Autorité de la concurrence

Notice on Competition Commitments Issued on March 2nd, 2009

I. Legal Basis

1. Article 5 of Council Regulation (EC) No. 1/2003 of December 16, 2002 relating to the implementation of articles 81 and 82 of the EC Treaty[1] gives National Competition Authorities (NCAs) the power "*to accept commitments.*"

2. Part I under article L. 464-2 of the *code de commerce*[2], modified by article 2 of Ordinance n° 2008-1161 of 13 November 2008 for the modernization of competition regulation, has granted the *Autorité de la concurrence* (hereinafter referred to as the "*Autorité*") the power "*to accept commitments proposed by undertakings or association of undertakings and to put an end to anticompetitive practices, in compliance with articles L. 420-1, L. 420-2 and L. 420-5.*"

3. This provision is supplemented by article R. 464-2 of the *code de commerce*[3], which stipulates that:

   "*When the Autorité de la concurrence intends to apply Part I under article L. 464-2 for the purpose of accepting commitments proposed by undertakings, the Rapporteur shall inform the undertakings or association of undertakings involved of his or her preliminary assessment of the practices in question. The assessment findings may be notified by mail, in a report, or, when the Autorité is acting on an application for interim measures, by the presentation of an oral report during a hearing. A copy of the assessment shall be sent to the applicant and to the Government Official, except when it is presented orally at a hearing with the parties in attendance.*

   The time limit for the undertakings or association of undertakings to put their commitments in writing after the preliminary assessment is determined either by the Rapporteur, if the assessment findings are notified by mail or in a report, or by the Autorité de la concurrence, if the assessment findings are presented orally during a hearing. The length of time may not be less than one month, unless agreed to by the undertakings or association of undertakings concerned.

---

[1] Council Regulation (EC) No. 1/2003 of December 16, 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, p. 1).

[2] Article 10 of Ordinance No. 2004-1173 of November 4, 2004 adapting certain provisions of the *code de commerce* to European Competition Law (OJ of November 5, 2004), codified in article L. 464-2 of the *code de commerce*.

[3] The requirements for bringing action before the *Autorité* are laid down in article R. 464-2 of the *code de commerce*.

Once the commitments given by the undertakings or association of undertakings in question have been received before the deadline referred to in the paragraph above, the Rapporteur shall notify the applicant, as well as the Government Official, of their content. He or she shall also issue a summary of the case and the commitments by all means in order to give any interested parties an opportunity to provide comments. The Rapporteur shall also set the deadline within which the parties, the Government Official and any interested third parties must provide their comments and the deadline may not be less than one month after the notification and public issue of the content of the commitments.

The parties and the Government Official shall be invited to the hearing by a letter of invitation sent by the Rapporteur *along with the proposed commitments no less than three weeks before the scheduled hearing. They may make oral observations during the hearing*."

4. Pursuant to these statutes, which introduce a system comparable to the one created under EU law by articles 9 and 27, paragraph 4, of Council regulation (EC) No. 1/2003, the *Conseil de la concurrence* [replaced by the *Autorité de la concurrence*] gradually developed its commitment practice. The purpose of this procedural notice is to provide a summary of this practice with the insight of the initial domestic and EU rulings. It describes in turn (II) the goals of this instrument, (III) its scope, (IV) the procedure and its stages and, lastly, (V) the nature and scope of commitment decisions. Adjustments may be made to the mechanism in the future based on any trends in the *Autorité*'s decision making practice and the jurisprudence of courts exercising judicial review.

II. Goals

5. The commitment procedure has expanded the range of solutions that enable the *Autorité* to carry out its mission, which is to ensure that markets operate in a competitive environment. The decision accepting commitments and making them binding (hereinafter referred to as the "commitment decision") is handed down after a more flexible fast-track process than an infringement decision. The purpose of this is to get undertakings, of their own accord, to terminate or to change for the future their conduct having led to "*competition concerns*", unlike infringement decisions, drawing conclusions on the anticompetitive nature of the conduct concerned, order the termination of the infringement or the modification of the conduct and, when necessary, order a sanction.

6. Use of this mechanism enables the competition authority and the undertaking or association of undertakings (hereinafter referred to as the "undertaking") giving commitments to save their financial resources. The benefits of this practice for the authority are the following:

   - it speeds up the resolution of cases, involving practices the nature or effects of which are such that they do not *a priori* call for the imposition of a sanction;
   - it focuses on the voluntary maintaining or restoring of competition in the marketplace in appropriate circumstances;
   - it frees up resources so that the *Autorité* may concentrate its efforts on the most serious violations.

7. It also brings the following benefits to the undertaking:

   - it speeds up the process and allows it to voluntarily contribute to finding an appropriate solution to the competition concerns identified; and
   - it brings the case to a close before any findings are issued or charges are brought.

8. In its mission to protect the economic public order, the *Autorité* renders commitment decisions which do not seek to satisfy a specific application but rather to put an end to situations harming competition.

III. Scope

9. The commitment procedure applies to situations raising ongoing competition concerns which could be ended quickly by applying the procedure. As the Paris Court of appeal held in its Canal 9 ruling, "*the applicable provisions (…) only provide for the finding of existing harm to competition.*"

10. The *code de commerce* does not specify the circumstances that may give rise to commitments. But the *Autorité*'s decisional practice has made it possible to identify conduct and situations for which this procedure is particularly appropriate.

11. The *Autorité* does not use the commitment procedure in cases where, in any event, the harm to economic public order calls for the imposition of a fine, which precludes *a priori* particularly serious forms of collusion such as cartels and certain types of abuse of dominant position having already caused significant damage to the economy.

12. The practices involved in the commitment decisions rendered to date are essentially certain unilateral or vertical practices restricting market access[4].

[4] The use of the commitment procedure has turned out to be appropriate in the following situations:
- to ensure consistency between competition law and intellectual property rights, for example, when access to rare resources is refused, such as access to an automobile maker's diagnostic system denied to independent repair shops (Decision No. 07-D-31 of October 9th, 2007, relating to practices by an automobile maker) or newspaper readership measurement research published by an organization that measures daily press readership (Decision No. 05-D-12 of March 17th, 2005, relating to practices in the national daily press readership measurement market and the related advertising market in this industry);
- to make sure there is effective competition in a market opening up to full competition when exclusivity clauses or potential margin squeeze effect risk blocking access to such a market in the broadcasting sector

IV. Procedure implementation

IV.1 – Preliminary assessment

A – Starting point of assessment

13. Article R. 464-2 of the *code de commerce* specifies that commitments are given pursuant to a "*preliminary assessment of the practices in question*" which must occur prior to any statement of objections[5]. Therefore commitments may not be given once the statement of objections has been issued[6].

14. However, any undertaking whose conduct has given rise to the application before the *Autorité*, once it learns of such circumstances and before a statement of objections is issued, may contact the Investigation Services to explore the possibility of giving commitments[7].

15. In such a case, the preliminary assessment may be undertaken, subject to the specific requirements of emergency procedures referred to in paragraph 19 below, only if the undertaking concerned informs the Investigation Services that it is prepared to make commitments, if the circumstances of the case are appropriate to launch the procedure and if the initial offer of commitments given by the undertaking seems, *a priori*, liable to facilitate a satisfactory completion of the procedure. These preliminary steps taken by the undertaking concerned may remain informal (*i.e.*, telephone or email contacts) provided that they show the undertakings' motivation to seriously explore the alternative of commitments.

16. In any event, the *Rapporteur* will not undertake a preliminary assessment if he or she considers it is necessary to prepare a statement of objections or if he or she is unable to identify competition concerns without carrying out an extensive inquiry or a more in-depth investigation.

(Decision No. 07-D-30 of October 5, 2007 relating to practices in the terrestrial hertzian broadcast services) or when similar margin squeeze risks are the result of the incumbent operator's pricing practices in the electricity sector preventing competing wholesalers from selling retail electricity to businesses at competitive rates (Decision No. 07-D-07 of December 10, 2007 relating to practices by the incumbent operator in the electricity sector);
- or, in the event of technical advances, to avoid a situation where contractual clauses required by a supplier prevent its distributors from selling online or subject the sale to unfairly restrictive terms (Decision No. 07-D-07 of March 8, 2007 relating to practices in the cosmetics and body care products industry, Decision No. 07-D-24 of July 24, 2006 relating to practices in the premium Hi-Fi and home entertainment systems market).

[5] Unlike the no contest procedure provided for under III of article L. 464-2 of the *code de commerce*, which can be undertaken only after the allegations have been notified.

[6] This has no bearing on an undertaking's ability to give commitments as part of the no contest procedure.

[7] Practically speaking, this can be done at the time of an interview or in reply to requests for information from the *Rapporteur*.

B – Content of the assessment

17. As the French Supreme Court indicated in the Canal 9 ruling of November 4th, 2008[8], the preliminary assessment does not "*constitute* (…) *a formal charge in the sense ascribed by article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms*" since its "*purpose is not to demonstrate the reality of the violations or ascribe them to* [an] *undertaking or even to lead to the imposition of a fine*", contrary to the statement of objections.

18. In this assessment drafted after an investigation into the allegations, the "Rapporteur *explains how the abuse of competition found at this stage of the process is liable to constitute a prohibited practice*"[9]. The degree to which the allegations are required to be detailed with regard to the competition concerns is comparable to that of interim measures, which explains why both procedures may be combined at the same time[10]. Consequently, the characterization of the practices must, in any event, be sufficient to allow the commitments' control in order to check if they are appropriate or not.

19. The *Rapporteur* must notify the undertaking concerned of the preliminary assessment by letter, by report or, if an application for interim measures is under assessment, during the *Rapporteur*'s oral report at a hearing. With the exception of the latter, a copy of the assessment shall be sent to the applicant and to the Government Official[11]. In the event that the preliminary assessment is carried out as part of the examination of an application for interim measures, before the preliminary assessment is carried out and no later than the day before the hearing scheduled for the purpose of the application, the *Rapporteur* will have informal contacts with the undertaking concerned to explain the position he or she intends to take with respect thereto.

20. After it has been informed on the competition concerns set forth in the preliminary assessment, the undertaking concerned shall put its commitments in writing or, in the event of an emergency procedure, shall advise the *Rapporteur* whether it intends to request the launching of the commitments procedure. The undertaking must send the *Rapporteur* its proposals, which does not mean that the *Autorité* is obligated to undertake the procedure. At its sole discretion, the *Autorité* determines the appropriateness of allowing the procedure.

[8] Ruling of the *Cour de cassation*, November 4th, 2008 (Canal 9).

[9] Aforementioned Canal 9 ruling.

[10] In a ruling dated November 8th, 2005, in a case involving the corporation Neuf Télécom, France's Supreme Court held that interim measures may be ordered "*if the facts alleged (…) appear liable, based on evidence produced at the trial, to constitute a practice that is inconsistent with articles L. 420-1 or L. 420-2 of the code de commerce*".

[11] Article R. 464-2 of the *code de commerce*.

IV.2 – The procedure

A – Commitments offer

21. An undertaking wishing to give commitments must be able to address the competition concerns identified in the preliminary assessment. The offered commitments must therefore be relevant, credible and checkable[12].

22. Pursuant to article R. 464-2 of the *code de commerce*, the undertaking must put its initial commitments in writing by the deadline given after the preliminary assessment is completed. The deadline to remit the offer is determined either by the *Rapporteur* or by the *Autorité*'s board when the assessment is presented orally as part of the examination of an application for interim measures. The deadline date may not be less than one month after the preliminary assessment is completed, unless the undertaking agrees thereto. The commitments offer must be forwarded to the applicant and to the Government Official.

23. The *Autorité* must ensure that any other parties whose interests may be affected be given an opportunity to provide comments on offers of commitments and to make a contribution to the examination thereof.

B – Market test

24. Once the proposed commitments have been received from the undertaking and after the content thereof has been forwarded to the applicant and to the Government Official, the *Rapporteur* will issue for the benefit of any interested parties a market test containing a summary of the case and the offer of commitments, which may be published by all means, but which, in practice, are put on the *Autorité's* website. This disclosure gives interested parties an opportunity to provide comments within a time limit that may not be less than one month after the market test is issued.

25. The parties to the procedure and the Government Official must also be invited to provide comments on the proposed commitments within one month of the notification date of the commitments.

---

[12] Commitments that may be proposed can take the form of modifications of contractual clauses (Decisions No. 07-D-30, mentioned above, and No. 07-D-17 of May 10, 2007 relating to practices in the movie theater industry), granting access to information necessary for the business of undertakings in a particular industry (Decisions No. 08-D-04 of February 25, 2008 relating to practices in the press delivery industry, No. 07-D-31, mentioned above, and No. 06-D-20 of July 13, 2006 relating to practices in the telephone and online information services industry and No. 05-D-25 of May 31, 2005 relating to practices in postage stamp price catalogue market) or clarifications on the contractual terms of membership to a selective online distribution network (Decisions No. 07-D-07, No. 06-D-28 and No. 06-D-24 mentioned above).

26. All of these comments will be filed and passed on to the parties to the procedure as well as to the Government Official. This stage is called the "*market test*" and it is very important to the *Autorité* in order to verify whether the proposed commitments are, on the one hand, relevant, credible and checkable, as mentioned in paragraph 21 above, and, on the other hand, proportionate to the competition concerns expressed in the preliminary assessment[13].

C – Access to the case file

27. The applicant and the undertaking concerned (hereinafter referred to as the "parties to the procedure") have "*access to the documents used by the* Rapporteur *to establish the preliminary assessment and to those used by the* Autorité *to decide on the commitments*"[14], that is to say at least the preliminary assessment and the third parties' comments resulting from the market test.

28. Moreover, the *Cour de cassation* has decided, in the November 4th, 2008 (Canal 9) ruling, that the *"Court of appeal, asked by a party to request the annulment of a decision* [of commitments], *whenever that party has not had access to the integrality of the file, to check if the lack of communication of certain elements has not hindered its interests"*.

29. This access is provided subject to the undertakings' legitimate interests in their business secrets not being disclosed. The various communications may therefore, if appropriate, give rise to action to protect business secrets as provided for under articles L. 463-4 and R. 463-13 of the *code de commerce*.

30. After the market test, the parties to the procedure and the Government Official are invited to attend a hearing during which they will be given another opportunity to present observations on the proposed commitments which the *Rapporteur* notified them of at least three weeks before the hearing.

D – Negotiation of commitments

31. To be effective, the procedure must guarantee the undertaking concerned that the proposal negotiated beforehand with the *Rapporteur* will be accepted by the *Autorité* as a basis for discussion at the hearing, regardless of any future changes needed thereto.

32. As a result, the *Autorité* introduced a flexible procedure according to which the *Rapporteur* works closely with the *Autorité*'s board from the very onset of the negotiation process in order to guarantee the maximum legal security for undertakings.

33. The Cour de cassation, in its November 4th, 2008 (Canal 9) ruling, decided that *"the* Autorité*'s active involvement in the process of negotiating commitments that took place*

[13] Court of First Instance of the European Communities, July 11th, 2997, in the matter of Alrosa/Commission, T-170/06, currently on appeal.

[14] Aforementioned Canal 9 ruling.

after the preliminary assessment under the conditions of article R. 464-2 of the code de commerce, lies in the negociated aspect of this phase of the procedure and does not mean that the Autorité *intervened in an inappropriate manner in the instruction of the case"*. Actually, the *Autorité* must determine whether the commitments are legally relevant and, where appropriate, accept them as binding.

34. The *Autorité*, which first examines the relevance, the credibility and the checkable nature of the commitments, then makes sure that they are proportionate. The principle of proportionality requires that the commitments are both necessary and sufficient to put an end to all the competition concerns identified.

35. During the hearing, the *Autorité* may subject its acceptance of the proposed commitments to certain amendments or it may reject them when it considers that they do not address the competition concerns. The *Autorité* also assesses their impact, taking into account observations made by the applicant, by the undertaking concerned, by the Government Official and by other interested parties.

36. In practice, the hearing may be temporarily adjourned when the undertaking concerned agrees to amend its commitments immediately. The hearing is resumed once the terms of the commitments have been agreed upon.

37. The *Autorité*'s board can also postpone making a decision for a period of time determined during the hearing when the required amendments are more substantial, when the undertaking concerned would like more time to make a decision with respect to the new proposed commitments or when a final decision cannot be reached by the end of the hearing. The *Autorité* will render a decision on the final version of the proposed commitments submitted at a new hearing scheduled at the end of the given period of time.

38. The commitments that the undertaking gives to address the competition concerns may vary in nature but may only be binding upon the undertaking concerned. If the commitments have a direct and immediate legal impact on a third party's legal situation in such a way that it substantially affects said third party's competitive positioning on the market under study, then such party may be called into the procedure so that it may take part to the commitment procedure; otherwise, there is little chance that the commitments procedure will be successful[15].

39. The *Autorité* does not accept binding commitments going beyond the resolution of competition concerns even though it can, when necessary, acknowledge additional remedies proposed by the undertaking concerned, for example, in order to facilitate the implementation of commitments that have been accepted. For instance, in one case, the *Autorité*, which does not have the authority to set prices in the marketplace, acknowledged the prices offered by an automobile maker to independent repair shops[16].

40. The *Autorité* is never required to make commitments binding rather than imposing fines or injunctions against undertakings. In all cases where, because an agreement cannot be reached with undertakings, the commitments cannot be accepted, the proposals of commitments and the observations from interested third parties will be removed from the case file. The procedure will be resumed from that point on.

---

[15] In the first commitment procedure before the *Autorité*, the partners of a firm carrying surveys into daily press readership (without whose agreement the commitments given by the firm, which involved including free daily newspapers in the readership measurements carried out by its three partners, could not be successful), were brought into the cause (Decision No. 05-D-12 of March 17th, 2005, mentioned above).

[16] Decision No. 07-D-31 of October 9th, 2007, relating to practices by an automobile maker.

V. Decisions making commitments binding

V.1 – Effects

41. After the discussion, if the *Autorité* considers that the proposed commitments address the competition concerns identified in the preliminary assessment, it issues a decision making the commitments binding and concluding that there are no longer grounds for action.

42. Even though it follows stages where the procedure is negotiated, the decision pursuant to which the *Autorité*'s board accepts the binding commitments is a unilateral decision putting an end to a situation that potentially infringes competition law.

43. This decision does not determine the merits of the allegations from the criminal prosecution standpoint in the sense ascribed by article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms. It does not take a position on the liability of the undertaking and cannot be used as the first term of the reiteration of the facts. It may not be used to prevent one of the parties to the procedure from bringing action in a court of law.

44. If the *Autorité* receives an application alleging practices that were covered by a commitment decision, it may not dismiss the application based on the principle of *non bis in idem*, in the absence of any specific allegation of the offending practice in the commitment decision. However, the *Autorité* may, if appropriate, find that there are no longer grounds for action given the cessation of the facts in question, without prejudice to the circumstances described in paragraph 45 below.

45. The commitment decision may remain in force for an indefinite period of time when the competition concerns must be remedied on a long-term basis or, on the contrary, it may be enforced for a limited period of time when the return to a competitive environment is anticipated, in which case the *Autorité* may set a term in the commitment decision.

46. The *Autorité* has the discretion to determine the need to review commitments and to decide, of its own initiative, to reopen the proceedings and in light of any developments that may occur on the market in question. Cases may be brought before the *Autorité* involving a conduct already covered by a commitment decision upon request of the applicant, the Minister of the Economy, any other interested undertaking or at the *Autorité*'s own initiative:

    a) where there has been a material change in any of the facts on which the decision was based;

    b) where the undertakings concerned act contrary to their commitments; or

    c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.

47. Within one month from the notification of a commitment decision, the applicant or the Minister of the Economy may file an appeal with the Paris Court of appeal for annulment or reversal of the decision. As specified in the Canal 9 ruling, "*notwithstanding the restrictive terms of article 468-4* [of the *code de commerce*, an applicant] *who brings a case before the "Conseil"* [become the *"Autorité"* since March 2nd, 2009] *and who can*

prove a legitimate interest insofar as the commitments accepted in the decision can have an effect on its own situation, is entitled to appeal the decision to accept commitments (…)."[17]

V.2 – Follow-up

48. To ensure that the decision is effective, the undertaking concerned may be required to accept the obligation to report back to the *Autorité* on its compliance with the binding commitments. This obligation may, for example, take the form of a report to the *Autorité's* Investigation Services detailing the progress in the implementation of the commitments based on a timetable predetermined by the *Autorité* and set forth in its decision.

49. If the *Autorité*'s Investigation Services deems it necessary, it may request further information as a result of the report provided by the undertaking and based on any other source of information and it may conduct an investigation. When the information received makes it clear that there has been a failure to comply with commitments or that there has been a change in the situation, the *Autorité* may decide, on its own initiative, to reopen the proceedings (see paragraph 45 a) and b) hereinabove).

50. By virtue of Part II of article L. 464-2 of the *code de commerce*, the *Autorité* may order in a "*decision making commitments binding*" a fine "*not exceeding 5% of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision* (…)*"*

51. The applicant, the Minister of the Economy or any other undertaking with standing may also notify the *Autorité* in the event of non compliance with any commitments (see paragraph 45 a) and b) hereinabove).

52. Pursuant to article L. 464-3 of the *code de commerce*, the violation or failure to comply with commitments may result in a fine not exceeding 10 % of the undertaking concerned total worldwide turnover, tax excluded.

[17] Confirmed, in that respect, by the aforementioned Canal 9 ruling.