



Behavioural remedies (imposed) in antitrust cases

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March 16, 2012

Aims of remedies - revisited

- General consensus:
 - To stop the illegal behaviour and its anticompetitive effects
 - To prevent the illegal behaviour recurring
 - To restore opportunity for competition in the market (but not dictate outcomes)
- More controversial in some cases:
 - Deterrent value?
 - To compensate victims?
 - To punish the offender?



EU: Remedies under Article 7,

Regulation 1/2003

- Article 7
 - “Where the Commission [...] finds that there is an infringement of Article [101] or of Article [102] of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, **it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.**”
- Behavioural remedies preferred to structural remedies
- Most commonly used in abuse of dominance cases
- This session will focus on imposed remedies (not negotiated remedies/settlements)



Imposed v.s. settlement remedies

- Are they different?
 - Settlement remedies (EU, Reg. 1/2003, Article 9)
 - Suggested by parties
 - Agreed by agency and parties
 - More room for creativity, tailoring, options, scope
 - Imposed remedies (EU, Reg. 1/2003, Article 7)
 - Possibly less room for creativity, tailoring, options, scope
 - “Imposition” may make fulfilment/enforcement difficult and contentious
 - Possibility of challenge by parties



Types of remedies (I)

- Negative behavioural remedies (prohibition)
 - Oblige parties to stop doing something
 - Benefits
 - Efficient/relatively simple to design
 - Clear for parties involved
 - Limits
 - Alone, may not be enough to restore effective competition



Types of remedies (I)

- Positive behavioural remedies (affirmative)
 - Oblige parties to undertake certain conduct
 - Benefits
 - A more positive and pro-active approach?
 - Could do more to help restore competition than a negative order alone
 - Limits
 - Design, administration, resource challenges
 - Monitoring may be needed
 - Risk of introducing artificial inefficiencies into the market
 - May adversely affect incentives to innovate
- Structural remedies
 - Under Regulation 1/2003, may be imposed:
 - Where there is no equally effective behavioural remedy
 - Where any equally effective behavioural remedy would be more burdensome on the undertaking than the structural remedy



Examples of behavioural remedies - overview

- Negative behavioural remedies, ordering:
 - An end to the infringing conduct (cease and desist)
 - Often coupled with fines
- Positive behavioural remedies, ordering:
 - Supply of services/products
 - Access to information
 - Other parties to be informed of the cessation of the infringement or provided with other information
 - Periodic provision of information to competition authorities
 - Price terms



Cease and desist orders (I)

- Order parties to stop the infringing behaviour and to refrain from behaviour having a similar/equivalent object or effect in the future
- Declaratory statement, which may be:
 - Stand-alone
 - Accompanied by other remedies or penalties
- Key remedy in EU cartel decisions
 - “The undertakings listed ... shall immediately bring to an end the infringement referred to ... insofar as they have not already done so. They shall refrain from repeating any act or conduct described ... and from any act or conduct having the same or similar object or effect”. (DRAM, 2010)



Cease and desist orders (II)

- Key remedy in EU abuse of dominance cases, including:
 - Intel, EU, 2009
 - Rebates to manufacturers conditional on purchasing all or almost all of their supplies from Intel
 - Payments to manufacturers to prevent sales of specific rival products
 - Fine of €1.06 billion, plus cease and desist order
 - Groupement des Cartes Bancaires, EU, 2007
 - Arrangement regarding charges payable by banks to GCB for management of the French payment card system
 - No fine, but cease and desist order
 - MasterCard, EU, 2007
 - MasterCard's EEA multilateral interchange fee was held to be an abuse of dominance
 - MasterCard was ordered to withdraw the fee within six months
 - Deutsche Telecom, EU, 2003
 - Margin squeeze regarding the provision of local access to Deutsche Telecom's fixed telecommunications network
 - Fine of €12.6 million plus cease and desist order
 - VW-Audi, EU, 1998
 - Order that the company “shall not replace restrictions of that kind with restrictions having similar objectives”
 - National Grid, UK, 2008
 - Abuse of dominance on the market for the supply of domestic gas meters



Positive remedies – supply

- Commercial Solvents, EU, 1974
 - Commercial Solvents refused to supply raw materials to a downstream competitor – it was the only EU supplier of the raw materials
 - Commercial Solvents was ordered to continue supplying its downstream competitor within 30 days and to propose subsequent supply arrangements within two months
- Magill TV Guide, EU, 1989
 - Refusal by television stations to allow Magill to publish consolidated television listings because they were protected by copyright
 - Commission ordered television companies to supply each other and third parties on request and on a non-discriminatory basis with their individual advance weekly listings
- Microsoft, EU, 2004
 - Microsoft abused its dominant position on the market for personal computer operating systems (“OS”) by:
 - refusing to supply competitors with certain OS interoperability information to allow them to develop and distribute competing products on the market for work group server operating systems; and
 - making the availability of the Windows client PC operating system conditional on the acquisition of Windows Media Player (tying)
 - Microsoft was ordered to disclose interface documentation necessary to allow non-Microsoft work group servers to achieve full interoperability with Windows PCs and servers
 - Documentation had to be disclosed even if IP-protected, but Microsoft was entitled to reasonable remuneration



Positive remedies – the Microsoft Media Player example

- Microsoft, EU, 2004
 - Microsoft ordered to offer PC manufacturers a version of its Windows PC OS without Windows Media Player
 - Microsoft remained free to offer a version including Media Player free of charge, but could not:
 - Offer terms making the unbundled version less attractive
 - Offer discounts conditional on purchasing the combined package
 - Query success:
 - Very limited demand for new product without media player from both PC manufacturers and computer stores
 - Pricing same for both products



Positive remedies - granting access

- British Midland v Aer Lingus, EU, 1992
 - Aer Lingus cancelled its “interline” agreement with British Midland, under which each airline could sell each other’s services, once British Midland started to compete with it on an important route. Aer Lingus did not cancel such agreements with other airlines
 - Aer Lingus ordered to resume its interlining relationship with British Midland
- CYTA, Cyprus, 2010
 - Cypriot telecommunications incumbent refused two competitors access to its database of customers
 - Access was required for the purposes of offering customers premium mobile SMS services
 - CYTA ordered to provide the competitors with the ability to provide premium SMS mobile termination services



Positive remedies - provision of information on infringement ending

- Obligation to inform interested third parties that the infringement has ended
- Johnson & Johnson, EU, 1980
 - Export prohibition for a certain product was illegal
 - Companies ordered to “bring it to the notice of their dealers, in writing, that exports to other Member States of the EEC are not prohibited”
- VW-Audi, EU, 1988
 - Agreements with Italian dealers restricted sales to consumers and authorised dealers from other Member States
 - VW ordered to:
 - Inform the authorised Italian dealers by circular that the infringing schemes were abolished and that no penalties need be feared if the dealer sells to final consumers from other Member States
 - Instruct its subsidiary to send similar circulars
- Rolling stock leasing market, UK, 2009
 - Investigation into the market concluded there was a distortion of competition
 - Ordered rolling stock companies to provide information to train leasing companies regarding each lease rental
- Coditel, Luxembourg, 2010
 - Cable TV provider tied cable TV subscriptions to purchase of its set-top boxes
 - Competition Council ordered Coditel:
 - To inform its clients of the possibility to purchase non-Coditel set-top boxes
 - To mention this information clearly in its marketing information along with interoperability information



Positive remedies - provision of information to competition authorities

- Inform the competition authority how the imposed remedy will be put into practice
 - Johnson & Johnson, EU, 1980
 - Ordered to inform dealers that certain exports are not prohibited and to inform the Commission “within three months of the way in which this notice has been given”
- Inform the competition authority that it has complied with an element of the imposed remedy
 - Chiquita/United Brands, EU, 1976
 - Ordered to inform its distributors of the end of the infringement and “inform the Commission that it has done so” by a specified date
- Make information periodically available to the authority
 - Chiquita/United Brands, EU, 1976
 - Ordered to inform the Commission twice yearly for a period of two years of prices charged during the previous six months to customers in certain Member States
 - ECS/AKZO interim measures, EU, 1983
 - Ordered to supply the Commission every month with a copy of every offer, order, invoice and credit note in respect of any offer or sale the relevant products to any buyer in the United Kingdom



Positive remedies – price terms (I)

- Under EU competition law, not entirely clear whether the Commission can impose prices, but it has come close...
- Has been done on occasion
 - ECS/AKZO interim measures, EU, 1983
 - Minimum prices set by the Commission, which could only be lowered to meet (but not to undercut) a lower price offered by a competitor
 - Napp Pharmaceuticals, UK, 2001
 - Abuse of dominance on the market for sustained release morphine tablets
 - Napp ordered to:
 - reduce its NHS price list for the tablets by at least 15%; and
 - sell the tablets to hospitals in the UK at a price not less than 20% of this reduced NHS price list



Positive remedies – price terms (I)

- Difficulties in competition authority acting as price setter/enforcer
 - Insufficient price/cost/conditions of competition – risk of inefficient outcomes
 - Monitoring burden/legal challenges
- Possible solutions if pricing remedies are needed - use of broader wording/obligations rather than specific pricing
 - Chiquita/United Brands, EU, 1976
 - Pricing policy subsequently monitored
 - Magill TV Guide, EU, 1989
 - Any royalties charged for television listings information must be “reasonable”
 - Tetra Pak II, EU, 1991
 - Ordered to ensure that difference in prices results “solely from the specific market conditions” and not to “practice predatory or discriminatory prices” or grant benefits “not justified by an objective consideration”



Sanctions for non-compliance with imposed remedies under Article 7

- EU: periodic penalties (Reg. 1/2003, Article 24(1))
 - Maximum, per day, of 5% of average daily turnover
- Such fines under Article 24 have only ever been imposed on one company – Microsoft
 - Commission found Microsoft failed to comply with the remedies imposed in its infringement decision
 - Fined Microsoft €280.5 million
 - Later adopted a further Article 24(1) decision fining Microsoft €899 million



Monitoring the remedy

- Commission may provide for appointment of a monitoring trustee to oversee ongoing compliance with imposed remedies
- Monitoring is often of compliance with the remedy rather than effectiveness of the remedy
 - UK is increasingly studying the effectiveness of its remedies
 - Monitoring effectiveness improves the development of future remedies



Microsoft Monitoring Trustee

- Commission adopted decisions:
 - To establish a monitoring mechanism and appoint a monitoring trustee paid for by Microsoft (under Article 7(1))
 - To provide for periodic penalty payments of up to €2 million per day should Microsoft fail to comply with the terms of the Commission's infringement decision (under Article 24(1))
- Decision under Article 7(1) provided that:
 - The trustee be selected from a list submitted by Microsoft (if none suitable the Commission could choose the trustee)
 - The trustee have the necessary qualifications, professional expertise, resources and availability to carry out its mandate
 - The trustee be wholly independent from Microsoft
 - Microsoft could only apply for the removal of the trustee if it considered that the trustee was:
 - no longer fulfilling the specified requirements of its role; or
 - unable to carry out its functions effectively



Role of the Microsoft Monitoring Trustee

- To provide a confidential report to the Commission on its activities every three months, or whenever determined by the Commission
- To inform the Commission immediately if it had reason to believe there might have been a failure to comply with the infringement decision
- To provide *ad hoc* opinions to the Commission
- To advise the Commission on any third party complaints about Microsoft's compliance
- To establish a procedure for co-operation between Microsoft and the Commission in relation to third party complaints relating to non-compliance
- To mediate the resolution of disputes between Microsoft and third parties and reach a settlement (subject to the Commission's approval)



Powers of the Microsoft Monitoring Trustee

- To interview Microsoft personnel
- To inspect Microsoft documents
- To obtain access to Microsoft's physical facilities
- To access specific source codes
- To access any information that Microsoft or any other party was requested to provide to the Commission for the purpose of monitoring compliance with the infringement decision
- To appoint advisers, subject to prior consultation with Microsoft and the Commission's approval



Microsoft's appeal to the General Court

- Microsoft claimed that its obligation to appoint and remunerate a monitoring trustee was unlawful for being *ultra vires*
- General Court judgment, 2007 (*Case T-201/04*)
 - The obligation to allow the monitoring trustee to access information, documents, premises and employees on a continuing basis and for an unlimited period was without basis
 - The Commission had no authority to compel Microsoft to grant to an independent trustee powers which the Commission itself could not confer on a third party
 - The Commission had exceeded its powers by making Microsoft responsible for all the costs associated with the appointment of the trustee
- Commission decision, 2009:
 - Full time monitoring trustee no longer required
 - Ongoing *ad hoc* compliance advice from technical consultants



Limitations to imposed remedies

- The European Commission cannot:
 - Order positive action to remedy conduct that is not in itself contrary to Articles 101 and 102
 - Order parties to enter into contracts (if other methods of ending the infringement exist)
 - e.g. may not order excluded companies to be included in a distribution network, as other options, such as altering/ending the distribution system, may be chosen



Remedy design tips

- The remedy must:
 - Achieve its aims – i.e. stop illegal behaviour and restore competition
 - Be proportionate to the violation
 - Be enforceable, with the possibility to monitor compliance
 - Not chill efficient conduct
 - Not reduce incentives to innovate
- There must be a link between the infringement and the obligations imposed
- The cost of designing and administering the remedy should be minimised
- Competition authorities may consult on the proposed remedies before imposing them
- Each remedy will need to be tailored to the specific facts of the case and the market at issue





EU-China Trade Project (II)

中国-欧盟世贸项目(二期)



A project funded by the
EUROPEAN COMMISSION
欧盟资助项目

Thanks!

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