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Effective Competition Law Remedies

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

Remedies in antitrust infringement decisions

- Ensure the effectiveness of antitrust remedies: legal and practical requirements/implications
 - Powers, objectives and (guiding/limiting) principles
 - Types of remedies: pros&cons
 - Process

Antitrust remedies: powers and principles

- The Commission can impose any remedy, whether behavioural or structural, which is necessary to bring the infringement effectively to an end, having regard to the principle of proportionality (recital 12 and art. 7 of Reg. 1/2003)
 - The notion of effectiveness
 - The principle of proportionality

The notion of effectiveness: what is/are the objective(s) of the remedy?

- Re-establish the situation as it was before the infringement (*Status quo ante*)
- Re-establish the situation as it would be today absent the infringement (counterfactual)
- Re-establish the competitive process, i.e. recreating the conditions for a competitive and contestable market to the benefit of both existing competitors and new entrants. But:
 - No guarantee of a specific market outcome
 - No compensation for individual competitors (damage actions)
- Prevent repetition of the infringement and eliminate its consequences (*Akzo*, C-62/86, §155)

The principle of proportionality

- The remedy must be "proportionate to the infringement committed and necessary to bring the infringement effectively to an end" (article 7 of Reg. 1/2003):
 - On the one hand, the remedy must go as far as necessary to bring the infringement effectively to an end;
 - On the other hand, the remedy must be limited to what is necessary to achieve its objective, i.e. when there are several appropriate measures, the least onerous one must be imposed
 - Stricter version of the test (*Automec, T-24/90, §51*): "it is not for the Commission to impose its own choice from all the various potential courses of action which are in conformity with the Treaty"

Antitrust remedies: options (1)

- Cease and desist orders
 - Pros: proportionality + flexibility / dynamic implementation
 - Cons: risks for timeliness / effectiveness / complex assessment/monitoring

Antitrust remedies: options (2)

- Specific measures (behavioural / structural)
 - Need to strike balance between proportionality (*Automec*) and effectiveness; otherwise the power to impose “any measure” would be meaningless...
 - Or at least: outline possible options and/or prescriptive (positive and negative) guiding principles

Antitrust remedies: options (3)

- Neutralise the effects of the infringement
 - *Ufex* (C-119/97 P, §94): "If anti-competitive effects continue after the practices which caused them have ceased, the Commission [...] remains competent [...] to act with a view to eliminating or neutralising them"
 - *Akzo* (C-62/86, §155): remedy "intended to [...] eliminate its consequences"
 - *Commercial Solvents* (C-6-7/73, §§45-46): "order to do certain acts or provide certain advantages which have been wrongfully withheld"; "ensure that the infringement was made good and that Zoja was protected from the consequences of it"

Effective antitrust remedies: process

- The identification of the appropriate remedy in the final decision is a complex case-specific analysis
- Early discussion on remedies helps to identify the appropriate remedies, to carry out the proportionality test, and later to assess and monitor compliance
 - It might also trigger commitments or cooperation
- Complexity in identifying the remedy should not deter enforcement

THANK YOU!

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