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"Settle 'em all": Generalized Commitments and the Under and Over Enforcement of Antitrust Law

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Commissioner Almunia left office on 31 October 2014. He leaves behind a snippet of high profile merger prohibitions, a large reform of State aid law, and a pinch of controversies in relation to ethical issues.[i] But above all, Commissioner Almunia's fabric brand has been his incommensurate proclivity for « *settlements* » in antitrust cases. Since the introduction of this procedure in May 2004, the Commission has adopted 31 commitments decisions under Article 9 procedure. This is in contrast with the 11 prohibition decisions adopted under the standard Article 7 procedure. In some sectors like energy, settlements have become the routine procedure. Even in idiosyncratic cases like the ongoing investigation against Google, Commissioner Almunia was reported to push for a settlement.

Commissioner Almunia's appetite for settlements is perfectly understandable. With it, the Commission follows an abridged procedure that potentially saves time and resources. And the Commission can obtain from settling parties remedies that come close to those applied in the standard procedure: price concessions, licensing commitments, asset divestitures, etc. Moreover, the parties themselves often favor commitments. Settling firms know that with an Article 9 decision, they can return to business quickly, and avert the stigmata – fines and negative publicity – associated with a finding of infringement.

In a recent interdisciplinary paper, Professors Gautier and Petit (2014) consider whether a « *generalized commitments* » policy leads to optimal enforcement of competition law.[ii] To this end, they develop a game-theoretical model of litigation under asymmetric information and uncertainty.[iii] Their objective is to assess whether the Article 9 procedure optimally diagnoses anticompetitive harm and leads to

remedies that restore competition. They use the standard Article 7 procedure as a benchmark because, despite its procedural disadvantages (in terms of duration, paperwork, etc.), it entitles the Commission to better gauge harm and devise remedies.

In their model, they find that this is not the case. A generalized commitments policy might lead to both over and under enforcement of competition law. Over-enforcement because whilst all firms systematically settle, not all of them would have been guilty in the standard Article 7 procedure. In other words, the Commission applies remedies to non-cases. Under-enforcement because remedies are lower compared to those that would be imposed in the formal procedure. Given the postulated asymmetry of information between the Commission and the firm relative to the importance of the alleged anticompetitive 'harm', in order to convince all firms to settle, the Commission must indeed accept commitments that set *a minima* i.e. that are equal to the expected sanction of the lowest possible 'type'. Put differently, there is a sort of « *race to the bottom* » with generalized commitments. As a result of this, one of the paper's conclusions is that under a generalized commitments policy, the Commission adopts remedies too often but these remedies are too weak.

This, in turn, should lead the Commission to apply the commitments procedure more parsimoniously, and to adopt a « *selective commitments policy* » making a mixed use of Article 7 and Article 9 for cases where the suspected infringement, the relevant markets and the potential remedies are similar[iv] - or at the extreme, to treat all cases under the standard procedure. With a selective commitments policy, the Commission uses the threat of returning to the standard procedure if the firm does not negotiate commitments that are strong enough[v], threat that becomes ineffective if the policy is to "*Settle 'em all*". A selective use of commitments alleviates the 'race to the bottom' effect.

With this background, the paper then explores the type of « *enforcement policy* » that the Commission should follow. It argues that the choice of a generalized commitments policy, of a selective commitments policy or of a standard enforcement policy should hinge on the underlying case uncertainty. The paper stylizes two sources of uncertainty: the availability of legal guidance (Law, or L) and the factual knowledge of the market (Facts, or F).

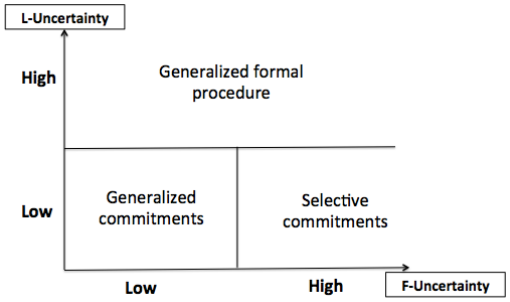
The L-uncertainty depends on a range of factors: absence of judicial precedent, divergences in precedents, existence of ongoing proceedings on a similar legal issue before the review and appeals courts; absence of guidance from other official instruments; ability to classify the conduct as a restriction of competition by object; etc.

The F-uncertainty represents the Commission's ability to establish on the facts that the conduct causes actual or potential anticompetitive harm. At the outset of the procedure, the Commission has no knowledge of this, and there is asymmetry of information between it and the firm in this respect. Its ability to

establish harm will, in turn depend on a number of factors: presence of complainants, previous cases involving the same firm (in similar or other areas), size and number of relevant markets affected by the conduct, size of the firm's market shares, size of barriers to entry and scale, inelasticity of demand; duration of the alleged anticompetitive abuse, etc.

The model used in the paper produces clear-cut, innovative results that can be summarized as follows. First, there is a specific enforcement cost associated with the negotiation of commitments, *i.e.* the cost of applying too often a remedy that is too weak and this cost increases with L-uncertainty. In general, an important L-uncertainty is against commitments. Second, there is a specific under-enforcement cost when commitments are generalized and this cost increases with factual uncertainty. An important F-uncertainty is against generalized commitments. Accordingly, commitments are only recommended when there is little L-uncertainty. If this limited L-uncertainty is associated with a large factual uncertainty, selective commitments are recommended. If it is associated with a limited F-uncertainty, generalized commitments are recommended. Finally, when both L and F-uncertain, it is optimal to use the standard procedure.

The paper then goes on to discuss those findings in light of the Commission's decisional practice in the past ten years. It looks at energy and exploitative pricing cases as examples of "*generalized commitments*" and finds that the use of generalized commitments is apposite, given the low level of L and F uncertainty in this sector. In contrast, it discusses the "patent litigation war" cases against *Motorola* and *Samsung* and suggests that the use of selective commitments may not have been optimal, given the large degree of L-uncertainty surrounding those cases (denoted, in particular, by the fact that the question of the applicable legal standard had not yet been resolved by the Court of Justice of the EU when those decisions were adopted).



The study's main added value is to show that the commitments procedure is not a substitute to the standard procedure. Surely, the commitments procedure generates procedural economies for the Commission. But a generalized commitments policy leads, under some conditions, to under and over enforcement costs that do not happen under the standard procedure. A critical feature of the paper is to explain that those enforcement costs may be caused by the Legal (L) and Factual (F) uncertainty that surrounds the interaction between the firm and the agency.

[i] *See* "Credit Agricole sparks probe of EU bias on rate-rigging", *Bloomberg,* Sep 24, 2014 http://www.bloomberg.com/news/2014-09-23/credit-agricole-sparks-probe-of-eu-bias-in-euribor-rigging-case.html *See* also, "Enter Margrethe Vestager. Exit Joaquin Almunia pursued by an ombudsman", *Competition Law Insight*, Nov 19, 2014, Available at http://www.competitionlawinsight.com/regulatory/european-commission/enter-margrethe-vestager-103727.htm

[ii] GAUTIER, A. and PETIT, N. (2014). Optimal Enforcement of Competition Policy: The Commitments Procedure Under Uncertainty. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2509729

[iii] BEBCHUK, L. A. (1984). Litigation and Settlement under Imperfect Information, *RAND Journal of Economics*, 15(3), 404-416. *See* also, SHAVELL, S. (1989). Sharing of Information Prior to Settlement or Litigation, *RAND Journal of Economics*, 20(2), 183-195, and CHONE, P., S. SOUAM and A. VIALFONT (2014). On the optimal use of commitments decisions under European competition law, *International Review of Law and Economics* 37, 169-179.

[iv] This is the policy that was recently followed in the *Samsung* (Article 9), and *Motorola* (Article 7) cases (related to abusive litigation by patent holders), in the *Microsoft I* (Article 7) and *Microsoft II* (Article 9) cases (related to the tying of Windows with complementary softwares), or in the or *Mastercard* (Article 7) and *Visa* (Article 9) cases (related to multilateral interchange fees).

[v] In a recent speech to the European Parliament, the Commissioner in charge of competition policy clearly announced that if Google refuses to improve its commitments proposal, the Commission will switch to the standard infringement procedure. "*If Google's reply goes in the right direction, Article 9 proceedings will continue. Otherwise, the logical next step is to prepare a Statement of Objections*." Presentation of the Annual Competition Report to the European Parliament by the Commissioner ALMUNIA, J. Sept. 23, 2014 http://europa.eu/rapid/press-release_SPEECH-14-615_en.htm