13.5.2023).

and directs it to the involved undertakings. The authority possesses the discretion to evaluate whether it is suitable to accept commitments put forth by the undertakings under investigation.³⁰ When accepted, the authority may, through a formal decision, make commitments binding upon the concerned undertakings. Mariniello proposes that, in order to enhance transparency in commitment decisions and address certain shortcomings (which will be elaborated upon later), the competition authority should publish a “comprehensive account” of the objections it has raised with the defendants while still preserving the primary advantages of these decisions.³¹

3.2 Discretion of the Competition Authority in Commitment Cases

In Pakistan, before the CCP accepts any commitments, it ensures that these commitments are “sufficient” enough to effectively resolve the identified adverse impacts on competition.³² Upon acceptance of commitments, the CCP may issue a favorable decision, and it is required to record the specifics as part of its decision, which will be made available in the public register. If any of the commitments accepted by the CCP are violated, it reserves the right to revoke the favorable decision.³³ In situations where the undertaking fails to uphold its commitments, the CCP has the authority to impose penalties under Section 38 of CA 2010.

The European Commission is never bound under Article 9(1) of Regulation 1/2003 to accept commitments, as mentioned in *Alrosa Company Ltd v Commission*. Therefore, the Commission or the undertaking(s) concerned may decide to discontinue their discussions at any point during the commitment procedure. If this occurs, the European Commission retains the authority to proceed with the formal process as outlined in Article 7 of Regulation 1/2003. There is no obligation for

³⁰ Lianos, I., “Competition Law Remedies in Europe”, in *Handbook on European Competition Law: Enforcement and Procedure*, Edited by Ioannis Lianos and Damien Geradin, Cheltenham: Edward Elgar Publishing (2013): 451.

³¹ Mariniello, M., “Commitments or prohibition? The EU antitrust dilemma”, *Bruegel Policy Brief*, Issue 1 (2014): 1.

³² General Enforcement Regulations 2007, Regulation 30 (2).

³³ *Ibid*, Regulation 33.

the Commission to provide an explanation for why it deems commitments unsuitable to make them binding, which would result in the conclusion of the proceedings.³⁴

A commitment decision can be issued for a defined duration and should confirm that there are no longer valid reasons for the Commission to take further action.³⁵ However, this in itself does not indicate that the Commission has definitively determined that there is no longer a violation. Which suggests that this might be construed that after being presented with appropriate commitments, the Commission has opted not to pursue the case any further due to administrative prioritization. As a result, it seems that a commitment decision does not provide immunity for future actions either.³⁶

The Court of Justice, in *Alrosa Company Ltd v Commission*, clarified that Article 9(1) of Regulation 1/2003 stipulates that a commitment decision may be issued with a defined duration, although this is not obligatory. It should be interpreted solely as granting the Commission the authority, rather than imposing an obligation, to issue decisions with a set timeframe. Consequently, there is no fundamental restriction preventing the Commission from rendering commitments legally binding without a specific time limit.³⁷

3.3 Variation, Substitution or Releasing a Commitment

In Pakistan, the undertaking, whose commitment has been accepted, can formally request the CCP in writing to modify, substitute, or withdraw that commitment. In doing so, the undertaking making the request must expeditiously inform all other pertinent parties within two working days from the submission date of the application.³⁸ The application for “variation, substitution or release” must

³⁴ Case T-170/06, *Alrosa Company Ltd v Commission*, ECLI:EU:T:2007:220, paragraph 130.

³⁵ Regulation 1/2003, Art: 9 (1).

³⁶ Whish, R. and Bailey, D., *Competition Law*, 8th Edition, Oxford: Oxford University Press (2015): 274.

³⁷ Case T-170/06, *Alrosa Company Ltd v Commission*, ECLI:EU:T:2007:220, paragraph 91.

³⁸ General Enforcement Regulations 2007, Regulation 34 (1) (2).

include the following elements: a declaration indicating whether the party is seeking a “modification, substitution, or release”; in the case of “modification or substitution”, a detailed description of the “proposed changes or substitute commitment terms”; an explanation regarding whether the “competition concerns” originally targeted by the commitment in question still persist; and a clarification of the potential impact of the modification, substitution, or release on any lingering competition concerns, supported by relevant documents. All explanations should be supported by relevant documents.³⁹ Generally, the CCP engages in consultations with individuals or undertakings it deems relevant before varying, substituting or releasing a commitment.⁴⁰

It can be noted that in the majority of CCP decisions, conventional procedures continue to be prevalent and there has not been a discernible shift towards investigations into alleged CA 2010 violations being resolved solely through “commitment decisions”. Consequently, the outcomes of the commitment provision are still awaiting evaluation.

The European Commission has the authority to reinitiate proceedings after accepting commitments in certain specified circumstances. This can occur when there is a significant modification in any of the underlying facts upon which the decision was grounded, if the involved undertakings breach their commitments, or if the decision was founded on incomplete, inaccurate, or deceptive information provided by the parties.⁴¹ If the involved undertakings deviate from their commitments, the Commission has the option to reinitiate proceedings with the intention of issuing a prohibition decision on the issue. In such cases, the Commission can impose “a fine of up to 10% of the undertaking’s annual turnover” without the necessity of establishing any infringement of

³⁹ Ibid, Regulation 34 (3).

⁴⁰ Ibid, Regulation 34(4).

⁴¹ Regulation 1/2003, Art: 9 (2).

competition rules when an undertaking fails to adhere to its commitments. The Commission also has the authority to enforce “periodic penalty payments” amounting to a “maximum of 5% of the average daily turnover” until the undertaking adheres to its commitments.⁴² In the *Microsoft (Tying)* case, the Commission imposed a €561 million penalty on Microsoft Corporation for failing to uphold its commitments that had been legally binding as per a decision under Article 9 of Regulation 1/2003.⁴³

4. Factors Considered by Competition Authorities in Evaluating Commitment Proposals

The competition authority's discretion in accepting commitments is influenced by several factors, including whether the decision will effectively function as a deterrent. Additionally, it depends on the nature of the alleged violation, the characteristics of the proposed commitments, and their ability to swiftly and effectively address the competition concerns raised by the competition authority.⁴⁴ The authority is obliged to apply the “principle of proportionality” when assessing the proposed commitments and determining whether they will adequately address the identified competition concerns.⁴⁵

5. Advantages of Commitment Decisions

5.1 A Rapid Solution to Competition Concerns

⁴² Ibid, Art: 24(1) (c).

⁴³ European Commission, Decision of 6 March 2013 relating to a proceeding on the imposition of a fine pursuant to Article 23(2) (c) of Council Regulation (EC) No 1/2003 for failure to comply with a commitment made binding by a Commission decision pursuant to Article 9 of Council Regulation (EC) No 1/2003, Case COMP/39.530 - Microsoft (Tying), C (2013) 1210 final, 6.3.2013, Artt: 1-2.

⁴⁴ Lianos, I., “Competition Law Remedies in Europe”, in *Handbook on European Competition Law: Enforcement and Procedure*, Edited by Ioannis Lianos and Damien Geradin, Cheltenham: Edward Elgar Publishing (2013): 451.

⁴⁵ Levy, O., “Compliance by Design: Commitments under Articles 9, 82 and 86 of the EC Treaty by Dominant Firms”, *Common Market Law Review* 49, Number 5 (2012):1483-1546.

Whish regards commitment mechanism an innovative provision. In the European Union, there was no provision in Regulation 17/62 allowing the resolution of a case through legally binding commitments. Article 9 of Regulation 1/2003 introduced, for the first time, a legal framework for commitments.⁴⁶ In the case of *Commission v Alrosa Company Ltd.*, the Court of Justice elucidated that Regulation 1/2003 introduced a novel mechanism aimed at ensuring the effective enforcement of the competition rules outlined in the Treaty on the Functioning of the European Union (TFEU). It also highlighted that this new approach provides a faster resolution to the competition concerns identified by the Commission. This is accomplished by issuing decisions that legally bind the commitments proposed by the parties and endorsed by the Commission, rather than by formally establishing a violation.⁴⁷

5.2 Provides Flexibility to Undertakings in Addressing Competition Issues

The competition authority, prior to endorsing commitments put forth by the undertakings that would be legally binding, evaluates whether these commitments will genuinely resolve the identified competition issue. These commitments are consistently customized to align with the specific nature of the competition problem that has been identified. Typically, the competition authority does not approve commitments that fail to address the concerns related to competition. These commitments must be clear and capable of being executed independently.⁴⁸ The procedure for commitment decisions is typically briefer compared to that for prohibition decisions.⁴⁹ The Court of Justice stated that commitment mechanism is “based on considerations of procedural

⁴⁶ Whish, R. and Bailey, D., *Competition Law*, 8th Edition, Oxford: Oxford University Press (2015): 269.

⁴⁷ Case C-441/07 P, *Commission v Alrosa Company Ltd.*, ECLI:EU:C:2010:377, paragraph 35.

⁴⁸ European Commission, Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C 308, 20.10.2011, p. 6, point 128; Dunne, N., *Competition Law and Economic Regulation: Making and Managing Markets*, Cambridge: Cambridge University Press (2015): 109.

⁴⁹ Lianos, I., “Competition Law Remedies in Europe”, in *Handbook on European Competition Law: Enforcement and Procedure*, Edited by Ioannis Lianos and Damien Geradin, Cheltenham: Edward Elgar Publishing (2013): 452.

economy, and enables undertakings to participate fully in the procedure, by putting forward the solutions which appear to them to be the most appropriate and capable of addressing the Commission's concerns".⁵⁰

Saves Resources for Both Competition Authorities and Undertakings Involved

Pursuing the commitment approach benefits both the undertakings involved and the competition authority. On one hand, undertakings offering commitments seek to mitigate the potential damage to their reputation resulting from a prohibition decision and also wish to prevent a formal determination of infringement against them. Conversely, the competition authority is keen on promptly and efficiently addressing the identified competition concerns, thereby swiftly restoring undistorted conditions of competition of the market.

6. Criticisms and Limitations of Commitment Decisions

6.1 Concerns about Lack of Judicial Scrutiny in Commitment Decisions

Mariniello points out certain drawbacks of commitment decisions. He claims that commitment decisions are like a treatment of the symptoms with no real focus on the cure of the disease. He further argues that commitments are of a voluntary nature and are less susceptible to being scrutinized through judicial review. He explains that since these decisions are based on a "preliminary assessment of the concerns [.....] they do not formally identify any infringement". The undertakings involved are not required to admit any infringement of competition rules. It is highly improbable for a commitment decision to face legal challenges in court, and the competition authority discloses minimal information regarding its theory of harm in the commitment decision.⁵¹

⁵⁰ Case C-441/07 P, *Commission v Alrosa Company Ltd.*, ECLI:EU:C:2010:377, paragraph 35.

⁵¹ Mariniello, M., "Commitments or prohibition? The EU antitrust dilemma", *Bruegel Policy Brief*, Issue 1, 2014, pp. 1-2.

6.2 Difficulty in Assessing the Effectiveness of Commitment Decisions

The commitment decisions, on one hand, do not set legal precedents and offer “limited insights into the interpretation of the law”. Consequently, commitment decisions do not serve as precedents for establishing competition violations in future cases. This implies that there is insufficient guidance accessible to other undertakings seeking to comprehend how the competition authority evaluates the actions of undertakings. On the other hand, a commitment decision diminishes the motivation of the competition authority “to build a robust case”. Knowing that it will not be exposed to judicial review, there is less reason for the authority to disclose extensive information. Moreover, the lack of a clear identification of concerns reduces the likelihood of private damage claims against the involved undertakings.⁵²

7. Call for Continued Evaluation and Improvement of Commitment Decision Process:

Concluding Remarks

Commitment decisions are instrumental in fostering competition and guaranteeing that the competition authority achieves its goal of establishing a level playing field within the competition jurisdiction. Both in the European Union and Pakistan, the European Commission and the CCP possess the authority to issue “commitment decisions”, and their processes are quite similar. For instance, the CCP in Pakistan issues a “Show Cause Notice”, while the European Commission serves a “Preliminary Assessment”. Both of these serve as the basis for the undertakings involved to propose suitable commitments. They both specify a timeframe during which the concerned undertakings can respond to the Commission’s and CCP’s concerns and present draft commitments. Both competition authorities have the discretion to terminate negotiations on

⁵² Ibid.

commitments and proceed to render a decision if an agreement on commitments is not reached within a reasonable time frame.

In cases where the undertakings fail to uphold their commitments, both the Commission and the CCP have the authority to impose penalties. The European Commission can reopen proceedings under specific circumstances. In Pakistan, the party whose commitment has been accepted has the option to submit a written application to the CCP to modify, substitute, or release that commitment.

Regulation 1/2003 explicitly specifies that commitment decisions are suitable for all cases except those involving cartels. In contrast, the General Enforcement Regulations 2007 do not provide such a clear distinction. Within the EU, commitments can take the form of either behavioral or structural remedies. In Pakistan, there is no provision that clarifies the nature of commitments. Nonetheless, in the “Show Cause Notice” issued to Shangrila (Private) Limited for violating Section 10 of CA 2010, which deals with deceptive marketing practices, as mentioned earlier, the concerned party proposed behavioral commitments that were accepted by the CCP.

It is desirable for the CCP to make a decision regarding the acceptance of commitments while taking into consideration a range of factors. These factors may include whether the decision ensures deterrence, the type of alleged infringement, and the nature of the commitments proposed.⁵³ As stated in Article 27(4) of Regulation 1/2003, before making commitments legally binding, the European Commission must carry out a market test. In cases initiated by a complaint, the European Commission notifies the complainant about the market test and extends invitations to the complainant and other third parties to provide their comments. However, in Pakistan, the

⁵³ Geradin, D. and Wils, W., “The OECD Secretariat's Proposal to Accept Soft Commitments: A Legal and Economic Assessment”. *World Competition* 29, Number 2 (2006): 245-275.

only criterion explicitly mentioned in Regulation 30(2) of the General Enforcement Regulations 2007 is as follows: “[b]efore accepting any commitments, the [CCP] may ensure that the commitments are sufficient to clearly address the adverse effects to competition which have been identified”. Hence, the primary factor of consideration is the ability of commitments to adequately address the competition issues raised by the CCP.

In the European Union, the significance of the Commission’s Best Practice Guidelines cannot be disregarded. Specifically, the Commission Notice on best practices for conducting proceedings related to Articles 101 and 102 of the TFEU⁵⁴ provides valuable insights necessary to enhance understanding of various aspects, including the Commission’s procedure for issuing commitment decisions. This contributes to streamlining the process, ensuring efficiency, and fostering a high degree of transparency and predictability in the overall procedure. This Notice is developed based on the accumulated experience of implementing Regulation 1/2003 and Regulation 773/2004 and represents the perspectives of the European Commission.

In Pakistan, there is a noticeable scarcity of guidance for comprehending the CCP’s practices when it comes to adopting commitment decisions. Pakistan generally lacks legal precedents in the field of competition cases. Consequently, it is advisable for the CCP to issue guidelines that can serve as supplementary documents, offering best practices and valuable insights to stakeholders.

References

Case C-441/07 P, *Commission v Alrosa Company Ltd.*, ECLI:EU:C:2010:377

Choné, P., Souam, S. and Vialfont, A., “On the Optimal Use of Commitment Decisions under European Competition Law”, *International Review of Law and Economics* 37, Issue C (2014): 169-179.

⁵⁴ European Commission, Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C 308, 20.10.2011, p. 6.

Competition Act No. XIX of 2010 (Published in the Gazette of Pakistan, Extraordinary, 13 October 2010)

Competition Commission (General Enforcement) Regulations 2007, SRO. No 1189(I) 2007 (Published in the Gazette of Pakistan, Extraordinary, 8 December 2007)

Competition Commission of Pakistan, Press Release, “CCP Disposed of the Show Cause Notice issued to Shangrila (Private) Limited”, 2 December 2013, <https://cc.gov.pk/home/viewpressreleases/235>

Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty, OJ L 1, 4.1.2003, p. 1

Dunne, N., *Competition Law and Economic Regulation: Making and Managing Markets*, Cambridge: Cambridge University Press (2015)

European Commission, “Commitment decisions” (Article 9 of Council Regulation 1/2003 providing for a modernised framework for antitrust scrutiny of company behaviour), MEMO/04/217, 17 September 2004, <http://europa.eu/rapid/>

European Commission, Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C 308, 20.10.2011, p. 6

European Commission, Decision of 6 March 2013 relating to a proceeding on the imposition of a fine pursuant to Article 23(2) (c) of Council Regulation (EC) No 1/2003 for failure to comply with a commitment made binding by a Commission decision pursuant to Article 9 of Council Regulation (EC) No 1/2003, Case COMP/39.530 - Microsoft (Tying), C (2013) 1210 final, 6.3.2013

European Commission, notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation 1/2003/EC in cartel cases, OJ C 167, 2.7.2008, p. 1

European Commission, Summary of Decision of 13 December 2011 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement, Case COMP/39.692 - IBM Maintenance Services, OJ C 18, 21.1.2012, p. 6

European Commission, Summary of Decision of 26 November 2008 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement, Cases COMP/39.388 - German Electricity Wholesale Market and COMP/39.389 - German Electricity Balancing Market, OJ C 36, 13.2.2009, p. 8

- Fatima, S., "Introducing Settlement Program for Cartel Cases in Pakistan Competition Regime: An Appraisal", *Journal of Law and Social Studies* 5, Issue 2 (2023): 203-210
- Fatima, S., "Rights of Complainant in the Competition Regime of Pakistan: An Appraisal". *Pakistan Journal of Law, Analysis and Wisdom* 2, Issue 1 (2023):247-270
- Geradin, D. and Wils, W., "The OECD Secretariat's Proposal to Accept Soft Commitments: A Legal and Economic Assessment". *World Competition* 29, Number 2 (2006): 245-275
- Levy, O., "Compliance by Design: Commitments under Articles 9, 82 and 86 of the EC Treaty by Dominant Firms", *Common Market Law Review* 49, Number 5 (2012):1483-1546
- Lianos, I., "Competition Law Remedies in Europe", in *Handbook on European Competition Law: Enforcement and Procedure*, Edited by Ioannis Lianos and Damien Geradin, Cheltenham: Edward Elgar Publishing (2013): 362-455
- Mariniello, M., "Commitments or prohibition? The EU antitrust dilemma", Bruegel Policy Brief, Issue 1 (2014): 1-8
- McMahon, C., "Commitment Decisions: Empirical Evidence from EU Competition Policy", *European Competition Journal* 6, Issue 3 (2010):497-525
- Schweitzer, H., "Commitment Decisions under Art. 9 of Regulation 1/2003: The Developing EC Practice and Case Law", European University Institute Working Papers, EUI LAW; 2008/22, 2008,
http://cadmus.eui.eu/bitstream/handle/1814/9449/LAW_2008_22.pdf?sequence=1
- Whish, R. and Bailey, D., *Competition Law*, 8th Edition, Oxford: Oxford University Press (2015)
- Wils, W.P.J., "Ten years of commitment decisions under Article 9 of Regulation 1/2003: Too much of a good thing?", New frontiers of Antitrust Concurrences Journal 6th International Conference, Paris, 15 June 2015, <http://ssrn.com/author=456087>