

The place of remedies in the objectives of competition law enforcement

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All views expressed are strictly personal

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EU "competition law (enforcement)"

- **Articles 101 & 102 TFEU** ("antitrust")

 - Regulation 1/2003

- **EU Merger Regulation**

- state aid control

Objectives of antitrust enforcement

1. clarifying and developing the content of the antitrust prohibitions
2. preventing infringements
 - a) termination of ongoing infringements
 - b) prevention of future/repeated infringements
 - c) deterrence and punishment
3. dealing with the consequences of infringements
 - a) restoring competition
 - b) disgorgement of illicit gains
 - c) compensating victims

Article 7(1) of Regulation 1/2003

"Finding and termination of infringement"

"Where the Commission [...] finds that there is an infringement of [Article 101 or Article 102 TFEU], it may by decision require the 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. 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): "[...] 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."

T-24/90 *Automec II*

"[...] the Commission undoubtedly has the power to find that an infringement exists and to order the parties concerned to bring it to an end, but it is not for the Commission to impose upon the parties its own choice from among all the various potential courses of action which are in conformity with the Treaty" (para 52)

C-119/97 P *Ufex*

" 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 [...]." (para 94)

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C-441/07 P *Alrosa*

"[Article 7 and Article 9 of Regulation 1/2003] pursue different objectives, one of them aiming to put an end to the infringement that has been found to exist and the other aiming to address the Commission's concerns following its preliminary assessment. [...]

Undertakings which offer commitments on the basis of Article 9 of Regulation 1/2003 consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the regulation after a thorough examination. On the other hand, the closure of the infringement proceedings brought against those undertakings allows them to avoid a finding of an infringement of competition law and a possible fine." (paras 46-48)

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EU Merger Regulation

"The completion of the internal market and of economic and monetary union, the enlargement of the European Union and the lowering of international barriers to trade and investment will continue to result in major corporate reorganisations, particularly in the form of **concentrations**.

Such reorganisations are to be **welcomed** to the extent that they are in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the [European Union].

However, it should be ensured that the process of reorganisation does **not result in lasting damage to competition**; [Union] law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or a substantial part of it." (recitals (3) to (5))

EU Merger Regulation

"Where the undertakings concerned modify a notified concentration, in particular by offering commitments with a view to rendering the concentration compatible with the common market, the Commission should be able to declare the concentration, as modified, compatible with the common market. Such commitments should be proportionate to the competition problem and entirely eliminate it. It is also appropriate to accept commitments before the initiation of proceedings where the competition problem is readily identifiable and can easily be **remedied**." (recital (30))

Remedies Notice 2008/C 267/01

"The purpose of this Notice is to provide guidance on modifications to concentrations, in particular commitments by the undertakings concerned to modify a concentration. Such modifications are more commonly described as '**remedies**' since their object is to eliminate the competition concerns ^(footnote 4) identified by the Commission." (para 2)

Footnote 4: "[...] the term 'competition concerns' corresponds, according to the stage of the procedure, to serious doubts or preliminary findings that the concentration is likely to significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position."

T-310/01 *Schneider Electric*

"[...] in the procedures for reviewing concentrations, the statement of objections is not solely intended to spell out the complaints and give the undertaking to which it is addressed the opportunity to submit comments in response. It is also intended to give the notifying parties the chance to suggest corrective measures and, in particular, proposals for divestiture and sufficient time, given the requirement for speed which characterises the general scheme of [the EU Merger Regulation], to ascertain the extent to which divestiture is necessary with a view to rendering the transaction compatible with the common market in good time." (para 442)

EU Merger Regulation: remedies

1. enabling concentrations

while

2. preventing significant impediments to effective competition

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EU Merger Regulation

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