The ARA "consent decree" – a new enforcement tool for abuse cases *ante portas*?

On September 20, the Commission announced that it imposed a **fine** of 6 million EUR on Austrian **waste management service ARA** for blocking competitors from entering the market for management of household packaging waste from 2008 to 2012. According to the press release, the fine **was reduced by 30%** for ARA's cooperation with the Commission.

The case features many interesting aspects concerning material law, such as:

(i) a non-profit organisation receiving a substantial fine (notion of undertaking),
(ii) the duplicability of the collection system (essential facility),
(iii) the regulatory framework restricting access (state action doctrine)

and, concerning procedure:

(iv) the reduction of the fine for cooperation with the commission,
(v) the elements of a settlement in an Article 102 case, as well as
(vi) the structural remedies suggested by the undertaking and imposed by the Commission.

Apart from the aspects of material law, that may however never find their way to the ECJ now, it may be the **novel combination of the three procedural aspects** stated above, that make the case unique and potentially ground-breaking:

What we have here is an **Article 7/23** (Regulation 1/2003) decision in an abuse case that has essentially/primarily been **settled** (however not under the settlement notice, which doesn't cover abuse cases) including a **substantial reduction** of the fine in return for **structural remedies** suggested by the undertaking in a cooperation submission (much like in an Article 9 (Regulation 1/2003) case). In essence, the Commission combines a bunch of previously highly efficient enforcement tools to address a **refusal to deal** issue in a – granted – increasingly profitable, however not tremendously strategic (national and regulated) market.

This may not be a radical change in the Commission's long-established enforcement policies but it is a significant step towards an increasingly **consent-oriented enforcement policy** that, approaching 15 years since the introduction of Regulation 1/2003, raises fundamental questions of how to differentiate Article 7 and Article 9.

Access to waste – the facts of the case

But let's rewind and take a look at the facts of the case (which bear some resemblance to Case C-385/07, DGP – Duales System Deutschland), before addressing the potentially revolutionary enforcement approach that the Commission took here.

Altstoff Recycling Austria (ARA) is a non-profit company owned ultimately by a large number of undertakings involved in the production of packaging material or using packaging material for the sale of their products. Under Austrian law, each company that produces waste by way of producing or using packaging for their business activities is under a **legal obligation** to participate in a "**collection system**", which takes care of the various types of waste- organizing collection, recycling and, if necessary, deposition. For many years ARA was a **monopolist** in this market, notably in the market for the **collection of household waste**, which is to be differentiated from the market for commercial waste. In 2013, already under the impression of the Commission's case against ARA initiated in 2010, the legal framework was changed to allow for **unrestricted access** to both the collection of household as well as commercial waste.

Garbage cans – an essential facility

The Commission's main arguments were that (i) ARA would **abuse a dominant position** on the market for a specific type of household waste by way of its **refusal to grant competitors access to its collection infrastructure**. Under the *Bronner*-test, the Commission held that ARA's collection system was **not duplicable** for technical, legal and economic reasons and thus, as an **essential facility**, had to be opened to competition by the incumbent.

A second argument seems to have (ii) concerned the (already openly accessible) market for the collection of **commercial waste**, stating that ARA had **foreclosed competitors** there by way of including certain (allegedly

commercial) categories of waste in its monopolized collection system for household waste.

At the time of the Commission decision, both issues seemed to only be of **historic** interest, so that the fine was calculated for an infringement dating from 2008 to 2012 (the date from which on the household waste market had been legally opened).

Procedure – a commitment decision in disguise?

In its decision on September 20, the Commission, according to its press release, finds an **infringement and imposes a fine**, thus applying Articles 7 and 23 of Regulation 1/2003. Also, applying its 2006 Guidelines on fines, it **reduces the fine substantially in return for ARA's cooperation** consisting of essentially offering a **structural remedy**, i.e. divestiture of "part of the household collection infrastructure" owned by ARA.

Finding an **infringement AND "settling"** the case with a structural commitment appears to be the major novelty in this case. Other than allowing for imposition of a fine, finding an infringement of course exposes the undertaking to potential **follow-on litigation** for compensation. This risk seems to have been part of the discussions between the undertaking and the Commission. As ARA explicitly states in a company press release, "it upholds its legal opinion concerning the question that there was **no causal link** between ARGEV's (the subsidiary in question) behaviour and the fact that competitors could only enter the market after legislative changes". ARA also expressly states that even the Commission leaves that question open in its decision.

It appears we are standing at the cradle of a new, quite flexible enforcement tool here. If we (a) need (i.a.) an express recognition of the infringement in a regular settlement case under the 2008 settlement notice and (b) a commitment offer under Article 9, Reg 1/2003 (but not express recognition let alone the finding of an infringement), what we have in this case is (c) apparently something in between. If we think about the essence of the ARA-decision on a **sliding scale of procedural options**, the ARA decision seems however to be **much closer to an Article 9 commitment decision** than to an Article 7 decision (as a precondition of an Article 23 fine decision), the provision it is actually based upon.

The big question is, **does Reg 1/2003 allow for such flexibility?**

Before the 2008 settlement notice, these issues were discussed intensely (see e.g. *Wils*, Efficiency and Justice in European Antitrust Enforcement, Hart 2008, para 159 et. seq.) but ultimately the settlement notice stopped short of including abuse (you had a – previously between abuse and case/s. I removed it for cohesion throughout) cases which have since been increasingly often concluded with formal commitment decision under Article 9 (see e.g. COMP/39402 of 18.3.2008 - RWE Gas Foreclosure, COMP/39317 of 4.5.2010 - E.ON Gas, COMP/39316 of 3.12.2009 - Gaz de France, COMP/AT/39727 of 10.4.2013 – CEZ).

My impression is that there is a category of abuse cases that does not fit well for either of the above solutions. Too contentious to be ended under Article 9 without a fine, but too complex to tough out a fully-fledged Article 7/23 decision, especially in fast moving markets. The ARA case itself – ironically – is probably not such a case, the Microsoft-case might have been one and the lessons learned from it are probably the motivation behind the Commission's new approach.

Pros and cons – can you have the cake and eat it?

On the **positive side**, this could allow the Commission to **save (considerable) resources and swiftly change market conditions** in favour of more competition. This may be particularly useful in cases where markets move quicker than a competition case is ultimately decided and where financially strong undertakings go the extra mile to secure an efficient defence. To give quickly is to give double, the saying goes and – to take that saying further – to give something at all is probably also better than nothing, given that the alternative, especially in complex cases concerning exclusionary abuses, is for the Commission not to touch the case in the first place (see, commenting on Article 9 decisions, *Temple Lang*, in Gheur/Petit, Alternative enforcement techniques in EC competition law, 2009, 142).

On the **negative side**, there is some **concern for legal certainty**. However complex cartel cases can get (SCI-doctrine, notion of the undertaking, you name it), "to distinguish good from bad competition under Article

102" (see *Eilmansberger*, CMLR 2005, 129-177) is yet another thing. Technological evolution is posing ever-new legal problems that require a deep understanding of the technologies and business models involved in order **not to produce false positives.** A quick-and-dirty solution might not hurt in an old economy essential facility case but what about notoriously complex abuse cases in the network economy? Who will develop legal doctrine if Courts will practically be out of the loop? Judicial control by way of annulment decisions to the CFI may in practice be removed, even in cases where the undertakings cannot bring themselves to fully agree with the Commission about the nature of the infringement. Preliminary rulings and third-party annulment actions might not be enough to do the job.

With regard to **rights of defence**, the **principle of proportionality** is central when preparing the special blend of remedy and fine. In that regard, the Court's language in the *Alrosa* case might offer some guidance however that case was of course concluded under Art 9 without a fine (Case C-441/07 P). We'll see whether the Court's observations on the powers of the Commission under Article 9 and Article 7, and the differing aims of those two provisions, will ever be dwelled upon in a future case concerning an "ARA-like" remedy decision.

Concerning the use of **consent decrees** in the USA, as well as commitment decision under Article 9, the up and downsides have been intensely discussed (see e.g. *Wils*, para 104 et seq. for further arguments). Now, as the ARA-decision has further **broadened the scope of application of consensual solutions** in competition enforcement to cases involving the imposition of a fine, this discussion needs to be taken up again. Future candidates for the "consent decree" approach already seem to be on the Commission's table. The questions will be if and how this **new approach can be formalized** in the future and – above all – which cases it will be applied to.

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