The Commerce Commission - the right balance between settling and litigating? EU insights

Speedread

Settlement of potential or current enforcement actions by the Commission may achieve Commission objectives while the infringer has optimal outcomes too. The choice between enforcement and settlement can be challenging for regulators. Insights from the EU inform the approach here.

November 2013

The Commission is increasingly settling competition and regulatory cases with lateral solutions, rather than taking them through the courts. This is a good thing and can produce outcomes by which competition and consumers are better off in net term. The Commission has made outstanding arrangements in a number of cases, including solutions benefiting consumers directly, and it's to be admired for coming up with lateral solutions, of which settling the Interchange banking cases is a good example. Another example, handled brilliantly by the Commission and an insurance company, is outlined in our article, *Managing Fair Trading Act Complaints – a great example.*[1]

The trick is to optimally manage the balance between enforcement and settlement, particularly to ensure that settlement concessions are not unduly compromised by concerns such as cost, delay, and the prospect that the issue becomes irrelevant by the time that it gets to court. Yes, there must be compromise, possibly quite a bit, but the porridge and the bed need to be just right.

The Commission has updated its approach on the choice as to litigation or other steps, and we think the approach is very good, as we outlined in our article, *New NZ Commerce Commission enforcement guidelines.*[2]

European insights

New Zealand is not alone in trying to get right the sometimes difficult choice between settlement and enforcement. A leading UK competition law academic for example has recently commented that the EU competition law agency, DG Comp, may not be getting it right in settling cases too readily.[3] Professor Richard Whish's comments inform the optimal approach here.[4]

His concerns include that:

- While in fast moving technology markets, the facts may be irrelevant when the enforcement process is heard some years later, and that's a reason of settling, this means that important precedents such as the Microsoft series of judgments aren't created, to give guidance to stakeholders. Settling cases such as the current Google allegations means there won't be guidance from the decisions, for example.
- The lack of enforcement decisions, the Professor said, "*will surely have some effect on deterrence. Competition authorities deter [anti-competitive practices] by imposing fines.*"

And those are valid points. Some cases will need to go to full enforcement in New Zealand to ensure those sorts of objectives are met. Others - probably the great majority - should be settled

(sometimes with court approval and sometimes not). If an alleged infringer is playing too hard-ball on settlement, then that may be the case to take to court. In this way, a reasonable balance might be achieved.

All this opens up wonderful opportunities for the Commission to achieve its objectives, minimising delay, cost and taking resources away from other areas, while the alleged infringer can get an optimal outcome too by working with the Commission to achieve great outcomes.

One very helpful practice, often used by our Commission, is the issue of its reasons for deciding not to instigate enforcement action. While this can open up the Commission to criticism where there is disagreement with the approach (see for example our article *Sky's Tall Dwarf: an unexpected winner*[5]), this practice is nonetheless highly valuable, including in providing guidance to stakeholders for the future.

We welcome this approach by the Commission, and its willingness to outline its position in some detail.

1. http://www.wigleylaw.com/assets/Uploads/Fair-Trading-Act-breach2.pdf

2. http://www.wigleylaw.com/assets/Uploads/CC-enforcement-guidelines2.pdf

3. By the Article 9 Commitment procedure which is similar to settlements by the Commission (sometimes involving court approval and sometimes not).

4. His comments are reported on 12 November 2013 in the Global Competition Review, *Whish; Be wary of DG Comp settling too many cases.*

5. http://www.wigleylaw.com/assets/Uploads/Skys-Tall-Dwarf-an-unexpected-winner.pdf

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