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Chapter 20

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by

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Chapter 21

REMEDIES AND SANCTIONS FOR UNLAWFUL UNILATERAL CONDUCT

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Chapter 20

QUO VADIS ANTITRUST REMEDIES*

*Philip Lowe** and Frank Maier-Rigaud****

I. INTRODUCTION

The effectiveness of any competition authorities' enforcement depends as much on the actual implementation of the adopted decisions as on the investigation of the infringements and the finding of liability. Once liability has been established, re-establishing the conditions for effective competition is the ultimate objective of competition law and remedies are the means to achieve this goal. Remedies, and their proper design, are therefore a key aspect in enforcing competition policy and allowing markets to develop to their fullest potential.

In order to ensure effective enforcement, the issue of remedies has to be addressed from the very beginning of any case.[1] This also encompasses the question whether antitrust law enforcement is indeed the best approach to tackle the problem identified in the market. It is therefore of crucial importance to take a holistic approach to the problem identified and to consider the advantages or disadvantages of a legislative or regulatory approach to the problem at hand. Of particular relevance in this context is the question within what time frame competition law can effectively bring relief.[2]

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1 The advantage of an early internal reflection on remedies in parallel with the definition of the theory of harm of the case allows a clarification of the counterfactual, despite the possible bias introduced with such an early assessment. It further allows a well informed priority setting, as an early discussion of the possible remedies should help identify whether competition law (and competition remedies) is a suitable instrument to deal with the issues in question and may be useful with respect to deciding upon the relevant procedure.

2 Interim measures are one element allowing a speedier intervention or at least a freezing of the status quo.

The definition of adequate remedies is a complex exercise that has to take into account not only their theoretical suitability to address a competition distortion but also their practical implementation. Remedies are seldom self-enforcing, even in cases where they are defined in very general terms as in a cease-and-desist order.

Several parameters therefore have to be taken into account when defining remedies:

- the degree of detail of the obligations imposed, i.e. whether they should be defined in general terms (cease and desist) or include detailed prescriptions;
- the ability and incentives of third parties (competitors, customers) to support monitoring;
- the contribution that other bodies, such as national courts, sector regulators or arbitrators, could provide to the effective enforcement of the remedies;
- the necessity and role of external assistance supporting the Commission's monitoring (for instance using a trustee mechanism).

Choices made with regard to these parameters are inter-related and will also have to be reflected in the drafting of the remedies. For instance, if the Commission intends to rely on private enforcement or on arbitration for the enforcement of part of the remedies, it will have to draft detailed remedies to ensure that their interpretation raises little difficulty. Such detailed remedies may, however, be less effective as they may not have properly apprehended all possible problems of implementation despite higher specificity. On the contrary, remedies defined in broad terms are normally more effective but will primarily have to be enforced by the Commission.

In the following the legal framework of European competition law will briefly be sketched out before some suggestions regarding the way forward with respect to remedies in antitrust and in particular in unilateral conduct cases are outlined. This paper does not provide a review of the relevant case law but focuses on particular issues such as for instance the role of structural remedies, where developments are needed and underway. As fines, although an integral part of the deterrent and sanctioning system against anticompetitive conduct, can under no circumstances be considered as a remedy, fines will not be addressed. It should also be noted that a clear distinction between the finding of an infringement, i.e. liability, and remedies has to be kept in mind. All too often, in particular in discussions of remedies in an international context, these two aspects are confused and allegedly softer, behavioral remedies are considered more appropriate in order to accommodate more general doubts relating not to the remedy but to the question of liability and whether the conduct should be considered a competition law infringement to begin with.

Section II sets out the legal framework discussing in turn Article 7, Article 8 and Article 9 decisions. In Section III three main suggestions regarding the role of structural remedies, the role of commitments decisions under Article 9 and the role of interim measures are made. Section IV concludes.

II. LEGAL FRAMEWORK

Based on Regulation 1/2003, it is incumbent on the Commission to "effectively bring the infringement to an end."[3] For this purpose, the Courts recognised that the Commission must not only "prohibit the continuation of certain action, practices or situations which are contrary to the treaty," but also "may include an order to do certain acts or provide certain advantages which have been wrongfully withheld."[4] The Commission would thus be in breach of its responsibility if it were to adopt a decision that is unfit to effectively establish compliance with competition law.

Bringing an infringement effectively to an end entails:

- to make good the conduct at stake,[5] by prohibiting the infringing conduct;
- to eliminate its consequences,[6] i.e. preventing the undertakings concerned from continuing to enjoy the fruits of their illegal behaviour and re-establishing effective competition on the market;
- to prevent its repetition[7] – whether in the form of a repetition of the same conduct or conduct having an equivalent effect on the market.[8] A prohibition that could be circumvented by way of a mere change of means would fail to achieve the objective sought, especially in cases where the competitive assessment of the conduct at stake focuses on its effects rather than its form. Similarly, the effectiveness principle allows for the adoption of measures aimed at ensuring an effective enforcement, such as reporting duties, the information of third parties or the appointment of a monitoring trustee.

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3 See Council Regulation 1/2003, O.J. L 1/1 (2003), Article 7.

4 See Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corp. v. Comm'n, Case 6-7/73, 1974 ECR 223, para. 45 (hereinafter Commercial Solvents).

5 See id.

6 See AKZO Chemie BV v. Comm'n, Case C-62/86, 1991 ECR I 3359, para. 155.

7 See Commercial Solvents, supra note 4, para. 46.

8 See, e.g., Hilti AG v. Comm'n, Case C-53/92P, 1994 ECR I 666, or Tetra Pak Int'l SA v. Comm'n, C-333/94P, 1996 ECR I 5951 (hereinafter Tetra Pak II).

Although the case law cited refers to Article 7 prohibition decisions, the test under Article 9 commitment decisions, although worded differently, is not of a different nature. Commitments must offer a satisfactory resolution to the Commission's concerns and remove its grounds for action. The Commission is therefore precluded from rendering commitments binding that provide for an insufficient resolution of the concerns raised by the conduct in question.

For interim measures under Article 8, the objective is to prevent the most detrimental effects of the infringement, i.e. to put a halt to further effects and freeze the status quo. The ultimate aim of bringing an infringement effectively to an end is achieved only subsequently with the adoption of a final decision closing the investigation.

A. Remedies under Article 7

Pursuant to Article 7(1) of Regulation (EC) No. 1/2003, the Commission is entitled, where it finds an infringement of Article 81 or 82 of the EC Treaty, to require the undertakings concerned "[...] 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 [...]."

Prohibition decisions under Article 7 are the most commonly used instrument in antitrust. An Article 7 decision encompasses three aspects:

- the finding of an infringement relating to a given conduct - that occurred in the past and may still be ongoing;
- an injunction to bring the infringement effectively to an end if it is still ongoing. Such an injunction may impose on the addressee to refrain from a certain conduct and from similar conduct in the future but it may also entail positive obligations, i.e. more or less detailed behavioural or structural remedies;
- a separate, punitive aspect (a deterrent factor) via the imposition of fines under Article 23 of Regulation (EC) No. 1/2003.

The second and third aspects should not be confused. Remedies are not sanctions against undertakings, nor compensations granted to harmed parties; they constitute the means to bring the infringement effectively to an end. They ensure that competition at least as it was prior to the infringement is restored.

The punitive aspect is dealt with via the imposition of a fine. Similarly, while fines and the prospect of private damage claims deter

future infringements, they cannot ensure that the effects of the infringement are undone and that the market functioning is restored. If the infringement still has effects on the market at the time of the adoption of the decision, Article 7 imposes that remedies be adopted so as to bring it effectively to an end, a result that cannot be achieved through fines.

These three aspects can be present to various degrees in a given decision. For instance, where the Commission adopts a prohibition decision relating to past infringements,[9] the legitimate interest of doing so may be the need to clarify a legal position, the need to promote exemplary behaviour, the interest in discouraging any repeat infringement, given its particularly serious nature, or the interest in enabling the injured parties to bring matters before the national civil courts.[10] In this context the remedial aspect is likely to be of a lesser importance, unless the effects of the infringement still bear on the market.

Enforcement of these various elements is ensured by the Commission and national courts. Enforcement of the remedial obligations bearing on the undertakings concerned is assured by the Commission via financial incentives, i.e. periodic penalty payments under Article 24 of Regulation (EC) No. 1/2003.

B. Interim Measures under Article 8

Article 8(1) of Regulation (EC) No. 1/2003 sets out that "in cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative, may by decision, on the basis of a prima facie finding of infringement, order interim measures."

The objective of an interim measures decision is fulfilled if it can be shown that the damage "could no longer be remedied by the decision to be adopted by the Commission upon the conclusion of the administrative procedure."[11] The Commission may thus adopt an interim decision taking protective interim measures that it deems to be indispensable for ensuring the effectiveness of any final decision it later adopts in respect of the conduct under investigation.

As set out by established case law of the Court, the application of Article 8 requires two main substantial conditions:

- The prima facie finding of an infringement: This test sets a relatively low evidentiary threshold. For instance case law refers to the fact that "at first sight, there were serious doubts as to the

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[9] See GVL v. Comm'n, Case 7/82, 1983 ECR 483.

[10] See Sumitomo Chemical and Sumika Fine Chemicals v. Comm'n, Case T-22-23/02, 2005 ECR II 4065 para. 132 sq. The existence of such legitimate interest must be considered at the stage of the decision by reference to the particular circumstances of the case considered.

[11] See id. at paras. 80-81.

legality"[12] of the conduct in question but considers that this test does not go as far as "the requirement of a finding of a 'clear and flagrant infringement' at the stage of interim measures."[13] This standard, however, requires that the prima facie finding remains within the analytical framework of an Article 7 decision.

- The urgency, due to the risk of serious and irreparable damage to competition: First, Article 8 refers to the notion of damage to competition, whereas older case-law referred to damage to the party requesting the adoption of such measures by the Commission. Second, the risks for competition justifying the urgency have to be balanced against the risks of serious and irreparable damage to the undertakings concerned.

With respect to the substantive definition of remedies in Article 8, the conditions mentioned above have the following consequences:

- Remedies to be adopted on an interim basis, for the limited period of time as set out in Article 8(2), have to be "of a temporary and conservatory nature and restricted to what is required in the given situation,"[14] having regard to the legitimate interest of the undertakings concerned.[15]
- The scope of interim measures is limited to what would be required in the framework of the final finding, i.e. they cannot be used to address issues that do not constitute at first sight infringements of competition law. However, in order to take into account the provisional nature of these measures, it is possible to require incidental flanking obligations that are aimed at managing the specific interim circumstances until the final closure of the case.

Enforcement of compliance with the measures ordered under Article 8 bears primarily on the Commission, whose investigation of the infringement is continuing in parallel until the adoption of a decision closing the case (under Article 7, 9 or less probably 10). In addition, given that Article 8 decisions are valid for a limited period of time, it is incumbent on the Commission to monitor the implementation and efficacy of the measures adopted, so as to renew them in due time and possibly add appropriate amendments.

[12] See Automobiles Peugeot SA and Peugeot SA v. Comm'n, Case T-23/90, 1991 ECR II 653, para. 63.

[13] See La Cinq SA v. Comm'n, Case T-44/90, 1992 ECR II 1, para. 62.

[14] See Camera Care v. Comm'n, Case 792/79R, 1980 ECR 119, para. 19.

[15] See IMS Health v. Comm'n, Case T-184/01R, 2001 ECR II 3193, para. 123 et seq.

C. Commitment Decisions under Article 9

Article 9(1) of Regulation (EC) No. 1/2003 sets out that "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."

Recital 13 of Regulation 1/2003 further underlines that "[...] Commitment decisions should find that there are no longer grounds for action by the Commission without concluding whether or not there has been or still is an infringement. Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case. Commitment decisions are not appropriate in cases where the Commission intends to impose a fine."

As Article 9 decisions cannot be combined with a fine, their main purpose is the negotiation of a remedy in cases where the conduct in question does not require a punitive action. This result is achieved by making the commitments binding on the parties.

With regard to the definition of remedies, the standard set by Article 9 derives from the absence of any finding of infringement in the decision. The objective of commitments negotiated within this context is to "meet the concerns" expressed by the Commission in its preliminary assessment. While this wording may appear less specific than in Article 7, it must, however, be clear that what is required remains essentially the same: a preliminary assessment under Article 9 can only contain concerns that would reach the standard for objections if the Commission pursued an Article 7 procedure. If negotiations remain unsatisfactory, the Commission is in a position to adopt an infringement decision.

III. QUO VADIS: THREE SUGGESTIONS

A. Structural Remedies

Competition authorities in preserving the market mechanism are aiming essentially to determine the process and the framework for competition to take place, but not to determine outcomes. There exist essentially two different categories of remedies that can separately or cumulatively be applied to restore competition. The categories are (1) behavioural remedies ranging from cease-and-desist orders leaving the

implementation fully to the respective firm to more regulatory, prescriptive measures and ultimately (2) structural remedies.[16]

Behavioural remedies cannot modify the incentives of the firm(s) but try to suppress the incentives by constraining firm behaviour in an essentially regulatory way.[17] Cease-and-desist remedies leave the reactions of the firm open and do not constrain firm behaviour except for behaviour that would again create competition problems. All other behavioural remedies are less general in that they specifically point out what type of behaviour would be considered a problem and may go as far as prescribing behaviour actively.

Structural remedies try to directly modify the incentives of the firm and leave the rest to market forces. While some behavioural remedies —in particular those that regulate procedure —attempt to change the incentives of a firm by essentially regulating information flows (for instance Chinese wall remedies), structural remedies are not of a regulatory nature and effectively change the incentives faced by the firms, with reduced circumvention possibilities.

Structural remedies may be the preferred choice in particular in those cases where the structure of the firm directly and inevitably produces incentives to violate competition law.[18] Although less relevant in practice where behavioural and structural remedies are unlikely to be equally effective, behavioural remedies may be more burdensome than structural remedies in particular in cases where a rather competitive takeover market for the business to be severed exists. In that case, the price obtained for the business is likely to be at least close to the expected discounted future revenue stream that the business will generate as a stand alone unit. Unless important economies of scale and efficiencies of integration exist,[19]

[16] In addition, information obligations, informing customers about the remedy set in place or line of business restrictions effectively preventing the reconstruction of the severed business may be imposed as flanking measures.

[17] Obviously competition law infringements typically follow a clear business logic in the sense that they tend to increase directly or indirectly the profits of the firm infringing the law.

[18] In an Article 82 context this would imply that structural solutions are to be considered in those cases where dominance inevitably results in a clear incentive to violate competition law. In cases where there is no inherent link between dominance and the violation, behavioural remedies may be the more appropriate choice. This is the case for instance under exclusive dealing arrangements. It may be necessary for the firm engaging in this conduct to have a certain market power in order for the practice to be anticompetitive but it is not the market power or dominance as such that leads the firm to inevitably adopt an exclusive dealing arrangement.

[19] Note that this is particularly implausible in vertical cases, as foreclosed rivals would likely be up or downward integrated as well if efficiencies of integration were that substantial. A possible solution in the case of high efficiencies of integration not due to scale is of course a horizontal break-up of the upstream business. In that case, downstream firms could vertically integrate and competition would take place in the form of integrated firm competition.

any additional value to the integrated firm derives from the abusive behaviour and represents the strategic value of the infringement that should remain uncompensated. In that case, a structural remedy is likely to be less burdensome and intrusive than any behavioural remedies specifying price, quality and quantity and may also be superior to cease-and-desist orders.

This conclusion finds some support in the *Raso* case,[20] which concerned an exclusive right to supply necessary temporary labour to carry out port operations such as loading, unloading, embarkation, disembarkation and storage, etc., granted to a port company that was also active in port handling operations. This dual role created a conflict of interest that could result in the company with the monopoly for the supply of temporary labour to charge exclusionary prices or to supply its competitors with less efficient workers. In line with the Court's judgment in *RTT v. GB-Inno-BM*,[21] the Commission found that the conflict of interest of being the monopoly supplier of temporary labour while at the same time also being active in port services requiring such labour 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." The decision is of some relevance as the Commission also commented on behavioural remedies, clearly declining behavioural or procedural, legal unbundling types of remedies.[22]

The powers of the Commission are strictly limited to adopting those remedies that are proportionate to the objective sought, as recalled by Recital 12 of Regulation 1/2003. As set out by the ECJ in its judgement in the *Magill* case, "in the context of the application of Article 3 of Regulation No. 17, the principle of proportionality means that the burdens imposed on undertakings in order to bring an infringement of competition law to an end must not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed."[23] This limitation is aimed at protecting established fundamental

[20] See Raso v. Comm'n, Case C-163/96, 1998 ECR I 533. Note that here the structure of the firm creates such incentives not due to economies of scale or network effects but due to the legal monopoly for the supply of temporary labor.

[21] See RTT v. GB-INNO-BM SA, Case C-18/88, 1991 ECR I 5941.

[22] In *Raso*, supra note 20, it is stated that "(f) Lastly, even separating the two roles would not be sufficient if it occurred within the same group. It would be necessary for the two undertakings with separate roles to be entirely independent," thereby clearly declining legal unbundling/information firewall types of remedies. In *RTT* the Court similarly concluded that "the maintenance of effective competition requires that the drawing up of technical specifications ... and the granting of type-approval must be carried out by a body which is independent...." It should be noted that structural remedies were immediately considered proportionate despite the fact that both cases had Article 86 aspects and behavioural, information firewall types of remedies had not been tried.

[23] See RTE and ITP v. Comm'n, Case C-241-242/91P, 1995 ECR I 743, para. 93 (hereinafter Magill).

liberties protected by Community law such as the freedom to contract, which "must remain the rule"[24] unless otherwise necessary.

The proportionality principle is applicable to proceedings under Article 7, where the Courts control manifest errors in the assessment. Under Article 8, the Courts control not only that the measures are proportionate to the objective, but also that their adoption on the basis of a prima facie assessment is proportionate to the urgency of adopting them, on the basis of a balance between the public interest and the interests of the undertakings concerned. Also under Article 9 the Commission should not accept commitments that impose broader obligations than what is required to address the concerns identified.[25]

In practical terms, the proportionality principle means, first, that a remedy cannot be imposed if it is not necessary. Second, "where several remedies exist for bringing an infringement to an end," the Commission should seek the least onerous option enabling it to achieve its objective, or only prescribe the objective but not impose the way to achieve it in case of several alternative, equally effective means to implement a given remedy.

If the Commission can demonstrate that a given remedy is "the only way of bringing the infringement to an end" the condition of proportionality is fulfilled, as the ECJ confirmed regarding an order to disclose IP-protected information in the *Magill* case.[26]

This principle is translated into Recital 12 and Article 7(1) regarding the choice between behavioural and structural remedies, as they read: "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."

First, Article 7 establishes a preference for behavioural remedies if they can be found as efficient as structural remedies to address a given case. The notion of "equally efficient" remedies is, however, difficult to demonstrate as structural and behavioural remedies function completely differently. As laid out above, structural remedies are aimed at changing the incentives of the firm(s) in the market, which is achieved once the remedies are implemented. On the other hand, behavioural remedies try to redress conduct in a context where incentives remain the same; this may be less efficient and arguably outside the market logic. In addition, requiring certain behaviour with respect to one dimension of the strategy space (quantity, price, quality, choice of contractual partners, etc.) may lead to circumvention by changing the behaviour with respect to another dimension.

[24] See Automec SRL v. Comm'n, Case T-24/90, 1992 ECR II 2223, para. 51.

[25] See Alrosa v. Comm'n, Case T-170/06 (not yet published), CFI judgment of 11 July 2007, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006A0170:EN:HTML (hereinafter Alrosa).

[26] See Magill, supra note 23, para. 91.

Second, Article 7 considers that if there are equally efficient behavioural alternatives to a structural remedy, they should be preferred provided that the structural option is not less "burdensome" for the undertakings concerned. It is not obvious that any category of remedy would be more or less burdensome in terms of fundamental rights: while structural remedies impinge on property rights via for instance the sale of assets, behavioural remedies bear upon the freedom to conduct a business, including freedom to contract.[27] The notion of burden may also encompass costs stemming from the implementation of remedies during the total period during which they are in effect. In the case of a structural remedy, costs are limited in time until the completion of the obligation imposed. Behavioural remedies, on the other hand, require permanent monitoring and enforcement. As a result, behavioural remedies resemble firm-specific regulation and remove a lot of the flexibility that firms need in order to operate efficiently and compete effectively in a changing environment. In such an environment, behavioural remedies may require ongoing revision and adaptation in order to avoid that they become ineffective and/or detrimental to the competitive process.

On this basis, Recital 12 specifically mentions that structural remedies that affect the structure of the undertakings concerned as it was before the infringement are specifically adapted to cases "where there is a substantial risk of lasting or repeated infringement that derives from the very structure of the undertaking," thus implicitly assuming that structural remedies are more efficient in addressing a competition distortion in a definite way. Another case in which structural remedies may be specifically required are markets in which behavioural measures were prescribed in another, regulatory context, and where persisting competition infringements were found — such as, for instance, in liberalised sectors such as telecoms and energy. The fact that behavioural prescriptions are preferred in the regulatory context cannot preclude the Commission from adopting structural remedies if they are proportionate to the objectives sought; on the contrary, the fact that the infringements were persisting under the regulatory obligations is an indication that at least the type of behavioural remedy applied in the regulatory context was ineffective.[28]

B. Procedural Choices

Decisions adopted under Article 9 are often considered attractive by the undertakings concerned because they do not contain a finding of infringement that could be used by third parties as a basis for future

[27] See Charter of Fundamental Rights, O.J. C 364/1 (2000), Articles 17 and 16.

[28] The problems stemming from vertical integration as confirmed by the Commission's Energy Sector Inquiry are a case in point. The requirements of legal and functional unbundling have not prevented vertically integrated undertakings from using their network assets to favour their supply interests.

private litigation and because they tend to also reduce the negative publicity for the undertakings concerned.

A commitment decision may be appropriate for reasons of expediency and efficient use of resources, if indeed proceedings are faster and less burdensome when the company under investigation is willing to commit to sufficient remedies. In particular nothing should prevent the undertakings concerned to offer structural remedies if they are effective and less burdensome than behavioural measures. The "preliminary" nature of the reasoning is comparable to the prima facie element in the reasoning of an Article 8 decision: while the standard of evidence is lower than under Article 7, the Commission can only act where its concern relates to a possible infringement and commitments should have the same scope as injunctions under Article 7.

In so far as the commitments are drafted and proposed by the undertakings concerned, they may, however, go above and beyond what is required to "meet the concerns." As stated by the Court of First Instance, "the fact that an undertaking has offered commitments ... does not mean that those commitments can be assumed to be proportionate and does not relieve the Commission of the obligation to verify their adequacy and their necessity as regards the aim which it is sought to achieve."[29] Under Article 7 the principle of proportionality imposes that in case of several alternative and equally effective means to achieve the result sought by a given remedy, the Commission only prescribes the objective but does not impose the way to achieve it. Another concern is that for negotiated remedies, the companies concerned will generally strive to have as much detail as possible. In contrast the Commission is in general very careful not to make commitment provisions too specific, in order to avoid circumvention, while still ensuring that the remedies it is accepting are detailed enough as to the planned implementation. In any case, there is a risk that proposed remedies are used for other purposes than to remedy the competition problem. A commitment under Article 9 may be designed by the firm for strategic proposes. For instance it may be used to credibly commit to certain behavior, with similar effects as a strategic investment in capacity. It is therefore not enough for a competition authority to analyze the effectiveness and proportionality of the remedies but also possible

[29] See supra note 25, para. 143. A more general but important point regarding remedies is made in para. 148 and para. 149 of the judgement, where the CFI states that "The Decision also de facto obliges Alrosa, which is not subject to the procedure initiated under Article 82 EC, to make significant changes to its structure and activity in order to compete with De Beers outside the CIS, and to do so within a period of three years. The Commission is thus forcing an operator which is not directly concerned by the proceedings initiated under Article 82 EC to work towards a change in the structure of the market for the production and supply of rough diamonds. Such a measure exceeds the powers of the Commission under Article 82 EC."

negative side effects or circumvention possibilities and to avoid the general blessing of certain conduct.

In summary, there may be a limited role for Article 9 commitment decisions in those specific cases, where indeed the procedure allows for solutions to be implemented quickly. As the Commission is obliged to raise "concerns" where it would have raised "objections" and can furthermore not accept commitments that go above and beyond what is necessary to "meet the concerns," Article 9 decisions, in particular in complex cases, will typically not have substantial procedural advantages despite the fact that Article 9 decisions are more consensual and are, therefore, less likely to entail appeals from the committing party. In general, therefore, Article 7 decisions are the preferable procedural choice, as through their more general remedies they have a higher precedence value and provide a basis for private actions.

C. Stopping Irreversible Effects

In particular in dynamic markets, competition law infringements can have irreversible effects on competition. Upon a critical threshold, markets may for instance tip in favour of a particular technology rendering a restoration of competition as it was prior to the infringement almost impossible. In such instances interim measures, effectively putting a halt to irreversible effects and consequences of the infringement, are necessary. It is therefore surprising that this instrument has been used only hesitantly so far.

One reason for this may be that proceedings under Article 8 appear as increasing the burden of investigation, since they add a full-blown procedure (and likely judicial review) to the main investigation. Procedural requirements are quite substantial (statement of objections; right of the parties to be heard; probable judicial challenge). The resources spent on the Article 8 procedure are thus not used for the main investigation, and this may delay the adoption of the final decision. These are probably the reasons that the Commission has not made extensive use of interim measures in the past.

Nevertheless, procedures under Article 8 are particularly well suited in cases necessitating a fast resolution, provided that the finding of an infringement appears sufficiently likely. In fact interim measures may indeed be crucial in ultimately guaranteeing that the infringement can be brought effectively to an end without imposing unnecessary burden on industry. A procedure under Article 8, given the prima facie lighter burden of evidence, can as a matter of fact be rather quick compared to the main proceedings, thus providing a rapid, tangible outcome on the market, especially if other, non-competition instruments are not available to resolve the problem.

Interim measures also have the additional benefit that they allow testing and fine tuning the various measures and their respective efficiency and manageability, with a view to appropriate final remedies. This testing period may be of particular relevance when the Commission has to assess the efficiency and the respective burden imposed by each type of measure in its final reasoning under Article 7. In this respect, an Article 8 decision ordering behavioural remedies could be useful as a preliminary step, strengthening the case for structural remedies to be imposed in a prohibition case if the measures fail to achieve all desired effects.

Finally, parties that were ordered interim measures may also find a strong incentive to adopt a cooperative approach to the case, if a negotiated resolution is considered appropriate by the Commission.

In conclusion, there is scope for an increase in the use of interim measures in antitrust procedures in appropriate cases. Indeed, it is of high importance to consider already at the early stages of a case whether interim measures will be needed in order to prevent anticompetitive effects that can not be reversed upon the conclusion of the administrative procedure.

IV. CONCLUSION

In what direction should policy in the area of remedies be developed? The present article has identified three main areas where policy can and should be developed: (1) What is the proper scope for structural remedies, (2) What is the proper scope for Article 9 versus Article 7 decisions, and finally (3) What is the proper scope for interim measures as an integral part of an early analysis of a case.

Policy makers should, however, not think that they have all the solutions and one should not jump immediately to the conclusion that by imposing a particular remedy, which is in principle offering an incentive to competitors to innovate and compete, that they are actually going to do so. You can take a horse to water but you can not make it drink.

As a result a cautious approach is required in such complex and crucial matters as remedies. The first question that needs to be addressed in carrying out a first assessment of any case concerns the question of the impact of the illegal behavior on the market and whether competition law enforcement is the right tool to respond to the problem (in a timely manner). In certain circumstances, the intervention of sectoral regulators or indeed the imposition of new legislation is arguably an alternative to imposing an antitrust remedy. Although interim measures are available that may bring relief in a timelier manner, regulatory solutions may be preferred.

If it turns out that competition law instruments are indeed the preferred tool to tackle the problems in the market, the option of adopting an interim measures decision has to be seriously considered in order to prevent irreparable harm to competition. Although there may be

advantages of Article 9 commitments decisions, in particular in less complex cases where they may allow earlier implementation, the Commission will continue to mainly rely on Article 7 prohibition decisions that will impose a carefully drafted remedy aimed at restoring competition. In such decisions, the role of structural versus behavioral remedies will have to be reevaluated free of any preconceived ideas. Indeed, there may be scope for an increased role of structural, non-regulatory and fundamentally market-based remedies in appropriate cases.