



Remedies under Article 82 EC

Per Hellström

DG Competition, European Commission

(speaking in a personal capacity - the views expressed are not necessarily those of the European Commission)

The Legal framework in Europe

- Article 82 of the EC Treaty
- Regulation 1/2003
- Case law of the Community Courts
- Decisional practice of the European Commission

Regulation 1/2003

- **Context for remedies**
 - - Article 7 "prohibition decisions"
 - - Article 9 "commitment decisions"
 - - Article 8 "interim measures"

Regulation 1/2003

- Article 7 "prohibition decisions"

"[...] to bring such an 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. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. [...]"

Recital 12 of Reg 1/2003

“Structural remedies should only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. Changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking”

Framework in practice

- Standard scenario: cease-and-desist order plus fines
- A remedy is an expansion of a cease-and-desist order
- Where the anti-competitive effects on the market persist even though the restriction of competition itself is no longer in place, remedies are necessary
- Alternative solutions:
 - Prescribe a certain action, or
 - Prohibit a certain action, leaving the firm discretion on what precisely to implement.

Design of remedies

- Remedies/commitments should be:
 - Effective
 - Proportionate/Necessary
 - Clear and precise
 - Cost-efficient
 - Transparent
 - Consistent

Effectiveness

- Possible criteria for assessment:
 - Does the remedy lower barriers to entry?
 - Does the remedy change the incentive or ability of market participants to compete?
 - Is the remedy likely to increase consumer welfare?
 - Does the remedy reduce efficiencies in production?
 - How likely is it that the remedy prevents future competitive detriment?
 - Can the remedy be practically implemented, monitored and enforced?
 - How quickly can the remedy restore competition?
 - ...

Behavioural remedies

- Classification - infringement type:
 - Anti-foreclosure
 - Anti-collusion
 - Anti-exploitation

Monitoring and Enforcement of Remedies in general

- Monitoring
 - Commission
 - Sector specific regulator
 - Competitors, customers
 - Trustees
 - National courts
 - Arbitration
- Organizational question

Structural remedies

- A structural remedy is a measure that effectively changes the structure of the market by a transfer of property rights regarding tangible or intangible assets, including the transfer of an entire business unit, that does not lead to any ongoing relationships between the former and the future owner. After its completion, a structural remedy should not require any further monitoring.

Structural remedies

- Involve the transfer of (property) rights → divestiture
- Should not create ongoing links between competing firms → “clean break principle”
- Remove incentive and/or means of a firm to infringe competition law (no regulation nexus as in behavioural remedies);
- Monitoring and enforcement only necessary until divestiture completed
- Rarely used under Article 82

The purpose of a remedy

“An antitrust remedy ... must stop the offending conduct, prevent its recurrence, and restore competition. Preventing recurrence must involve proactive steps to address conduct of similar nature. Restoration requires prospective relief to create lost competition and may involve actions to disadvantage the antitrust offender and/or favour its rivals.”

Charles A. James. *The Real Microsoft case and Settlement*, 16 *Antitrust* 58, 60 (2001)