REMEDIES IN EUROPEAN ANTITRUST LAW

Per Hellström
Frank Maier-Rigaud
Friedrich Wenzel Bulst*

He that will not apply new remedies must expect new evils; for time is the greatest innovator.

Sir Francis Bacon, *Essays* (1597)

This essay explores the scope of the European Commission's power to impose remedies in cases of abuse of a dominant position under Article 82 of the Treaty establishing the European Community.[1] After introductory remarks regarding the legal basis and objectives of remedies, we delineate the Commission's powers with respect to remedies. We then turn to give a few examples of past Commission practice, followed by an exploration of how the Commission might render remedies more effective as an enforcement tool, and then address a few issues of procedure.

---

* Per Hellström is the Head of Unit for Antitrust: IT, Internet, and Consumer Electronics for the European Commission's Directorate General Competition. Frank Maier-Rigaud is a Senior Economist for the Energy and Environment Directorate for the European Commission's Directorate General Competition and is affiliated with both the Department of Economics, University of Bonn (Germany) and the Max Planck Institute for Research on Collective Goods (Bonn, Germany). Friedrich Wenzel Bulst is an Attorney in the IT, Internet, and Consumer Electronics Unit for the European Commission's Directorate General Competition. The views expressed are those of the authors and not necessarily those of the European Commission. The authors would like to thank Nick Banasevic, Philippe Chauve, Celine Gauer, Christopher Sprigman, and Wouter Wils for helpful comments on an earlier draft.

[1] For a comprehensive account of antitrust remedies in Europe, see Philip Lowe & Frank Maier-Rigaud, *Quo Vadis Antitrust Remedies, in* 2007 Fordham Competition L. Inst. 597 (Barry E. Hawk ed., 2008); OECD, Competition Comm., Remedies and Sanctions in Abuse of Dominance Cases, DAF/COMP(2006)19 (May 15, 2007), *available at* http://www.oecd.org/dataoecd/20/17/38623413.pdf.

I. INTRODUCTION

Article 7 of Regulation 1/2003[2] empowers the European Commission to find an infringement of European antitrust law and to require the firm—generally called an "undertaking" in EC law—concerned to bring such an infringement to an end.[3] According to the second sentence of Article 7(1), the Commission may "[f]or this purpose . . . 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."[4]

In view of this, under Regulation 1/2003, the purpose of a remedy is to bring the infringement effectively to an end. Based on this understanding, a fine is not considered a remedy under Community law.[5] In this context, remedies are not "sanctions" against undertakings in the sense of a penalty or punishment, nor do they generally[6] compensate harmed parties.[7] Punishment is intended to be ensured by the imposition of fines.[8] While the prospect of fines and private damages claims may (depending on their level and likelihood) deter future infringements, the mere payment of a fine or damages usually does not put the infringement to an end.

The distinction between punitive measures and remedies is, however, not universally recognized.[9] The term "remedy" is at times used more broadly (as indicated for instance by the range of topics covered under the conference heading "Antitrust Remedies for Dominant Firm Misconduct") encompassing both remedies, in the sense of this article, and

---

[2] *See* Council Regulation (EC) No 1/2003, 2003 O.J. (L 1) 1, 9 (explaining the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty).

[3] *Id.* art. 7(1); *see id.* art. 9(1) ("Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission."); *see also* Lowe & Maier-Rigaud, *supra* note 1 (discussing Articles 7, 8, and 9).

[4] Council Regulation 1/2003, *supra* note 2, art. 7(1).

[5] *See infra* Part V.B.

[6] *See infra* Part VII.D.

[7] *See* OECD, *supra* note 1, at 20 (noting "it may be useful to think of remedies as measures that aim to stop a defendant's conduct and its anticompetitive effects, prevent their recurrence, and restore competition. Sanctions can be thought of as measures that aim to deter unlawful conduct and perhaps to compensate victims.").

[8] *See* Council Regulation 1/2003, *supra* note 2, art. 23; Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003, 2006 O.J. (C 210) 2, 2–5.

[9] *See* Thomas O. Barnett, *Section 2 Remedies: A Necessary Challenge*, *in* 2007 FORDHAM COMPETITION L. INST., *supra* note 1, at 549, 554.

sanctions, despite its clear etymological origin[10] and the possible confusion resulting from subsuming distinct concepts under an identical label. Possibly this lack of precision is responsible for suggestions such as the claim "that fines . . . have a potential role to play also in this restorative role in the absence of other feasible remedies."[11] Fines, just as periodic penalty payments[12] are, however, sanctions against specific infringements of individual firms. The aim of the fine is a preventative effect not just on future actions of the firm, but also on other firms that have engaged in similar practices. This has, however, little to do with the problem of restoring the competitive process in any specific case. Although fines may well be imposed in Article 82 cases, they, therefore, cannot be considered as an instrument even remotely capable of restoring competition.

The most straightforward behavioral remedy is a "cease and desist order." Such an order under certain circumstances eliminates the consequences of an abuse and, therefore, can be an effective way to put an end to an infringement.

For present purposes, a definition of a remedy as a measure intended to bring an infringement effectively to an end should suffice. More interesting than the terminological question of what constitutes a remedy is the debate about how far a remedy should go, i.e., what it means to bring an infringement effectively to an end.

The judgment of the European Court of Justice (the Court) in *Ufex* is most instructive in this context. In *Ufex*, the Court held that the Commission may not reject a complaint for lack of Community interest[13] on the mere basis that the allegedly infringing activity or behavior has ceased. It must also assess whether the anticompetitive *effects* of the behavior in question persist.[14] This indicates that once that infringement

---

[10] The Latin origin of the word remedy is *remedium*, derived from the term *mederi* (i.e., to heal).

[11] *See* Howard A. Shelanski, Participant in Panel Discussion on Remedies and Sanctions for Unlawful Unilateral Conduct at the Thirty-fourth Annual Fordham Competition Law Institute Conference on International Antitrust Law & Policy, *in* 2007 FORDHAM COMPETITION L. INST., *supra* note 1, at 614.

[12] *See* Council Regulation 1/2003, *supra* note 2, art. 24.

[13] *See* Commission Notice on the Handling of Complaints by the Commission Under Articles 81 and 82 of the EC Treaty, 2004 O.J. (C 101) 65; EUROPEAN COMM'N, REPORT ON COMPETITION POLICY 2005 at 25–27 (2007), *available at* http://ec.europa.eu/competition/annual_reports/2005/en.pdf.

[14] *See* Case C-119/97P, Ufex v. Comm'n, 1999 E.C.R. I-1341, ¶¶ 93–94 ("the Commission is required to assess in each case how serious the alleged interferences with competition are and how persistent their consequences are. That obligation means in particular that it must take into account the duration and extent of the infringements complained of and their effect on the competition situation in the Community," and "[i]f anti-com-

has been established, the Commission can order not only the infringing act or omission to be stopped,[15] but also the ongoing competitive consequences to be undone. Bringing an infringement effectively to an end, therefore, requires that its effects on the market be brought to an end. Hence, this is the objective of antitrust law enforcement through remedies. The Court so far has not ruled out other objectives that remedies in a broad sense may—albeit contrary to the usage of the term for present purposes—also pursue, such as deterrence, compensation, or punishment.

The Court has explicitly recognized that the Commission has the power not only to prohibit "the continuation of certain action, practices or situations which are contrary to the Treaty," but also to "include an order to do certain acts or provide certain advantages which have been wrongfully withheld."[16] Therefore, the Commission may require an undertaking to actively take certain measures.[17] This line is essentially shared by U.S. authorities where, for instance, the Assistant Attorney General who proposed the U.S. Department of Justice's settlement in *United States v. Microsoft* observed:

> 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 favor its rivals.[18]

II. STRUCTURAL AND BEHAVIORAL REMEDIES

According to Article 7(1), the Commission may impose any behavioral or structural remedies necessary to effectively bring an infringe-

---

petitive effects continue after the practices which caused them have ceased, the Commission thus remains competent under Articles 2, 3(g) and [82] of the Treaty to act with a view to eliminating or neutralising them.").

[15] Such an order is, in any event, merely declaratory because this obligation follows from the direct effect of Article 82 EC.

[16] *See* Joined Cases 6 & 7/73, Istituto Chemioterapico Italiano S.p.A & Commercial Solvents Corp. v. Comm'n, 1974 E.C.R. 223, ¶ 45.

[17] "Mesure corrective" in French, "Abhilfemaßname" in German. The French text reads: "elle peut leur imposer toute mesure corrective . . . qui soit proportionnée à l'infraction commise et nécessaire pour faire cesser effectivement l'infraction." The German text reads: "Sie kann ihnen hierzu alle erforderlichen Abhilfemaßnamen . . . vorschreiben, die gegenüber der festgestellten Zuwiderhandlung verhältnismäßig und für eine wirksame Abstellung der Zuwiderhandlung erforderlich sind."

[18] *See* Charles A. James, *The Real* Microsoft *Case and Settlement*, ANTITRUST, Fall 2001, at 58, 60; Barnett, *supra* note 9, at 551 ("While a remedy might not be limited to conduct that is identical to the conduct that constituted the violation, it should be limited to conduct that is closely related."); *see also* Carl Shapiro, Microsoft*: A Remedial Failure*, 75 ANTITRUST L.J. 739, 740 (2009).

ment 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."[19] According to recital 12 of Regulation 1/2003, 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.

Article 7 seemingly establishes a preference for behavioral remedies if they appear as effective as structural remedies. The notion of "equally effective" is, however, a complex one, as behavioral and structural remedies work differently. Structural remedies are aimed at changing the incentives of the firm(s) in the market, which is achieved once the remedies are implemented. Behavioral remedies, on the other hand, try to redress specific conduct in a context where incentives remain essentially unchanged.

If both types of remedies are considered "equally effective," the least "burdensome" remedy for the undertaking has to be chosen.[20] It is, however, prima facie not obvious that *categories* of remedies are more or less burdensome in terms of fundamental rights: while structural remedies may have a bearing on property rights if, for instance, a sale of assets is required, behavioral remedies bear upon the freedom to conduct a business, including the freedom to contract.[21] As a result, even in those rare cases where behavioral and structural remedies are equally effective, structural remedies cannot automatically be considered more burdensome.

Consequently, the Commission is entitled, within the limits set by the proportionality principle, to require the undertakings concerned to undo the distorting effect their anticompetitive behavior has had on the market.

III. WHY "REMEDIES"?

Why does the Commission not limit itself to imposing cease and desist orders coupled with fines? This could be sufficient to stop undesired

---

[19] Council Regulation 1/2003, *supra* note 2, art. 7(1).

[20] On the concepts of "equally effective" and "burdensome," see Michael Adam & Frank Maier-Rigaud, *The Law and Economics of Article 82 EC and the Commission Guidance Paper on Exclusionary Conduct*, 1 J. COMPETITION L. (ZWeR—ZEITSCHRIFT FÜR WETTBEWERBSRECHT) 131 (2009).

[21] *See* Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1, arts. 16 & 17; *infra* Part V.A.

conduct and, depending on the level of fines, might act as a deterrent, vis-à-vis both the infringer and other undertakings. What is the purpose of imposing more extensive remedies?

This question has already been partly addressed above in Part I. Harm to competition that is already done would persist if only cease and desist orders were imposed. In many cases, especially in network industries, the infringer could continue to reap the benefits of a past violation to the detriment of consumers. This is what remedies are intended to avoid and why Article 7 gives the Commission the power to impose remedies.

Remedies would be unnecessary if fines or other types of sanctions constituted a perfect deterrent. In other words, in a world without infringements, a discussion of remedies is superfluous. However, preventative measures are, inter alia, for economic and psychological reasons, unlikely ever[22] to lead to a total elimination of antitrust violations.[23] Remedies are therefore needed—even if they may be hard to design and difficult to monitor. Once an infringement has been properly identified, the infringement itself, but also the consequences of the antitrust violation, have to be tackled. Therefore, remedies only become an issue once an infringement has been properly identified and should—at least ideally—result not only in putting an end to the infringement in a narrow sense, but also in the restoration of competition to how it would have developed *but for* the anticompetitive conduct.[24]

IV. FINDING OF AN INFRINGEMENT VERSUS IMPOSING A REMEDY

The imposition of a remedy naturally presupposes the finding of an infringement. While it is advisable for the enforcer to think about a suitable remedy early on in a competition case, the finding of an infringement and remedy design are two separate questions, and as such must be kept entirely apart and should not be confused.

There may well be cases where effective remedies will be difficult to find. If, for example, in the absence of Article 8 interim measures[25] an abuse in a network industry has taken place for some time and the mar-

---

[22] *See, e.g.*, WILLIAM BREIT & KENNETH G. ELZINGA, ANTITRUST PENALTY REFORM: AN ECONOMIC ANALYSIS (1986) (noting in this context the very long-term perspective underlying the optimal deterrence model); Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1 (1989) (critiquing this long-term approach).

[23] *See* WOUTER P.J. WILS, EFFICIENCY AND JUSTICE IN EUROPEAN ANTITRUST ENFORCEMENT 173–79 (2008).

[24] *See infra* Part VII (discussing this point in more detail).

[25] *See* Lowe & Maier-Rigaud, *supra* note 1.

ket has tipped towards a particular technology, it may prove difficult to undo the anticompetitive consequences. However, the finding of an antitrust infringement is not dependent upon the ease of finding or designing a suitable remedy for that conduct.

As a result, a competition authority should not hesitate to find an infringement even if the remedy is not clear-cut.[26] One must not succumb to an "if you can't fix it easily, it ain't broke" fallacy. Not trying to fix something is only an option when it is not broken.

V. LIMITS TO THE COMMISSION'S POWER

A. Proportionality

The Commission's power is limited by the general principle of proportionality. In the present context, the principle of proportionality requires that the burden imposed on an undertaking in order to bring an infringement to an end does not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed.[27] The objective of safeguarding the competitive process is, however, a very high-ranking one since free competition is a basic principle underpinning the Community's economic policy according to Article 4 EC (as well as Article 3 (1)(g) EC).

Infringers may not rely on the right to property or the freedom to conduct business to fend off a fine sanctioning antitrust violations, as it has been explicitly held by the European Court of Justice.[28] The Court based this finding on the public interest restrictions to which the right to property and the freedom to conduct business are subject. This reasoning might apply to remedies in the same way as to fines. Note that even a measure taken by a Community authority leading to the insolvency or liquidation of a given undertaking is not prohibited as such by Community law.[29] The burden on an infringer claiming that a remedy is disproportionate is therefore likely to be a high one.

---

[26] Even in cases where efforts fail to design a remedy going beyond a cease and desist order (as discussed *infra* Part VII), the Commission has the possibility to impose a cease and desist order coupled with a fine.

[27] Case T-201/04, Microsoft Corp. v. Comm'n, 2007 E.C.R. II-3601, ¶ 1276.

[28] *See* Case C-308/04 P, SGL Carbon AG v. Comm'n, 2006 E.C.R. I-5977, ¶ 108 (Eur. Ct. Justice) ("So far as the appellant's argument relating to the freedom to conduct business and the right to property is concerned, it is sufficient to note that those principles are subject to public-interest restrictions and that they cannot be relevant in the context of setting a fine for an infringement of Community competition law.").

[29] Case 52/84, Comm'n v. Kingdom of Belgium, 1986 E.C.R. 89, ¶ 14; Case C-499/99, Comm'n v. Kingdom of Spain, 2002 E.C.R. I-6031, ¶ 38.

Where several effective remedies are available, there is in principle a role for the infringing undertaking in selecting the appropriate remedy.[30] It is in order to comply with this principle that, in certain cases, the Commission has invited the parties to put forward proposals for bringing an effective end to the infringement identified in the decision[31] or has presented alternative remedies in a Statement of Objections and asked the company concerned to comment on the alternatives.[32]

B. No Punishment

As mentioned above, a remedy is an entirely different instrument from a fine that the Commission can impose pursuant to Article 23 of Regulation 1/2003. A remedy is not intended to punish, and, unlike a fine, the imposition of a remedy does not require a finding of negligence, let alone intent.

A remedy does, nonetheless, often constitute a burden on the infringing undertaking, which may, therefore, perceive it as a punishment. The prospect of being the subject of an effective remedy also may have a deterring effect akin to that of the prospect of being fined.

Such side effects of successful remedy design do not curtail the Commission's discretion. Provided the Commission observes the principle of proportionality, the perception of a remedy as a punishment is immaterial. When assessing proportionality, the Commission may, however, have to take into account the totality of the measures taken against the infringer.

C. Equal Treatment

Certain remedies, such as, for example, a "must carry" obligation (i.e., distribution obligation), may give rise to equal treatment issues with respect to which third parties may benefit from the remedy. The Commission may have to decide which products must be carried/distributed by the infringer. It could be considered inappropriate to limit the benefits of such a remedy to complainants or to apply procedural criteria of

---

[30] *See* Case T-24/90, Automec v. Comm'n, 1992 E.C.R. II-2223, ¶¶ 51–52.

[31] *See, e.g.*, Case IV/26811—Continental Can Co., Comm'n Decision (Dec. 9, 1971), 1972 O.J. (L 7) 25. In *Commercial Solvents*, the European Court of Justice expressly recognized that the Commission may require the undertaking concerned to submit to it proposals with a view to bringing the situation into conformity with the requirements of the Treaty. Joined Cases 6 & 7/73, Istituto Chemioterapico Italiano S.p.A & Commercial Solvents Corp. v. Comm'n, 1974 E.C.R. 223, ¶ 45.

[32] This was done in the *Microsoft* case regarding an appropriate tying remedy, where Microsoft was asked to comment on a "must carry" and an "unbundling" remedy.

some other kind to delineate the group of beneficiaries. If possible, the infringer should therefore be required to accord any benefits on a non-discriminatory basis, although this could in certain cases be impractical.

If choosing among several beneficiaries cannot be avoided by careful remedy design, at least two potential guiding principles come to mind. First, a rigorous *but for* approach could be adopted. Under such an approach, the companies that were strongest prior to the infringement would be the most obvious beneficiaries. Second, a more forward-looking approach may be worth considering,[33] favoring the strongest competitors or customers at the time of the decision in order to restore the competitive process as effectively as possible.

D. Legal Certainty

A Commission decision must meet the exigencies of the principle of legal certainty. Any remedy imposed must, therefore, be clear and precise so that the undertaking may know without ambiguity its rights and obligations and may take steps accordingly.[34]

VI. COMMISSION PRACTICE

How has the Commission made use of its power to impose remedies pursuant to Article 7 and its predecessor, Article 3 of Regulation 17/62? The following brief summary of some recent cases will, by way of example, include behavioral and structural remedies in the context of Article 7. Commitments offered by undertakings under Article 9 of Regulation 1/2003 also will be described.[35]

In addition to obliging an undertaking to end an infringement, the Commission regularly requires the undertaking to inform its customers of the decision and of the nullity of certain contractual provisions. Frequently, the undertaking also will have to report within or during a certain period to the Commission regarding compliance.

With a cease and desist remedy in December 2007, MasterCard was ordered to stop applying its current intra-EEA (European Economic Area) fallback interchange fees for consumer credit and debit cards by

---

[33] *See* Shapiro, *supra* note 18, at 748.

[34] Joined Cases 92 & 93/87, Comm'n v. French Republic et al., 1989 E.C.R. 405, ¶ 22 (Eur. Ct. Justice).

[35] *See* Council Regulation 1/2003, *supra* note 2, arts. 7(1) & 9(1).

the end of a transition period of six months and to refrain from adopting measures having a similar effect.[36]

MasterCard's Multilateral Interchange Fee (MIF) was found to restrict competition under Article 81(1) as it restricted price competition between acquiring[37] banks by artificially inflating the basis on which these banks set their charges to merchants.

> A MIF effectively determines a floor under the merchant service charge and merchants are unable to negotiate a price below it. This considerably inflated the costs of payment card usage at merchant outlets to the detriment of merchants and their customers. For instance, the Commission estimated that MasterCard's MIF accounted for more than 70 percent of the merchant service charges for credit cards in Belgium (2002) and for approximately 60 percent of these charges in Italy (2003). If MasterCard operated without a MIF, merchants would pay lower prices for accepting cards and, as a consequence, their customers should also incur lower costs for shopping.[38]

Examples of more far-reaching positive measures[39] to be undertaken by companies pursuant to a Commission decision primarily derive from input and customer foreclosure cases in which a duty to supply or to grant licenses/access to infrastructure/information are imposed.

One example is the widely discussed *Microsoft* case. In its 2004 decision, the Commission found that Microsoft had abused its dominant position in PC operating systems by (1) refusing to supply interoperability information necessary for competitors to be able to effectively compete in the workgroup server operating system market; and (2) tying its Windows Media Player with Windows.[40]

---

[36] Interchange fees are charged by a cardholder's bank (the issuing bank) to a merchant's bank (the acquiring bank) for each sales transaction at a merchant outlet with a payment card. When a cardholder uses a payment card to buy from a merchant, the merchant receives from the acquiring bank the retail price less a merchant service charge. This merchant service charge is the price a merchant must pay to his bank for accepting cards as means of payment. The issuing bank, in turn, pays the acquiring bank the retail price minus the MIF. *See infra* text accompanying note 38. The retail price is deducted from the bank account of its customer. *See* Press Release, European Comm'n, Antitrust: Commission Prohibits MasterCard's Intra-EEA Multilateral Interchange Fees—Frequently Asked Questions (Dec. 19, 2007) (Memo/07/590) (providing more details on the *MasterCard MIF* case).

[37] *See id.*

[38] *Id.*

[39] Note that the obligation to end certain infringing behavior may in fact be akin to the obligation to actively take certain measures (e.g., in refusal to supply cases).

[40] Case COMP/C-3/37.792—Microsoft Corp., Comm'n Decision, 2007 O.J. (L 32) 23 (Mar. 24, 2004) (*Microsoft Commission Decision 2004*), *available in full at* http://ec.europa.eu/competition/antitrust/cases/decisions/37792/en.pdf, *aff'd*, Case T-201/04, Microsoft Corp. v. Comm'n, 2007 E.C.R. II-3601 (Ct. First Instance).

The decision ordered *Microsoft* to disclose the information that it had refused to supply and to allow its use for the development of compatible products. The disclosure order was limited to interface specifications (not source code) and to ensuring interoperability with the essential features that define a typical workgroup network. It applied not only to the complainant Sun, but to any undertaking that had an interest in developing workgroup server operating systems.

The conditions under which Microsoft makes these disclosures have to be reasonable and non-discriminatory. Microsoft may require a reasonable and non-discriminatory remuneration for the production of the documentation, as well as for specific intellectual property rights that the Commission's decision might prevent it from fully enforcing against beneficiaries of the order to supply (provided that Microsoft could establish that these specific intellectual property rights are valid in the EEA).[41] With respect to tying, the decision ordered Microsoft to provide a version of Windows that did not include Windows Media Player. The Commission did not prevent Microsoft from also offering a bundled version of Windows including Windows Media Player.

Structural remedies have not been the default choice in antitrust cases for the Commission. Among others, structural remedies were devised in *Raso*,[42] which concerned an exclusive right to supply necessary temporary labor to carry out port operations (such as loading, unloading, embarkation, disembarkation, and storage) granted to a port company that was also active in port handling operations. This dual role created a conflict of interest that resulted in the company with the monopoly for the supply of temporary labor charging excessive prices and supplying its competitors with less efficient workers. In line with the Court's judgment in *RTT v. GB-Inno-BM*,[43] the Commission found that the conflict of interest of being the monopoly supplier of temporary labor while at the same time also being active in port services requiring such labor was inherently an abuse, as the firm was "legally placed in a position in which [it was] induced to commit abuses if they have an interest in so doing."[44] The decision is of some importance as the Commission also commented on behavioral remedies, such as the legal unbundling of the different parts.[45]

---

[41] *See Microsoft Commission Decision 2004, supra* note 40, art. 5.

[42] *See* Case 97/744, Italian Ports Legislation Relating to Employment, Comm'n Decision, 1997 O.J. (L 301) 17 (*Raso*).

[43] *See* Case C-18/88, Régie des Télégraphes et des Téléphones (RTT) v. GB-Inno-BM S.A., 1991 E.C.R. I-5941 (Eur. Ct. Justice) (*RTT*).

[44] *Raso*, 1997 O.J. (L 301) 17, ¶ 30(c).

[45] In *Raso*, it is stated that "even separating the two roles would not be sufficient if it

On November 26, 2008, the Commission adopted an Article 9 decision in the energy sector rendering commitments by E.ON, the world's largest utility company, legally binding.[46] The *E.ON* cases concern alleged infringements in the wholesale and the balancing markets for electricity (the wholesale case and the balancing case, respectively). In a nutshell, the alleged infringement by E.ON in the wholesale market consists of strategically withholding capacity in order to drive up the price. For a company with market power, it pays to reduce quantity in order to increase prices in a situation of almost inelastic demand and lack of storage capability. As supply is based on the merit curve,[47] there is a price quantity trade-off to be considered when deciding whether to offer the production of a plant that is below effective demand in the merit curve order.

Figures 1 and 2 present an abstract demonstration of such an effect. Figure 1 captures the situation before the withdrawal of capacity. It shows the inelastic demand for electricity and the resulting price. Further, it shows the plants (shaded) in the merit curve (supply function) that are owned by the dominant firm. Figure 2 then demonstrates the price and quantity effect of a withdrawal of capacity (in this case of the coal plant A of Figure 1). Although the dominant firm now offers less capacity as gas-fired power plants of competitors go online, the overall effect on profits for the dominant firm is positive. The surface B indicates the loss in profits due to the withdrawal of plant A but the shaded area above the former price point (P_t) and below the new price (P_{t+1}) indicates the new profits due to the withdrawal. A comparison of these two areas reveals that withdrawing capacity is beneficial for the dominant firm but also for its competitors, which free ride on the capacity restriction.

occurred within the same group. It would be necessary for the two undertakings with separate roles to be entirely independent." *Id.* ¶ 30(f). Thereby, the Commission clearly declined legal unbundling/information firewall types of remedies. In *RTT* the Court similarly concluded that "the maintenance of effective competition . . . require[s] that the drawing up of technical specifications . . . and the granting of type-approval must be carried out by a body which is independent . . . ." *RTT*, 1991 E.C.R. I-5941, ¶ 26. It should be noted that structural remedies were immediately considered proportional despite the fact that both cases had Article 86 aspects and behavioral remedies had not been tried.

[46] *See* COMP/39.388—German Electricity Wholesale Market & COMP/39.389—German Electricity Balancing Market, Comm'n Decision (Nov. 26, 2008), 2009 O.J. (C 36) 8 (summary), *available in full at* http://ec.europa.eu/competition/antitrust/cases/decisions/39388/en.pdf; *see also* Press Release, European Comm'n, Antitrust: Commission Opens German Electricity Market to Competition (Nov. 26, 2008) (IP/08/1774).

[47] The merit curve depicts the variable cost per MWh of different generation plants in ascending order. It is the electricity market supply curve. Figures 1 and 2 depict the typical shape of this so-called merit curve.

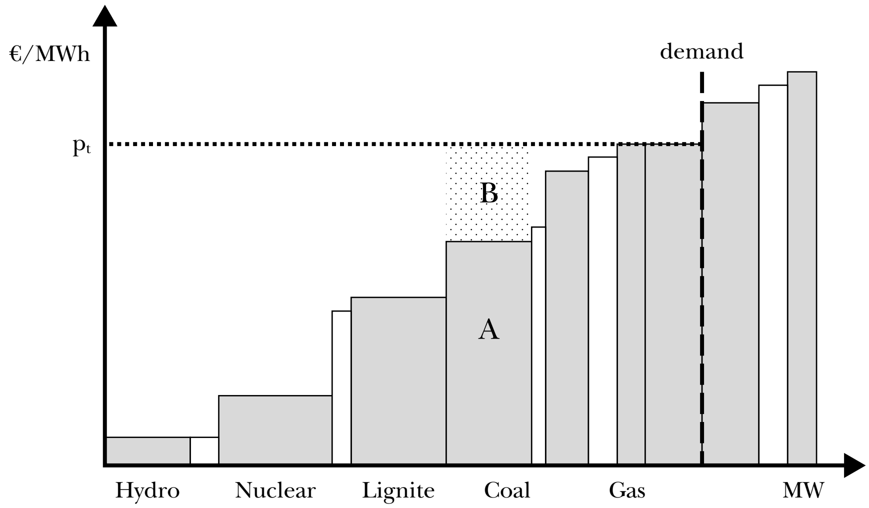

FIGURE 1:
MERIT CURVE BEFORE CAPACITY WITHDRAWAL

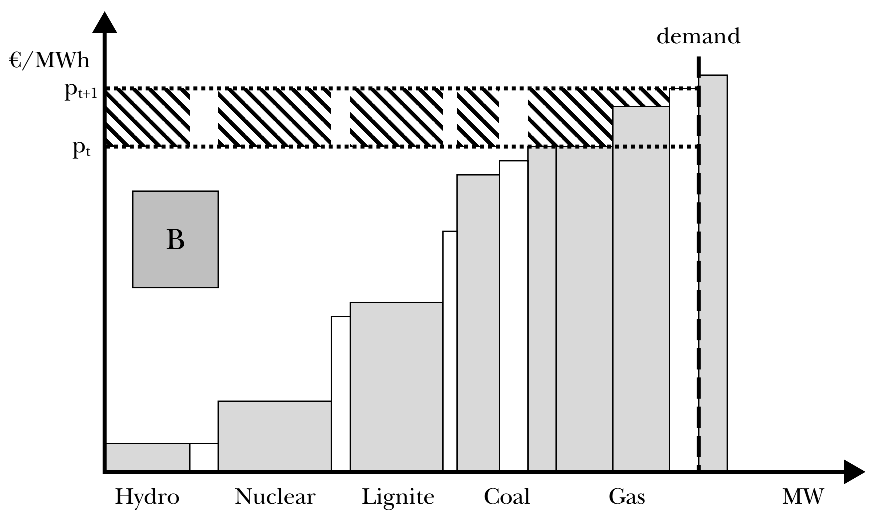

FIGURE 2:
MERIT CURVE AFTER CAPACITY WITHDRAWAL (COAL PLANT)
RESULTING IN HIGHER PRICES

The structural remedy proposed by E.ON that is about to be implemented consists of divesting about one-quarter of the E.ON generation capacity, i.e., about 5000 MW. More specifically, this generation capacity is not tied to supply contracts and concerns not only capacity that was allegedly withdrawn but also baseload capacity. In practice, E.ON will divest generation capacity from different types of technologies and fuels, i.e., nuclear, hydroelectric, lignite, hard coal, gas, and pump storage. With less infra-marginal capacity, the positive price effect is less likely to dominate the negative quantity effect, rendering capacity withdrawals unprofitable in the future.[48] In addition, once the commitments are implemented, E.ON will have an incentive to build up more capacity, thereby increasing total market capacity and competition.

The alleged infringement with respect to the balancing market consists of a deliberate preference of E.ON in its function as Transmission System Operator (TSO) for more expensive E.ON secondary reserves balancing capacity. A TSO requires balancing reserves to be able to synchronize the network. Primary reserves are automatic reserves that are specific and offered by most plants. Secondary reserves can be ordered within seconds by the TSO, which has direct control over them. Tertiary reserves (also called minute reserves) can be ordered by the TSO from a producer within minutes. The alleged abuse is an exploitative abuse as it is not about excluding tertiary reserves but about deliberately resorting to more expensive E.ON-owned secondary (rather than tertiary) reserves to synchronize the network.

The structural remedy to be implemented by E.ON consists of the full ownership unbundling of the TSO and the network. A regulatory or behavioral remedy would have been impossible to administer as the issues occurring on a quarter of an hour basis or even more frequently can hardly be solved by protocols or other non-structural measures. Behavioral alternatives to a divestiture commitment were considered unlikely to be equally effective in meeting the concerns of the preliminary assessment.

In addition to the *E.ON* cases, the Commission also made binding a commitment to structural remedies in the *RWE Gas Foreclosure* case.[49]

---

[48] In terms of Figure 1 and Figure 2, this implies that the shaded areas are reduced via divestiture to a size below that of area B, the lost profit of withdrawing plant A. In that case, the quantity effect dominates the price effect—capacity withdrawals would only be profitable if electricity producers collude and devise a mechanism to compensate those that withdraw.

[49] Press Release, European Comm'n, Antitrust: Commission Welcomes RWE Proposals for Structural Remedies to Increase Competition in German Gas Market (May 31, 2008) (Memo/08/355).

The Commission had concerns that RWE may have abused its dominant position on its gas transmission network to restrict its competitors' access to the network, thereby violating Article 82 of the EC Treaty. The suspicion related to a possible refusal to supply gas transmission services to other companies and to behavior aimed at lowering the margins of RWE's downstream competitors in gas supply ("margin squeeze"). In reaction to the Commission's concerns, RWE offered to divest its entire Western German high-pressure gas transmission network.[50]

Structural remedies are also not excluded in the ongoing *ENI* case concerning an Italian-state controlled company active at multiple levels of the production, transportation, and supply chains in the energy sector. The case concerns an alleged refusal to grant access to capacity available on the transport network (capacity hoarding), the granting of access in an allegedly less useful manner (capacity degradation), and an alleged strategic limitation of investment (strategic underinvestment) in ENI's international transmission pipeline system.[51]

---

[50] *See* COMP/39.402—RWE Gas Foreclosure, Comm'n Decision (Mar. 18, 2009), 2009 O.J. (C 133) 10, 10–11, *available in full at* http://ec.europa.eu/competition/antitrust/cases/decisions/39402/en.pdf. In that case,

> the Commission came to the preliminary view that RWE might have infringed EC Treaty rules on the abuse of a dominant market position (Article 82), notably by two types of behaviour:
>
> - firstly, RWE may have refused access to its network, notably by various means related to RWE TSO's capacity management. RWE may have pursued a strategy aimed at systematically keeping the transport capacity on its gas network for itself;
> - secondly, RWE may have intentionally set its transmission tariffs at an artificially high level in order to squeeze RWE's competitors' margins. Such a "margin squeeze" has the effect of preventing even a competitor as efficient as RWE from competing effectively on the downstream gas supply markets or limiting competitors' or potential entrants' ability to remain in or enter the market.
>
> To address the Commission's competition concerns, RWE committed to divest its existing Western German high-pressure gas transmission network, including the necessary personnel and ancillary assets and services.
>
> Without control over the transmission network, RWE will no longer be able to favour its own supply business. The Commission also ensured that the purchaser of the network will have no incentives to favour its own supply business, since the network can only be divested to purchasers which do not give rise to prima facie competition concerns.

Press Release, European Comm'n, Antitrust: Commission Opens German Gas Market to Competition by Accepting Commitments from RWE to Divest Transmission Network (Mar. 18, 2009) (IP/09/410). *See also* Press Release, RWE, RWE Seeks Settlement with European Commission (May 31, 2008), *available at* http://www.rwe.com/generator.aspx/presse/language=en/id=76864?pmid=4002210.

[51] *See* Press Release, European Comm'n, Antitrust: Commission Confirms Sending Statement of Objections to ENI Concerning Italian Gas Market (Mar. 19, 2009) (Memo/09/120).

VII. EFFECTIVE REMEDIES

As mentioned above, under Article 7 of Regulation 1/2003, the Commission has the power to impose any remedy necessary "to bring the infringement *effectively* to an end."[52]

The addition of the term "effectively" could be interpreted by reference to the *Ufex* case referred to in Part I.A. above. In other words, to bring an infringement *effectively* to an end, a remedy must not only bring a certain conduct to an end, but must also remedy the distortive effect the behavior has had on the market concerned. The aim should be to re-establish the competitive situation, i.e., the competitive process that would have prevailed *but for* the infringement.[53]

This is also in line with an effects-based approach to unilateral behavior, where an emphasis is placed on analyzing the effects of certain behavior (rather than its form). If it is established that the behavior of a dominant company produces or is liable to produce certain anticompetitive effects, the aim of a remedy must be to restore effective competition by eliminating the likely anticompetitive effects.

A. The Traditional Approach: Mirroring the Abuse

A review of past Commission practice reveals that, very often, the chosen remedy (simply) mirrors the abuse: A refusal to supply, be it access, a license, information, or outlet capacity, triggers an obligation to supply what has been withheld. An illegal tie is remedied by an obligation to untie. Mirroring the abuse may be the intuitive remedy of choice. However, in the event that this intuitive remedy is not likely to be successful or effective, one must further explore what instruments are at the Commission's disposal—taking the effect of the infringement as a starting point.

B. Beyond Mirroring the Abuse

An example may illustrate how an enforcement authority may consider going beyond mirroring the abuse.

---

[52] Council Regulation 1/2003, *supra* note 2, art. 7(1) (emphasis added).

[53] Some commentators refer to restoring the situation *ex ante*, but *ex ante* does not necessarily equal the situation *but for*. *Ex ante* is a step (or many steps) back in time whereas *but for* refers to a counterfactual scenario had the infringement not taken place. If the purpose of the remedy is to eliminate a distortion of competition, *but for* seems to be the more appropriate aim, and therefore the more appropriate term. While *ex ante* will often be a proxy for *but for*, it is not the aim of the remedy.

Where there has been customer foreclosure, as in a tying case, an effective remedy grants access to customers. It must be borne in mind that the immediate aim of the remedy is not necessarily to allow competition on an equal footing, but to redress harm to competition. For a limited period of time, it may therefore be necessary to give the infringer's competitors an advantage over the infringer in order to restore the competitive process—without undermining the infringer's incentive to compete on the merits.[54]

Thus, in a tying scenario, it may be that mere untying will not be sufficient to achieve a restoration of the competitive process, as the market distortion due to a long-standing abuse may still persist or may have led to important advantages for the infringer. A price differential between the unbundled and any bundled version that remains on sale may have to be imposed to make the remedy more effective, but even that may not be sufficient to eliminate or neutralize anticompetitive effects. In such cases, a must-carry remedy may be called for. But even a must-carry obligation—in addition to often being difficult to design and monitor—may not be sufficient to undo harm to competition. It may therefore be appropriate to also impose an advertising ban on the previously tied product for a specific period. It may even be appropriate to oblige the infringer to contribute to an effective marketing of the competing products, the market position of which has been negatively affected by the violation. If proportionate and necessary, all these measures—price differential, must-carry, active marketing support—are in theory within the Commission's power pursuant to Article 7.

The Commission arguably may even oblige the infringer to pay money to provide active product development support to competitors negatively affected by its illegal practices. If, for example, product development among the infringer's competitors has been delayed by the illegal refusal of necessary information and if these competitors cannot "catch up on time" by their own means due to the refusal, such a support obligation may well be an appropriate remedy to restore the competitive process.

An alternative approach that equally goes beyond simply mirroring the abuse in designing the remedy is to consider and modify the underlying incentive structure of the firm to engage in anticompetitive behav-

---

[54] On the importance of not prohibiting competition on the merits and not undermining the incentive to compete, see Gregory J. Werden, *Remedies for Exclusionary Conduct Should Protect and Preserve the Competitive Process, infra* this issue, 76 ANTITRUST L.J. 65 (2009) (stating, in Parts III.B and III.C that remedies for exclusionary conduct should protect and preserve the competitive process).

ior. This approach avoids the danger of handcuffing the dominant firm. Although tackling the incentives that have inevitably led to the infringement will not necessarily establish competition as it would have developed in the absence of an infringement, it tackles the root of the problem and removes the incentives to engage in anticompetitive behavior that typically remain untouched by a more regulatory approach.

Another approach beyond mirroring the abuse would be to seek to lower the entry barriers to the market in which the undertaking in question is dominant.[55]

C. Imposing Specific Measures vs. Imposing Objectives

How should such remedies be formulated? What is the desirable degree of detail? The most intuitive options for formulating a remedy going beyond a cease and desist order are the following: A company may be ordered to (a) undertake specific measures; (b) undertake specific measures to achieve specific objectives; or (c) undertake appropriate (types of) measures to achieve specific objectives. Option (a) will, in many cases, create too great a risk of circumvention, i.e., the undertaking adopts the specific measures required (only), but ensures simultaneously that these measures do not achieve their purpose. A notable exception may, of course, be a remedy ordering the divestiture of a portion of the assets of a firm. Option (b) offers more guidance than option (c) but also may invite circumvention. The most promising way of avoiding circumvention, in particular in the case of behavioral remedies, is often likely to be option (c): under that option, responsibility for achieving the aim of the remedy rests largely with the infringer. Furthermore, in certain cases, the specific objectives often may be easier to define for the Commission than the specific measures. The proportionality principle also may be an argument in favor of option (c) provided that several measures appear equally effective.

The above can be illustrated by the following example. If the aim of a remedy is to achieve access to a booking system, a remedy adopted under approach (a) above might order the addressee to grant access around the clock to companies A, B, and C for price X. Such a remedy could be circumvented, e.g., by charging exaggerated cancellation fees or by not processing reservations by A, B, and C as quickly as the addressee's booking and, thereby, creating a risk that reservations requested through A, B, and C cannot be confirmed. A remedy following approach (b) above would require access for companies A, B, and C

---

[55] *See* Shapiro, *supra* note 18, at 748–53. R

around the clock subject to identical cancellation fees and processing modalities as the addressee's bookings in order to allow them to compete on equal footing with the addressee of the remedy. A remedy pursuant to approach (c) above would impose the provision of access to competitors of the addressee on fair, reasonable, and non-discriminatory terms in order to enable them to compete on equal footing with the addressee.

D. Remedying the Distributive Consequences of an Infringement

While the previous section has focused on remedies restoring the competitive process, the effects of an infringement referred to by the Court in *Ufex*[56] frequently are not limited to the competitive process. Rather, there are often also effects of a distributive nature. In view of the objective of remedy design to bring the effects of an infringement to an end,[57] it may therefore be worth exploring the possibility of also remedying (at least partially) the distributive effects of the infringement and not only effects on the competitive process.[58] Is the Commission at liberty to oblige an infringer to compensate its (final) customers for the losses sustained due to the violation? The traditional response to this question would be to leave compensatory measures to the (national) courts. The Commission has published a White Paper on damages actions for breach of the EC antitrust rules which aims at making corrective justice more effective in the antitrust context.[59]

There are, indeed, a number of practical and policy reasons for having the distributive consequences of competition law infringements remedied via private damage claims. As of now, the Community Courts have not attributed any distributive competencies to the Commission and most commentators would not do so. If, however, the enforcement of competition law is all about protecting consumer welfare and Article 7 is about remedying the effects of an infringement, it is not obvious that Article 7 should preclude direct measures to restore consumer welfare and, thereby, to remedy the distributive effects of an infringement.

---

[56] *See* Case C-119/97, Ufex et al. v. Comm'n, 1999 E.C.R. I-1341.

[57] See text at the beginning of Part VII.

[58] Note that remedying distributive effects is distinct from imposing a fine or other sanctions on the company.

[59] European Comm'n, *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2008) 165 final (Apr. 2, 2008), *available at* http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf. *See also* Friedrich Wenzel Bulst, *Of Arms and Armour—The European Commission's White Paper on Damages Actions for Breach of EC Antitrust Law*, 2008 BUCERIUS L.J. 81 (detailed discussion of the White Paper), *available at* http://www.law-journal.de and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1162811.

Independently of how this question is to be resolved, the focus of Article 7 is undoubtedly on restoring competitive market conditions.

VIII. PROCEDURE

The Commission does not usually separate the procedure for finding an infringement and designing a suitable remedy[60]: Both issues are generally addressed at the same time in the same statement of objections, administrative hearing, and decision.

In more complex cases, it may be appropriate to formalize market testing of an envisaged remedy similar to standard practice in merger proceedings, where both the economic impact of a proposed merger and the adequacy of proposed remedies are investigated. The quality of remedies might also be improved if they were made a mandatory subject in the administrative hearing.

In specific cases, it may be worth considering a staggered remedy. This should not result in a trial and error approach going through a number of remedies with only a small chance of success. On the contrary, a staggered remedy should only be used, if ever, when serious proportionality issues arise.

The decision would then foresee several steps. In a first step, the least burdensome measure (e.g., a mere cease and desist order) would be imposed, subject to a time limit within which the Commission would assess the measure's effect on the market and the sustainability of such an effect, if any. The second step would provide for a more effective, but also more intrusive remedy, which could also be a structural one. The undertaking concerned would be obliged to comply with that second remedy once the Commission has established that the infringement was not ended within the time limit prescribed for the first step.[61] If one takes the view that such an establishment requires a separate statement of objections, such a statement would be limited to a demonstration of the proportionality of the second remedy. Proportionality could be established by showing that the first remedy was not effective, given that all other proportionality issues that could potentially arise already should have been addressed in the original infringement decision.

---

[60] Note that Article 8 of Regulation 1/2003 allows the Commission to order interim measures under certain circumstances. *See* Lowe & Maier-Rigaud, *supra* note 1, at 601–09.

[61] This may be the case despite compliance with the first remedy (i.e., if that remedy turns out not to have been sufficient) or due to a lack of compliance with that remedy, in which case Article 24 proceedings may have to be coordinated with monitoring compliance with the second remedy.

IX. CONCLUSION

A productive discussion of remedies and remedy design logically starts after the establishment of a well-defined infringement. The appropriate starting point for sound remedy design is the effect of the infringement at hand. While it may at times be a complex task to impose a truly effective remedy that establishes competition as it would have developed in the absence of the infringement, Article 7 leaves ample room for creative thinking and innovative remedies of a structural and behavioral kind.