

# European Court of Justice Deals Blow to Commitment Decisions

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On November 23, 2017, the Court of Justice of the European Union (Court of Justice) dealt a blow to the European Commission's (Commission) power to close antitrust investigations with commitment decisions, with its ruling in Case C-547/16 *Gasorba et al. v. Repsol*. The Court of Justice ruled that the adoption of a commitment decision does not preclude national courts from examining whether the agreements comply with the antitrust rules, nor from, if necessary, declaring those agreements void. Moreover, national courts even must treat commitment decisions as an indication of an antitrust violation.

## Facts of the Case

In February 1993, two individuals concluded a long-term, exclusive fuel supply agreement with Repsol in the context of a lease agreement for a plot of land and a service station.

Subsequently, the Commission initiated proceedings against Repsol under Article 101 of the Treaty on the Functioning of the European Union (TFEU). This provision prohibits agreements that restrict competition. In its preliminary assessment, the Commission found that the agreement raised competition concerns regarding the Spanish retail fuel market.

To address these concerns, Repsol offered commitments in lieu of a formal finding of infringement. By virtue of these commitments, Repsol would refrain from concluding long-term exclusive agreements, offer the service station tenants concerned financial incentives to terminate early their existing long-term supply agreements with Repsol, and refrain for a certain period of time from buying any independent service stations for which it did not yet act as supplier. In April 2006, the Commission terminated its investigation with a decision under Article 9 of Regulation 1/2003, turning Repsol's commitments into a legally binding Commission decision.

Following that decision, the individuals brought an action before the Spanish courts against Repsol seeking (i) the annulment of their long-term fuel supply agreement on the ground that it was contrary to Article 101 of the TFEU and (ii) compensation for the harm caused as a result. The question arose whether national courts are entitled to rule on an agreement that is covered by a commitment decision.

## Ruling of the Court of Justice

The Court of Justice was asked to rule on whether national courts are precluded from declaring a restrictive agreement void when the Commission previously accepted binding commitments concerning that agreement.

The Court of Justice ruled that "commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to decide on the case, and do not affect the power of the courts and the competition authorities of the Member States to apply Articles 101 and 102 TFEU."<sup>1</sup>

It further held that "a decision taken on the basis of Article 9(1) of Regulation No 1/2003 cannot create a legitimate expectation in respect of the undertakings concerned as to whether their conduct complies with Article 101 TFEU. [...] [T]he commitment decision cannot 'legalise' the market behaviour of the undertaking concerned, and certainly not retroactively."<sup>2</sup>

<sup>1</sup> Case C-547/16 *Gasorba et al. v. Repsol*, para. 27.

<sup>2</sup> *Ibid.*, para 28.

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More surprisingly, the Court of Justice also used the occasion to express its view on the evidentiary value of commitment decisions, by holding that “both the principle of sincere cooperation laid down in Article 4(3) TEU and the objective of applying EU competition law effectively and uniformly require the national court to take into account the preliminary assessment carried out by the Commission and regard it as an indication, if not prima facie evidence, of the anticompetitive nature of the agreement at issue in the light of Article 101(1) TFEU.”<sup>3</sup>

<sup>3</sup> Ibid, para. 29.

## Impact of the Ruling

The fact that commitment decisions can lead to further litigation is not a novelty. However, what seems novel in this case is that, whilst acknowledging that the Commission’s preliminary assessment under Article 9, Regulation 1/2003 does not lead to a finding of infringement, the Commission’s preliminary assessment should be regarded by national courts “as an indication, if not prima facie evidence, of the anticompetitive nature of the agreement.” This could make commitment procedures a less attractive alternative for companies that are subject to a Commission investigation.

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