

17 June 2015

Coordination of commitments in parallel antitrust investigations within the European Economic Area

Survey report by the European Competition Lawyers Forum¹

1. Background to the survey

- 1.1 We have undertaken a survey to consider procedural obstacles to the coordination of commitments when multiple authorities are investigating similar issues in parallel.
- 1.2 We asked a law firm in each jurisdiction in the European Economic Area (and Switzerland) to complete a short questionnaire about the commitments procedure in their country. We received responses from all 31 distributed surveys.²

2. Recommendation based on results

- 2.1 The survey revealed that the majority of jurisdictions are flexible with their procedures and therefore could easily accommodate parallel negotiation of commitments.
- 2.2 However, in some jurisdictions national commitments procedures have various constraints which could impede coordination between National Competition Authorities (“**NCA**s”) and make it difficult for an undertaking to negotiate commitments in parallel with multiple NCAs. In particular, to allow for effective coordination, NCA procedures should accommodate the fact that investigations may commence at different times and develop at different paces. National procedures should also allow the possibility for some NCAs to “take the lead” in commitments negotiations, without other NCAs needing to duplicate the work of the lead NCA(s).
- 2.3 The following procedural deadlines could impede coordination:
- (i) In **Italy** commitments must be offered within three months of the commencement of an investigation and in **Croatia** commitments must be offered within six months of the commencement of an investigation.
 - (ii) In certain member states commitments will only be accepted after the statement of objections. In **Belgium** and **Luxembourg** commitments can only be offered after a statement of objections has been issued. Although there is no formal commitments procedure in **Poland**, we were told that in practice the Polish

¹ The report has been compiled by Philippe Chappatte and Helen Townley of Slaughter and May and does not purport to reflect the views of all ECLF members. While this paper is based on survey responses, its recommendations do not necessarily reflect the views of the individual contributors or their law firms. The list of contributing firms is set out in **Annex 2**.

² A survey was not sent to Liechtenstein as we were told by local counsel that Liechtenstein does not have a national commitments procedure.

authority will typically only receive commitments after the statement of objections has been issued.³

- (iii) In **Croatia, France, Italy, Lithuania**⁴ and **Romania**⁵ it is not possible to offer commitments after a statement of objections has been issued.
- (iv) In **France** commitments must be submitted within one month of receiving the preliminary competition assessment and in **Romania** commitments must be submitted within 30 days of the commencement of commitments proceedings. In **Portugal** commitments must be submitted within ten days of the Portuguese NCA's formal invitation to submit commitments.⁶ There is some scope for extension of these timeframes.
- (v) In **Italy** the NCA must decide whether or not to accept or reject commitments within three months from the commencement of the market test. In **Spain**, once commitments proceedings are initiated, the normal investigation is suspended for a maximum of three months - during which the parties have an opportunity to negotiate commitments. In **Croatia** the NCA must decide whether to accept / reject the commitments within three months of the determination of the facts 'relevant to rendering the decision on the merits' (which is likely equivalent to the market test in practice).⁷ In **Greece**, (in circumstances where a statement of objections has not been issued) a hearing date is set within three months of commitments being offered – a decision of the Hellenic Competition Commission follows that hearing. In **Romania**, the NCA must issue a decision within six months of initiating the commitments procedure.⁸ There is some scope for extension of these timeframes.

2.4 These procedural deadlines have the potential to impede coordination in respect of parallel investigations. Our recommendation is that these procedures be harmonised to assist NCAs to achieve coordinated and consistent outcomes.

³ In Poland, the statement of objections is called "formal notification of antimonopoly proceedings".

⁴ Counsel in Lithuania also advise that under Lithuanian procedure a statement of objections should be issued within five months of the commencement of an investigation, with the possibility for multiple three month extensions.

⁵ Counsel in Romania also advise that it is possible to increase the chances of commitments being accepted if they are proposed within the first six months of opening the investigation.

⁶ We note that there is no time restrictions as to when the Portuguese NCA must make such a formal request. Therefore, it is within the power of the NCA to make this request at a time that aligns with a coordinated timetable.

⁷ For example, relevant facts may be the assessment of the facts of the case relating to viability of commitments and time taken to review commitments provided by third parties (i.e. similar to the conclusion on the market test).

⁸ We note that in The Netherlands default administrative law time limits apply which require the NCA to respond to an offer of commitments within 6 months of the commitments being offered. There is some scope for these time limits to be extended. Parties will then have an opportunity to comment of the NCA's response (typically a draft decision).

2.5 In particular we recommend that:

- (i) *There should be no restriction on offering commitments before or after a statement of objections:* The fact that some NCAs require commitments before a statement of objections and other NCAs will only accept commitments after a statement of objections creates a risk that commitments negotiations cannot progress in parallel.
 - (a) National processes should be flexible enough to allow for the fact that one NCA might issue a statement of objections early, while others may not see the need to issue a statement of objections at all.
 - (b) A requirement that commitments cannot be offered until after a statement of objections has been issued potentially precludes the efficiency benefits that can be achieved when NCAs investigate in parallel. In particular, in the case of parallel investigations one or some NCA(s) might “take the lead” in negotiating the commitments. If other NCAs are subsequently required to draft a statement of objections before accepting those commitments in their own jurisdiction, the process becomes unnecessarily inefficient.

- (ii) *There should be no strict national timeframes in respect of offering and negotiating commitments:*
 - (a) In Booking.com’s case, the Italian Competition Authority extended the deadline for Booking.com to offer commitments multiple times. The Italian requirement that commitments are offered within three months of the opening of an investigation appears to be an obstacle to coordination and difficult to comply with in cases where coordination between NCAs is required. The Croatian time limit of six months from the opening of an investigation is also likely too short in certain more complex cases. Italy and Croatia should consider changing their domestic procedures in this respect.
 - (b) The strict time limits in France and Romania for submitting commitments following a preliminary competition assessment / commencement of commitments proceedings may also present a potential obstacle to effective coordination. The Portuguese requirement to submit commitments within ten days of a formal invitation might also impede coordination in some cases. The fact that these time limits may be extended does not necessarily give undertakings the necessary certainty to plan on the basis that commitments will be submitted and negotiated in parallel.

- (c) A strict time limit for agreeing commitments once offered (or once commitments proceedings are formally initiated) could also inhibit effective coordination in complex cases. A three month time limit (as is the case in Italy, Croatia, Greece⁹ and Spain) may be insufficient in complex cases where extensive coordination is required. A six month time limit to issue a decision in respect of commitments from the initiation of a commitments procedure (as is required in Romania) may also be too short in complex cases.¹⁰

3. Summary of survey results

- 3.1 The survey questions and a summary of the survey results are set out in **Annex 1**.

Report compiled by Philippe Chappatte and Helen Townley of Slaughter and May with contributions from the firms set out in **Annex 2**.

⁹ Three months if a statement of objections has not been served. If a statement of objections has been served then within the applicable deadline for the issuance of a decision on the case.

¹⁰ The time limits in The Netherlands appear to be more flexible (a response is required from the NCA within six months, and undertakings then have an opportunity to comment) but could still potentially impede coordination in some complex cases.

Annex 1

1. Survey questions

- 1.1 A competition firm from each European country was asked to complete the following questionnaire:

1	How long would a commitments procedure typically take from the time first proposed to a formal decision?
2	Is it possible to offer commitments <u>before</u> a Statement of Objections (or equivalent) is issued in your jurisdiction?
3	Is it possible to offer commitments <u>after</u> a Statement of Objections (or equivalent) is issued in your jurisdiction?
4	Is there a deadline by which commitments must be offered? (If yes, please specify)
5	If yes, can this deadline be extended? (If yes, please specify by how long)
6	Is there a deadline by which your authority must accept/decline the commitments? (If yes, please specify)
7	If yes, can this deadline be extended? (If yes, please specify by how long)
8	<i>Please let us know if you have any other comments about the commitments process in your country, that you think could make parallel commitments negotiations by NCAs challenging</i>

2. Summary of survey results

Question 1: Typical length of commitments procedure

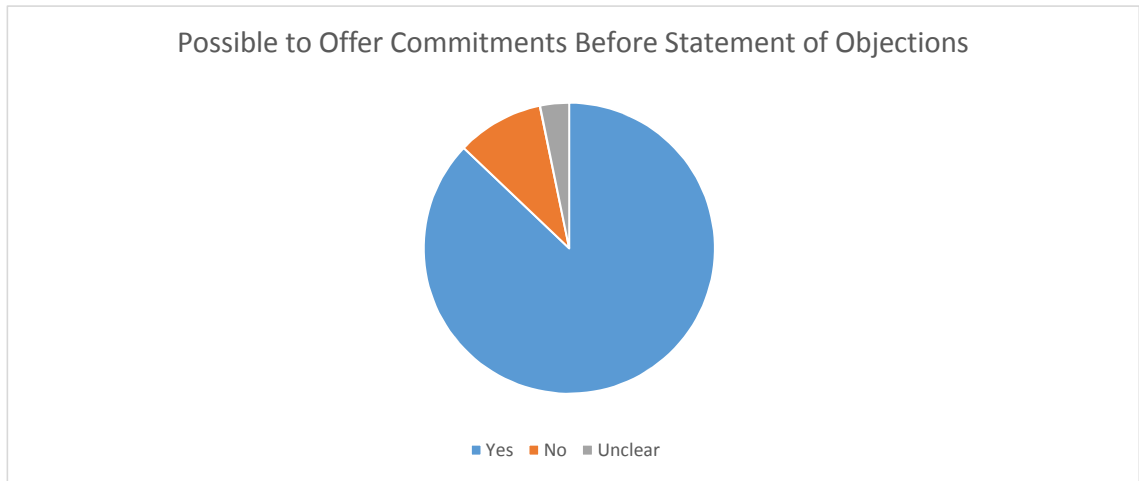
- 2.1 The majority of estimates provided as to the typical duration of a commitments procedure was between two – six months, although this of course may vary depending on the complexity of the case.¹¹

Question 2: Possibility for offering commitments before a statement of objections

- 2.2 Most countries allow for commitments to be offered before a statement of objections is issued.

¹¹ 14 out of 31 responses were unable to provide an estimated timeframe – for example because the duration of a commitments procedure could vary so greatly depending on the circumstances of the case.

- 2.3 Only three out of 31 responses stated that it was not possible to offer commitments before a statement of objections has been offered.¹² These countries were Belgium, Luxembourg and Poland.¹³ Please see the chart below:



Question 3: Possibility for offering commitments after a statement of objections

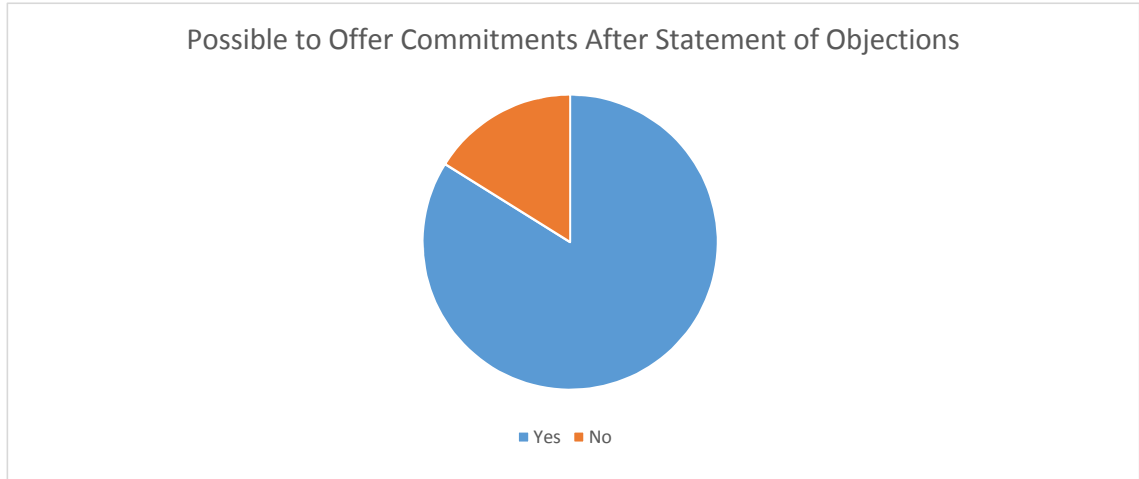
- 2.4 Most countries allow for commitments to be offered after a statement of objections has been issued.
- 2.5 Only five out of 31 responses said that it was not possible to offer commitments after a statement of objections has been issued.¹⁴ Although, four other countries specified that commitments must be offered prior to the *deadline for the response* to the statement of objections (or a similar deadline).¹⁵ Please see the chart below:

¹² The response from Cyprus indicated that in Cyprus it is not clear whether commitments can be offered before a statement of objections.

¹³ Counsel in Poland advised in their response that it is generally the case that commitments can only be filed after the statement of objections has been issued – this stems from the fact that under the Polish procedure a condition for initiating the commitments procedure is that a practice infringing Polish or EU law must be rendered plausible in the course of the proceedings before the Polish Competition Authority. This condition is most commonly met by the issue of the statement of objections. However, this is a general rule and in some cases the Polish Competition Authority initiate commitments proceedings prior to the statement of objections.

¹⁴ These countries are Croatia, France, Italy, Lithuania and Romania.

¹⁵ These countries are Slovenia, Czech Republic and Spain. In Greece, if a statement of objections has been issued at the time an undertaking offers commitments, the undertaking must offer commitments at least 20 days before the hearing date.



Questions 4 and 5: Deadline by which commitments must be offered

- 2.6 In most countries commitments can be offered at any stage during the investigation.¹⁶
- 2.7 In Italy commitments must be offered within three months of the commencement of an investigation and in Croatia commitments must be offered within six months of the commencement of an investigation.
- 2.8 Other than the countries which require commitments to be offered prior to the statement of objections being issued or the deadline for the response to the statement of objections (see above), a number of other national procedures include some type of time restriction. In particular:
- (i) In Poland, there is no formal commitments procedure but Polish counsel advise that in practice the Polish NCA will generally require commitments within the first few weeks of a statement of objections being issued. Given the Polish NCA will typically not accept commitments prior to a statement of objections being offered, the window for offering commitments in Poland has the potential to be very short.
 - (ii) In France commitments must be offered within one month of the authority issuing its preliminary competition assessment.¹⁷
 - (iii) In Romania commitments must be offered within 30 days of the commitments procedure being initiated.

¹⁶ These countries are Belgium, Hungary, Lithuania, Slovakia, Cyprus, Iceland, Bulgaria, Norway, Switzerland, Denmark, Finland, Estonia, Germany, UK, Austria, Sweden, The Netherlands and Latvia.

¹⁷ We note that Best Practice Guidelines in Malta suggest that commitments should be offered within one month of the preliminary competition assessment. But this is apparently not a firm requirement.

- (iv) In Portugal commitments must be submitted within ten days of the Portuguese NCA's formal invitation to submit commitments.¹⁸

2.9 National procedures allow for extensions to be granted to these deadlines. In France, extensions can be discussed with the NCA and extensions are regularly granted. In Romania it is possible to request an extension for a maximum of 60 days. In Italy and Poland it is possible for the deadline for submission of the commitments to be extended, but this is at the discretion of the NCA and an extension will only be granted in exceptional circumstances. In Croatia, to the knowledge of our respondent, it has not been tested whether an extension can be granted to the deadline for submission of commitments. In Portugal, the deadline to offer commitments once a formal request has been made can be extended by a further ten days, and there is precedent for an even longer extension.¹⁹

Questions 6 and 7: Deadline by which commitments must be accepted or rejected by the NCA

2.10 The responses identified a number of deadlines in respect of when the NCA must take a decision on the commitments:

- (i) In Italy the NCA has an obligation to decide whether to accept or reject the commitments within three months of the commencement of the market test. This can be extended in exceptional circumstances.
- (ii) When commitments procedures are initiated in Spain, the NCA suspends the time limit for concluding an investigation for a maximum of three months, during which it determines whether or not it will accept or reject commitments. It is not usual that this three month period would be extended, although the NCA retains some flexibility in this respect.
- (iii) In Croatia the authority must decide whether to accept / reject the commitments within three months of the determination of the facts relevant to rendering the decision on the merits.²⁰ This cannot be extended.
- (iv) In Greece, time limits differ depending on whether or not a statement of objections has been issued. If no statement of objections has been issued, a hearing must be held within three months after commitments are offered (the decision as to whether to accept or reject the commitments is taken at that

¹⁸ We note that there are no time restrictions as to when the Portuguese NCA must make such a formal request. Therefore, it is within the power of the NCA to make this request at a time that aligns with a coordinated timetable.

¹⁹ In Case PRC 2013/5 – *Peugot Portugal – Automoveis, S.A.*, the Portuguese NCA formally requested commitments on 1 October 2014 and Peugeot submitted commitments on 19 December 2014.

²⁰ For example, relevant facts may be the assessment of the facts of the case relating to viability of commitments and time taken to review commitments provided by third parties (i.e. similar to the conclusion on the market test).

hearing). The hearing date can be extended if changes are being made to the substance of the commitments and more time is required.²¹

- (v) In Romania, the NCA must issue a decision within six months of initiating the commitments procedure. This can be extended for a maximum of 60 days if deemed necessary following the market test.
- (vi) In the Netherlands, general administrative law requirements state that the NCA should respond to the offer of commitments as soon as possible, but at least within six months. Parties then have an opportunity to make submissions in respect of the NCAs response. These time limits can be extended in complex cases.

²¹ If a statement of objections has been issued, there is more flexibility as to the hearing date.

Annex 2

Country	Contributing Law Firm
Austria	Barnert Egermann Illigasch Rechtsanwälte
Belgium	Bredin Prat
Bulgaria	Boyanov & Co
Croatia	Porobija & Porobija
Cyprus	Andreas Neocleous & Co
Czech Republic	PRK Partners
Denmark	Gorrissen Federspiel
Estonia	Raidla Ellex
Finland	Hannes Snellman
France	De Pardieu Brocas Maffei
Germany	Quinn Emanuel Urquhart & Sullivan
Greece	Zepos & Yannopoulos
Hungary	Nagy és Trócsányi
Iceland	Logos
Ireland	Sidley Austin
Italy	Bonelli Errede Pappalardo
Latvia	Cobalt
Lithuania	Cobalt
Luxembourg	Elvinger Hoss Prussen
Malta	Ganado Advocates
Netherlands	De Brauw Blackstone Westbroek N.V.
Norway	Advokatfirmaet Thommessen AS
Poland	Wierciński Kwieciński Baehr
Portugal	Uría Menéndez

Romania	Țuca Zbârcea & Asociații
Slovakia	Černejšová & Hrbek
Slovenia	Odvetniki Šelih & partnerji
Spain	Uría Menéndez
Sweden	Kastell Advokatbyrå
Switzerland	Homburger
UK	Slaughter and May