



The Competition Authority and Double Bay Enterprises Ltd t/a Brazil Body Sportswear (the Fitflop case)

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Publication date

01-01-2013

Published in

Commercial Law Practitioner;20 (9), pp. 212-213

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EATON, S. (2013) 'The Competition Authority and Double Bay Enterprises Ltd t/a Brazil Body Sportswear (the Fitflop case)', available: <https://hdl.handle.net/10344/4398> [accessed 25 Jul 2022].

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Commitment Issues - New Developments in Irish and EU Competition Law

Introduction

Commitment decisions in competition law enforcement are a form of formal settlement, by which undertakings under investigation for a potential breach of competition law essentially commit with the investigating competition authority to modify their behaviour, thus ending its competition concerns. This has the benefit of bringing potentially anti-competitive behaviour to a more immediate end than conventional enforcement proceedings permit, and it results in considerable administrative and procedural efficiencies for the investigating authority, as well as various benefits for the alleged infringer.

The mechanism has been given an express statutory footing within the terms of Section 14B of the Competition (Amendment) Act of 2012 in Ireland. It's first invocation and the parameters of that section are reviewed below.

Article 9 of Regulation 1/2003¹ facilitates the possibility of legally binding commitments by the Commission when it is the investigating authority. If the Commission accepts such commitments by formal decision, it closes its investigation without any finding of infringement of Articles 101 or 102 of the Treaty on the Functioning of the European Union (TFEU),² and therefore without imposing any sanction. Where an undertaking breaches the commitment decision, the Commission has the power re-open the case,³ or to

Comment [AL1]: Brief paragraph on the source and nature of Irish commitment decisions to be inserted prior to Article 9 Reg 1/2003??

¹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty [2003] OJ L 1/1. The implementation of the Lisbon Treaty on 1 December 2009, renumbered Articles 81 and 82 of the EC Treaty were renumbered to Articles 101 and 102 TFEU.

² The commitment decision is however without prejudice to national competition authorities or courts finding an infringement according to Recital 13 of Regulation 1/2003. Recital 22 also states that commitment decisions adopted by the Commission do not affect the power of the courts and the competition authorities of the Member States to apply Articles [101 and 102] of the Treaty. See further Heike Schweitzer, 'Commitment Decisions under Art. 9 of Regulation 1/2003' in Claus Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law* (Hart Publishing 2010) 547, 573-576 and Mel Marquis, 'Cartel Settlements and Commitment Decisions' in Claus Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law* (Hart Publishing 2010) xxix, lxii-lxv.

³ Article 9(2)9(b) Regulation 1/2003.

impose periodic penalty payments⁴ or a sanctioning fine⁵ without the need to establish an infringement of Articles 101 or 102 TFEU.

In this article, the authors examine the EU and Irish legal bases for commitment agreements and the legal issues which have arisen for the relevant authorities.

Comment [AL2]: Need to map the content

Part I: Recent Developments in EU Competition Law

In March 2013, the Commission imposed a fine of €561 million on Microsoft⁶ for breaching its 2009 commitment decision.⁷ This is the first such fine⁸ since the introduction of Regulation 1/2003, under which the Commission has, to date, issued 31 commitment decisions,⁹ including the infamous *De Beers/Alrosa* case.¹⁰ The Commission's decision against Microsoft sends a clear

⁴ Article 24(1)(c) Regulation 1/2003, discussed below.

⁵ Article 23(2)(c) Regulation 1/2003, discussed below.

⁶ Commission Decision of 6 March 2013 addressed to Microsoft Corporation 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 AT.39530 - Microsoft (Tying)).

⁷ Commission Decision of 16 December 2009 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/C-3-39.530 – Microsoft (tying)).

⁸ This is not the first time that Microsoft has been subject to a 'first of its kind' fine, having been the first undertaking fined in Commission Decision of 12 July 2006 fixing the definitive amount of the periodic penalty payment imposed on Microsoft Corporation by Decision C(2005)4420 final and amending that Decision as regards the amount of the periodic penalty payment (Case COMP/C-3/37.792 Microsoft) for a penalty payment of €280.5 million in for non-compliance with obligations imposed in Commission Decision of 24 March 2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft), which required Microsoft, as a result of an Article 102 TFEU infringement, to release interoperability information to other developers of work group server operating systems on fair reasonable and non-discriminatory terms. Microsoft was subsequently fined a second penalty payment of €899 million in Commission Decision of 2 February 2008 fixing the definitive amount of the periodic penalty payment imposed on Microsoft Corporation by Decision C(2005)4420final (Case COMP/C-3-34.792 Microsoft) for non-compliance with the royalties for the interoperability information in . This amount was reduced by the General Court in Case T-167/08 *Microsoft v Commission* [2012] ECR II-00000 to €869 million.

⁹ Figure valid as of 8 July 2013. Twenty nine of these decisions predate the Commission fine on Microsoft for non-compliance with its commitment decision of March 2013, two are subsequent to it, and, there are three more commitment decisions currently in the Commission's pipeline. Commitment decisions represent the majority of non-hardcore cartel cases since the introduction of Regulation 1/2003. See Heike Schweitzer, 'Commitment Decisions in the EU and in the Member States: Functions and Risks of a New Instrument of Competition Law Enforcement within a Federal Enforcement Regime', *e-Competitions Bulletin, Special Issue on Commitment Decisions, August 2 2012*, 2.

¹⁰ Commission Decision of 22 February 2006 relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/B-2/38.381– De Beers) appealed in Case T-170/06 *Alrosa v Commission* [2006] ECR II-2601, and further in Case C-441/07 *Commission v Alrosa* [2010] ECR I-5949. For a commentary on this case, particularly on the questions of proportionality of the commitments made and the

message to undertakings that enter commitments with it - a breach of a legally binding commitment decision constitutes a serious infringement of EU law, and will be punished accordingly.

The Nature of Commitment Decisions

The Article 9 Regulation 1/2003 commitment decision is an alternative to the conventional infringement decision mechanism under Article 7 of Regulation 1/2003, which allows the Commission, upon investigation, to find an infringement of Articles 101 or 102 of the Treaty on the Functioning of the European Union (TFEU) and require the undertakings concerned to end that infringement by means of behavioural or structural remedies. Article 9¹¹ formalised an administrative practice that predated Regulation 1/2003. It provides that:

Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a

right to a hearing of third parties in commitment decisions see Manuel Kellerbauer, 'Playground instead of Playpen: the Court of Justice of the European Union's Alrosa Judgment on Art.9 of Regulation 1/2003' [2011] 32(1) ECLR 1; see also Firat Cengiz, 'Alrosa v. Commission and Commission v. Alrosa: Rule of Law in Post-Modernisation EU Competition Law Regime,' [2010] TILEC Discussion Paper DP 2010-033 <<http://ssrn.com/abstract=1674345>> accessed 16 July 2013; Emanuela Lecchi, Jason Logendra and Rachel Thomasen, 'Committing Others: the Commitment Procedure and its Effect on Third Parties' [2011] 4(4) GCLR 162; Heike Schweitzer, 'Commitment Decisions under Art. 9 of Regulation 1/2003' in Claus Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law* (Hart Publishing 2010) 547, 562-576; and, Florian Wagner-von Papp, 'Best and Even Better Practices in Commitment Procedures after *Alrosa*: the Dangers of Abandoning the "Struggle for Competition Law"' [2012] 49 CML Rev 929;.

¹¹ For an analysis of the origin, nature, practice and effect of commitment decisions, see Inga Kawka, 'Rights of an Undertaking in Proceedings Regarding Commitment Decisions under Article 9 of Regulation No. 1/2003' [2012] 5(6) Yearbook of Antitrust and Regulatory Studies 169; Heike Schweitzer, 'Commitment Decisions under Art. 9 of Regulation 1/2003' in Claus Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law* (Hart Publishing 2010) 547; Miguel Sousa Ferro, 'Committing to Commitment Decisions – Unanswered Questions on Article 9 Decisions', [2005] 26(8) ECLR 451; John Temple Lang, 'Commitment Decisions under Regulation 1/2003: Legal Aspects of a New Kind of Competition Decision' [2003] 24(8) ECLR 347; and, Wouter Wils, 'Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation 1/2003' [2006] 29(3) World Comp 5;.

decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.¹²

The aim of commitment decisions is to increase procedural effectiveness and administrative efficiency in the Commission's competition law enforcement,¹³ offering a 'rapid solution'¹⁴ or a quick-fix for competition concerns. There is no finding of infringement and therefore no fine imposed on committing undertakings. As undertakings voluntarily propose and enter commitments, they are unlikely to be challenged before the Union courts. Consequently, they are 'a very important tool ... a good way to solve antitrust concerns swiftly since they avoid lengthy proceedings'.¹⁵

Although there are no guidelines in balancing efficiency with the public interest in enforcement,¹⁶ commitment decisions should ideally only be used where the public interest in achieving an early termination of potentially anti-competitive behaviour and resulting enforcement efficiencies outweigh the benefits of conventional infringement decisions, including the clarification of the law, punishment and public condemnation of the behaviour, deterrence,¹⁷ and the

¹² Note that by virtue of Recital 13 of Regulation 1/2003, commitment decisions are not available where the Commission envisages imposing fines.

¹³ See Commission MEMO/04/217 of 17 September 2004 Commitment decisions (Article 9 of Council Regulation 1/2003 providing for a modernised framework for antitrust scrutiny of company behaviour) <http://europa.eu/rapid/press-release_MEMO-04-217_en.htm> accessed 17 July 2013; and, Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU <http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_articles.pdf> accessed 17 July 2013. See also Opinion of Advocate General Kokott of 17 September 2009 in Case C-441/07 P *Commission v Alrosa*, paragraph 51; and, the Court of Justice in Case C-441/07 *Commission v Alrosa* [2010] ECR I-5949, paragraphs 35 and 46. See also Firat Cengiz, 'Alrosa v. Commission and Commission v. Alrosa: Rule of Law in Post-Modernisation EU Competition Law Regime,' [2010] TILEC Discussion Paper DP 2010-033 <<http://ssrn.com/abstract=1674345>> accessed 16 July 2013, 6 and 10.

¹⁴ Vice-President Commissioner Almunia in Commission Press Release IP/13/196 Antitrust: Commission Fines Microsoft for non-compliance with browser choice commitments <http://europa.eu/rapid/press-release_IP-13-196_en.htm> accessed 11 July 2013.

¹⁵ Statement of Vice-President Commissioner Almunia on Microsoft, Brussels 6 March 2013, Speech/13/192 <http://europa.eu/rapid/press-release_SPEECH-13-192_en.htm> accessed 11 July 2013. See also **Staff Working Paper, Report on the Functioning of Regulation 1/2003 COM(2009) 206**.

¹⁶ Heike Schweitzer, 'Commitment Decisions in the EU and in the Member States: Functions and Risks of a New Instrument of Competition Law Enforcement within a Federal Enforcement Regime', e-**Competitions Bulletin, Special Issue on Commitment Decisions, August 2 2012, 5**.

¹⁷ Wouter Wils, 'Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation 1/2003' [2006] 29(3) World Comp 5, **PAGE**. On the undertaking's interests in deciding to commit, see Pierre Moullet, 'How Should Undertakings Approach Commitment Proposal [sic] in Antitrust Proceedings' 2013 34(2) ECLR 86, 86 and 90-91; Heike Schweitzer, 'Commitment Decisions in the EU and in the Member States: Functions and Risks of a New Instrument of Competition Law Enforcement within a Federal Enforcement Regime', e-**Competitions Bulletin, Special Issue on Commitment Decisions, August 2 2012, 2**; and, Heike Schweitzer, 'Commitment Decisions under Art. 9 of Regulation 1/2003' in Claus Dieter Ehlermann and

facilitation of private damages actions. Moreover, they should be a 'marginal tool available to antitrust authorities to be used to solve specific (and less serious) cases'.¹⁸

Article 9 of Regulation 1/2003 specifies that commitments endorsed in a commitment decision are binding on the undertaking concerned. Although the Commission closes its case upon issuing of a commitment decision, Article 9(2) of Regulation 1/2003 allows it to reopen proceedings:

- (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.

Furthermore, where the undertakings concerned act in contravention of their commitments pursuant to Article 9, either intentionally or negligently, Article 23(2)(c) provides that the Commission may impose fines of up to 10% of their total turnover in the preceding business year. Additionally, periodic penalty payments of up to 5% of average daily turnover in the preceding business year can be imposed to compel undertakings to comply with their commitment decision obligations under Article 24(1)(c).

The potential for the Commission to impose periodic penalty payments and / or 10% turnover fines and to issue an infringement decision has been an effective way to ensure that undertakings comply with their Article 9 obligations¹⁹ thus far, with evidence that only one of 31 commitment decisions to date has been breached.

Mel Marquis (eds), *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law* (Hart Publishing 2010) 547, 548.

¹⁸ Alberto Pera and Michele Carpagnano, 'The Law and Practice of Commitment Decisions: A Comparative Analysis' [2008] 29(12) ECLR 669, 671. The authors go on to consider the circumstances of when commitment decisions are appropriate, 671-674.

¹⁹ Wouter Wils, 'Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation 1/2003' [2006] 29(3) World Comp 5, [PAGE](#).

The 2009 Microsoft Commitment Decision

In January 2008, on receipt of a complaint by a Norwegian browser developer, Opera,²⁰ the Commission launched an investigation into a potential infringement of Article 102 TFEU by Microsoft, concerning the tying of its web browser, Internet Explorer (IE), to its Windows operating system.²¹ The statement of objections preliminarily assessed that this tying arrangement was liable to lead to foreclosure effects in the web browser market and gave IE an advantage that other web browsers did not have,²² even though IE was not a superior product to other available browsers.²³ Microsoft subsequently sought discussions with the Commission to negotiate guarantees to end its concerns.

Subsequent to market testing²⁴ and amendment,²⁵ the Commission adopted its commitment decision in December 2009,²⁶ compelling Microsoft to provide alternative browser choices to its EEA-wide Windows users that have IE set as their default browser. To operationalise this, Microsoft committed:

- 1) to enable original equipment manufacturers and users to turn IE off and on;

²⁰ The complaint was made on 13 December 2007. See Commission Decision of 16 December 2009 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/C-3/39.530 – Microsoft Tying, recital 4.

²¹ A parallel investigation was launched into Microsoft's failure to provide interoperability information in a range of software products and for the Microsoft.NET framework, which resulted in an interoperability undertaking requiring Microsoft to release interoperability information to third party software and servers. See further Maurits Dolmans, Thomas Graf G and David R Little, 'Microsoft's Browser Choice Commitments and Public Interoperability Undertaking' [2010] 31(7) ECLR 268.

²² Commission Decision of 16 December 2009 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/C-3/39.530 – Microsoft Tying, recital 39.

²³ Commission Decision of 16 December 2009 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/C-3/39.530 – Microsoft Tying, recital 54.

²⁴ Article 27(4) of Regulation 1/2003 requires the Commission to publish a notice with a summary of the case and a description of the commitments, and to invite third parties to submit comments within a certain time of no less than one month. For a summary of the market test results in this case, see Commission Decision of 16 December 2009 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/C-3/39.530 – Microsoft Tying, recitals 61-71.

²⁵ Amendment essentially pertained to the presentation of the browser screen choice, discussed below, and to monitoring the commitments. For an account of individual amendments to the originally proposed commitments, see Commission Decision of 16 December 2009 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/C-3/39.530 – Microsoft Tying, recitals 72-95.

²⁶ For an analysis of this decision, see Maurits Dolmans, Thomas Graf G and David R Little, 'Microsoft's Browser Choice Commitments and Public Interoperability Undertaking' [2010] 31(7) ECLR 268.

- 2) to allow original equipment manufacturers to pre-install web browsers of their choice and to use them as the default browser without retaliation;
- 3) to install a browser screen choice system for a five-year period for EEA-wide Windows users.²⁷

This browser choice system listed the top five browsers with the highest EEA-wide market share in random order with a short description of each, allowing users to select and install their preferred internet browser from among these browsers, as well as a further seven less prominent browsers, available on a right scroll of the screen.²⁸ This browser choice screen was implemented, as required, in February 2010 and proved successful, with 84 million browsers downloaded through it in the period March-November 2010.²⁹

The Commitment Decision Breach

In February 2011, Microsoft issued a Windows 7 Service Pack 1 operating system, which was released to users over a three month period. Microsoft indicated to the Commission in its subsequent annual compliance report that it was compliant with its commitment obligations, i.e., that the browser screen choice was included as part of this Windows update.³⁰ However, due to a systems omission or technical error, and despite electronically stored reminders for Windows engineers to update the programming code to include

²⁷ Commission Decision of 16 December 2009 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/C-3/39.530 – Microsoft Tying, recital 60.

²⁸ For the methodology in the selection of web browsers to feature on the browser screen choice system, see Commission Decision of 16 December 2009 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/C-3/39.530 – Microsoft Tying, recitals 82-84. For an analysis of this system, see Hein Hobbelen and Joelle Jablan, ‘Presentational Issues in the Microsoft II Case: Fair Chance for all Browsers or a European Commission Imposed Advantage for Existing Market Players?’ [2011] 32(4) ECLR 206.

²⁹ Commission Press Release IP/13/196 Antitrust: Commission fines Microsoft for non-compliance with browser choice commitments <http://europa.eu/rapid/press-release_IP-13-196_en.htm> accessed 11 July 2013; and, Statement of Vice-President Commissioner Almunia on Microsoft, Brussels 6 March 2013, Speech/13/192 <http://europa.eu/rapid/press-release_SPEECH-13-192_en.htm> accessed 11 July 2013.

³⁰ 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), recital 25; and Commission Press Release IP/12/800 Antitrust: Commission opens proceedings against Microsoft to investigate possible non-compliance with browser choice commitments <http://europa.eu/rapid/press-release_IP-12-800_en.htm> accessed 11 July 2013.

the browser screen choice, it was not installed on the Windows 7 Service Pack 1.³¹ Therefore, a choice of internet browsers was not available for a 14 month period from 17 May 2011 to 16 July 2012,³² affecting some 15.3 million users.³³ Following a third-party complaint in June 2012, the Commission investigated the breach and issued a statement of objections in October 2012. Microsoft had already admitted and recognised the error on its behalf in July 2012, and took immediate action to rectify the problem, making the browser choice screen available to affected users by the end of July 2012,³⁴ as well as reputedly cutting the bonuses of two of its executives for the error.³⁵

The Consequences of the Breach

Albeit an inadvertent breach of its 2009 commitment decision, the Commission imposed a significant fine of €561 million on Microsoft, and yet one at the lower end permissible under Regulation 1/2003. Article 23(2)(c) of Regulation 1/2003 allows for a maximum fine of 10% of total turnover in the preceding business year for an intentional or negligent breach of a commitment decision. The €561 million fine represents just 1.02% of Microsoft's worldwide turnover, and although significant in monetary terms, it is in fact rather insignificant in

³¹ For an account of the error, see 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), recitals 27-30.

³² 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), recital 43.

³³ 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), recital 46. Reported also in Statement of Vice-President Commissioner Almunia on Microsoft, Brussels 6 March 2013, Speech/13/192 <http://europa.eu/rapid/press-release_SPEECH-13-192_en.htm> accessed 11 July 2013; and, Final Report of the Hearing Officer COMP/39.530 – Microsoft (Tying) [2013] OJ C 120/14.

³⁴ For an outline of the timeframes involved, see Commission Decision of 6 March 2013 addressed to Microsoft Corporation 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 AT.39530 - Microsoft (Tying), recital 2. See also recital 26 regarding Microsoft's acknowledgment of the breach and recitals 31-37 for Microsoft's response to the breach.

³⁵ Reported in DW.de that Microsoft indicated this to American regulators in its 2012 filing: <<http://www.dw.de/eu-fines-microsoft-for-antitrust-breach/a-16653491>> accessed 8 July 2013.

terms of Microsoft's turnover, given that the maximum imposable fine according to the 10% turnover rules was €5.6 billion.

Comment [AL3]: Check amount correct

In reaching its fining decision, the Commission considered the gravity and the duration of the infringement, and the need to ensure a deterrent effect.³⁶ It concluded, relying on *E.ON v Commission*,³⁷ that whatever the circumstances of a particular case, any failure to comply with a commitment decision is in principle a serious breach of Union law.³⁸ Therefore, while intent can be a relevant and important factor in determining the level of fine, Microsoft's argument that the unintentional nature should have been considered as a mitigating factor for the fine calculation was rejected by the Commission.³⁹ Microsoft's negligence did not render the breach any less serious and it was not an excusable error of law.⁴⁰ Microsoft itself acknowledged as much in a letter to the Commission, stating that:

'There is no ambiguity in the relevant Commitment language. There is no question as to how to apply that language to the facts. There is no important matter of principle at stake. There is, rather, a clear obligation, fully understood by all the relevant people at Microsoft through the entire chain of management, and an error in executing our obligation ... Job No. 1 was to ensure we complied with every one of the Commitments. We recognize that we have fallen short of this goal.'⁴¹

³⁶ Commission Press Release IP/13/196 Antitrust: Commission Fines Microsoft for non-compliance with browser choice commitments; Statement by Vice President Almunia on Microsoft, Speech/13/192 Brussels, 6 March 2013.

³⁷ Case T-141/08 *E.ON Energie AG v Commission* [2010] ECR II-5761, paragraph 279.

³⁸ 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), recital 56.

³⁹ 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), recital 69.

⁴⁰ 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), recital 69.

⁴¹ 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), recital 26, citing Microsoft's letter of 12 July 2012, 1-2.

Although the €561 million fine is at the lower end of that permissible fines, in recognition of the unintentional breach, it is, at half a billion euro, a significant fine for a breach resulting from oversight.⁴² The Commission considered that given Microsoft's resources and expertise, it should have been able to avoid the negligence that resulted in the breach by having better processes in place.⁴³ Indeed, the Commission also considered that given Microsoft's previous infringements and experience in dealing with competition law proceedings, it should have been aware of the consequences of breaching its commitments.⁴⁴

As far as the Commission was concerned, Microsoft's non-compliance replicated the its original concerns, going to their very core,⁴⁵ this breach was of a serious nature,⁴⁶ affecting a significant number of users,⁴⁷ and, moreover, it undermined the effectiveness of the commitment decision mechanism under Article 9 of Regulation 1/2003.⁴⁸ The Commission considered that the 14 month breach, was a significant part of the total duration of the commitment

⁴² Alan Riley, quoted by DW <<http://www.dw.de/eu-fines-microsoft-for-antitrust-breach/a-16653491>> accessed 8 July 2013.

⁴³ 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), recitals 49-54 and 69.

⁴⁴ 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), recital 50 and 69.

⁴⁵ 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), recital 59.

⁴⁶ 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), recital 55.

⁴⁷ 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), recitals 60-61.

⁴⁸ 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), recitals 57-58

decision (five years),⁴⁹ and to ensure a deterrent effect, the Commission took into account the size and resources of Microsoft.

As a mitigating factor, the Commission took into consideration that Microsoft cooperated with it. It readily admitted its failure to comply and provided the Commission with information which allowed it to deal with the breach more efficiently.⁵⁰ It also committed resources to internally investigate the circumstances leading to the breach.⁵¹ However, the immediate rectification of the breach was not accepted as a mitigating factor. According to the Commission, as required by case law,⁵² there were no exceptional circumstances pertaining to this immediate rectification; rather Microsoft was under an obligation to comply with the commitments for a five year period and upon being informed of its failure to comply, it was obliged to rectify the failure. There was nothing exceptional in it doing so;⁵³ indeed failure to do so would have resulted in periodic penalty payments.⁵⁴ Also rejected as mitigating factors were: Microsoft's adoption of internal measures to prevent similar problems in the future; the fact that this case was the first of its kind;⁵⁵ and,

⁴⁹ 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), recitals 64-65.

⁵⁰ 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), recital 66. See Commission Press Release IP/13/196 Antitrust: Commission Fines Microsoft for non-compliance with browser choice commitments, and, Statement by Vice President Almunia on Microsoft, Speech/13/192 Brussels, 6 March 2013.

⁵¹ 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), recitals 34 and 66..

⁵² Case C-137/95 P *SPO and Others v Commission* [1996] ECR I-1611, paragraph 55; Case T-271/03 *Deutsche Telekom AG v Commission* [2008] ECR II-477, paragraph 279; Case T-332/09 *Electrabel v Commission*, judgment of 12 December 2012, paragraph 237.

⁵³ 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), recital 71.

⁵⁴ 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), recital 71.

⁵⁵ 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), recitals 72-75.

Microsoft's offer to extend its commitments by a 15 month period. These factors did not diminish the gravity of the breach and could not alter its fact.⁵⁶

Taking into all of the circumstances into consideration, , the Commission set the level of fine at €561 million, corresponding to 1.02% of Microsoft's turnover in the previous fiscal year.⁵⁷

Recent developments in Ireland

Ireland's first commitment agreement to be ruled by the High Court was ruled on 18th December 2012. The possibility of having it ruled by the High Court arose by virtue of Section 14B of the Competition Act 2002, as amended by Section 5 of the Competition (Amendment) Act, 2012.

Commitment, or settlement, agreements had been entered into previously between the Competition Authority and undertakings, however the statutory basis for those was not clear and was based on a very broad interpretation of the Authority's statutory functions.⁵⁸

Ireland's Competition Acts

The Competition Act, 1991 contained the first prohibition-based competition laws in Ireland. Sections 4 and 5 mirrored the provisions of what are now Articles 101 and 102 respectively of the Treaty on the Functioning of the European Union.

The Competition Act 1996 criminalised breaches of those two substantive rules. The two Acts were repealed and replaced by the Competition Act, 2002 ("the Principal Act") which incorporates those two substantive rules and increases the applicable penalties. The Competition (Amendment) Act, 2012 increases those penalties further.

The Competition (Amendment) Act, 2012 ("the 2012 Act") also adds a tool to the armoury of the Authority. The new enforcement mechanism is a court-endorsed commitment agreement, which allows the Authority to apply to the High Court to have commitments entered into by undertakings made an order of court. This pragmatic enforcement tool would reduce time and costs where co-operation and commitments were forthcoming from an undertaking.

The Legal Basis

⁵⁶ 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), recital 76.

⁵⁷ 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), recitals 77-79 and Article 2.

⁵⁸ Martyniszyn and Hinds, e-Competitions, April 1-2013 p.1

Section 14B, inserted by section 5 of the 2012 Act, provides an express statutory basis for closing an investigation in exchange for commitments from an undertaking under investigation. Section 14B also allows the Authority apply to the High Court for an order on the terms of the commitment agreement. Failure to comply with the order then constitutes contempt of court.

The point has been made that Section 14B might have been strengthened by allowing for a commitment agreement with the undertaking and executives or directors of that undertaking.⁵⁹

What gave rise to the case?

The facts surrounding the first invocation of Section 14B are surprising. Double Bay Enterprises Ltd., trading as Brazil Body Sportswear ('BBS') was the exclusive distributor in Northern Ireland and in Ireland of footwear sold as 'Fitflops' and supplied various retailers in both jurisdictions. BBS's contractual terms of supply with its retailers included a prohibition on mail order and internet sales without BBS's consent. They also restricted the customers to whom the footwear could be sold by the retailers and the territory in which the retailers could sell the footwear.

These provisions will remind most of the facts surrounding the case of *Consten Grundig v Commission*⁶⁰ from which the concept of absolute territorial protection became known to European lawyers.

On the operational side and as a matter of practice, BBS appeared to operate, monitor and enforce a resale price maintenance policy

The Competition Authority received complaints from retailers about these practices and the Authority decided to investigate the allegations of breaches of Irish and European Competition Law.

In the course of its investigation, the Authority gathered evidence which satisfied it that BBS had policed retailer's compliance with the various restrictive BBS contractual terms. Email correspondence was gathered which satisfied the Authority that BBS had made many attempts to enforce resale price maintenance by requiring retail prices to be increased to set levels, controlling when retailers put the footwear on sale and at what discount and having retailers inform it of another retailer's discounting.

The Authority offered BBS the opportunity of avoiding enforcement proceedings by entering into an agreement with it to cease operating the restrictions and to have the commitments in that agreement made an order of the High Court. BBS opted not to present any justifications or defences that may have been available to it and agreed to that resolution.

The agreement contains the commitments sought by the Authority and in return, it agreed not to bring court proceedings against the undertaking under section 14A of the Act.

⁵⁹ Power, *Ireland's competition (Amendment) Act 2012 : A by-product of the troika deal but legislation with long-term consequences*, Commercial Law Practitioner, 2012, 9, p 180 - 188

⁶⁰ *Consten v Grundig v Commission* (56 and 58/64), [1996] ECR 299

Mixed Messages

The 2012 Act was enacted as a result of the Troika's stipulation that Ireland increase its Competition law both in terms of levels of enforcement and levels of sanction.

On the one hand, the 2012 Act increases penalties for breaches of competition law but on the other, the Act allows that commitment agreements be ruled by the court where an investigation has been carried out by the competent authority and in consideration for the authority not bringing proceedings, the undertaking agrees to alter its *modus operandi*.

There is no limitation to the effect that this is not available where 'hardcore' offences are involved. Might it suggest to a business person or their legal advisers that the commercial course of action would be to carry on, confess if necessary and commit by agreement if that became the pragmatic option?

Private enforcement of Competition law

The Principal Act included, in section 14, a cause of action for the private enforcement of competition law. It provided any person aggrieved by a breach of competition law with a right of action against any participating undertaking or any director, manager or other officer of such undertaking. Relief by way of damages, including exemplary damages, injunction or declaration are provided for within section 14.

The 2012 Act does not comment on the effect a court-ruled commitment agreement is to have on the private right of action and there appears to be no obstacle to a private right to damages in respect of past damage suffered. However, section 8 of the Principal Act sought to render the evidentiary burden of the private action less onerous by providing that ;

“where, in proceedings under Part 2 of the principal Act, a court finds, as part of a final decision in relation to the matters to which those proceedings relate, that an undertaking contravened section 4 or 5 of that Act, or Article 101 or 102 of the TFEU, then, for the purposes of any subsequent proceedings (other than proceedings for an offence) under that Part, the finding shall be *res judicata*”

Where a commitment agreement is entered into by an undertaking and ruled by a court pursuant to Section 14B, that section will not apply. However the optics of the situation will be a matter of concern for the undertaking, its directors, managers and other officers where the scale of operations and value of the market are high.

Conclusion

While the court-ruled commitment agreement has an immediate appeal for those in favour of the enforcement of competition law, the messages of the 2012 Act to the business world operating in Ireland appear somewhat mixed.

The Commission's action however has made the position clear. While the commitment decision may appear to an undertaking to be a relatively painless resolution of an investigation, any deviation from the settlement will be heavily sanctioned. The Commission sets a clear precedent in the Microsoft decision, using it as a platform to emphasise the deterrent approach of its competition law enforcement, and to issue a message about the consequences that ensue for non-compliance with commitment decisions. According to Commissioner Almunia, 'such a breach is of course very serious, irrespective of whether it was intentional or not, and it calls for a sanction'.⁶¹ Although commitment decisions allow for a co-operative and early resolution to a potential infringement of Union competition law, they should not be entered into lightly by undertakings to simply make the Commission go away. They should be entered into in cognisance of their legally binding nature, the breach of which is automatically, as a matter of principle, a serious breach of EU law⁶² or a *per se* infringement.⁶³

Comment [AL4]: This should be preceded by a conclusion on Irish developments.

⁶¹ Statement by Vice President Almunia on Microsoft, Speech/13/192 Brussels, 6 March 2013.

⁶² Statement by Vice President Almunia on Microsoft, Speech/13/192 Brussels, 6 March 2013.

⁶³ Alberto Pera and Michele Carpagano, 'The Law and Practice of Commitment Decisions: A Comparative Analysis' [2008] 29(12) ECLR 669, 671.