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Behavioural versus Structural Remedies in EU Competition Law

… and it will fall out as in a complication of diseases, that by applying a remedy to one sore, you will provoke another; and that which removes the one ill symptom produces others … (Thomas More, *Utopia*, p 40)

1. Introduction

The effectiveness of competition law in general and any competition authorities' enforcement efforts in particular depends as much on the actual implementation of the adopted decisions via remedies as on the investigation of the infringement and the finding of liability. The purpose of this chapter is to discuss the role of structural remedies in EU competition law in a non-merger context. The focus is on the distinction between behavioural and structural remedies, the general role of structural remedies and the scope for implementing structural remedies from a legal and economic perspective.[1]

The motivation for this discussion stems from the curious asymmetry between the relatively frequent use of structural remedies in merger cases on the one hand and their sparse use in antitrust and in particular abuse of dominance cases on the other hand.

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[1] General introductions to remedies under Article 101 and 102 TFEU can be found in Lowe and Maier-Rigaud (2008) as well as Hellström et al (2009). For the merger context, some of the relevant papers are the *ex post* evaluation exercise carried out by DG COMP (European Commission, 2005) and summarised in Kopke (2005) and the notice on merger remedies (European Commission, 2008). See also Lévêque and Shelanski (2003) and Davies and Lyons (2007). There seems to be a trend towards behavioural remedies also in merger control, at least in the US. See Kwoka and Moss (2011).

This asymmetry seems mainly due to the legal perception that there exists a 'strong presumption that structural remedies are disproportionate'[2] in a non-merger context and that

> in implicit recognition of their highly intrusive nature, Article 7(1) of Regulation 1/2003 makes clear that structural remedies are only to be employed in exceptional circumstances … From this, it follows that three cumulative conditions must be satisfied before structural remedies may be imposed …: (1) structural remedies are a remedy of last resort, ie behavioural remedies would be insufficient; (2) structural remedies must be effective; and (3) structural remedies must be proportionate.[3]

As stated by Wind (2005: 659), 'Priority is given to behavioural remedies, as structural remedies are used only if it is not possible to use the first'.

As will be argued below, this legal interpretation is doubtful, but from a narrow economic point of view it is surprising to find that a suspected (!) substantial lessening of competition that may not even amount to dominance is presumably treated 'more fiercely' and 'rigorously' than the abuse of an already existing dominant position.

As long as the abuse of a dominant position has a more significant anti-competitive impact than the projected lessening of competition of a therefore prohibited merger (or the avoided effects due to a partial divestiture in the context of an approval), such an asymmetry may be incompatible with an economic effects-based approach to competition policy. As a result, it would seem reasonable to make use of the full spectrum of remedies available to the Commission in resolving competition problems in antitrust cases which may benefit not only the consumers and companies harmed by these infringements but ultimately even the perpetrators.

This chapter sets out to contribute to the clarification of the role of structural remedies from a competition policy perspective, but also from the perspective of the concerned companies on which such measures would be made binding. In addition to the *economic* arguments that would speak in favour of rehabilitating structural remedies in dominance cases, it is argued that the Commission clearly has the *legal* means of following such a more economic approach in the choice of remedies to be imposed. By clarifying this latter point, the chapter contributes to lifting the myth of a primacy of behavioural over structural remedies that does not withstand scrutiny of a detailed analysis of the relevant wording of Regulation 1/2003.[4]

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[2] O'Donoghue and Padilla (2006: 683) and identically in (2013: 887).

[3] O'Donoghue and Padilla (2006: 735). The test proposed on these and earlier pages has already been criticised in Adam and Maier-Rigaud (2009: 142f). Unfortunately, these parts have not been updated and are reprinted identically in O'Donoghue and Padilla (2013: 946).

[4] See Maier-Rigaud (2012), where some of the key arguments made here were already presented.

2. Behavioural versus structural remedies

There is no generally accepted definition of structural remedies in the literature, and the discussion of structural remedies has typically focused only on a subset of cases where such remedies could be imposed, namely in merger control. Davies and Lyons (2007) propose a 'clean break principle' in order to distinguish between structural and non-structural remedies. According to their definition, a structural remedy is one that neither requires ongoing monitoring by the enforcement authority nor establishes ongoing links between firms. A structural remedy is thus characterised as a one-off measure, as opposed to a measure creating an ongoing relationship between a firm and a regulator or with other firms. This follows the ICN Merger Remedies Review Project Group (ICN, 2005) that characterises structural remedies as 'one-off remedies that intend to restore the competitive structure of the market'. Another approach, focussing on property rights, is formulated by Motta et al (2003). The approach is based on the notion that 'structural remedies modify the allocation of property rights and create new firms: they include divestiture of an entire ongoing business, or partial divestiture'.[5] This is contrasted to non-structural remedies, which

> set constraints on the merged firms' property rights: they might consist of engagements by the merging parties not to abuse of certain assets available to them. They might also consist of contractual arrangements such as compulsory licensing or access to intellectual property.[6]

Lévêque (2000) finally considers the dichotomy of structural versus behavioural remedies as 'over-simplifying and confusing', and proposes instead to characterise remedies along two different dimensions: first, as to their target, such as a firm's environment, output or property rights; and second, as to whether they change the incentives of the addressee to behave in a certain way or whether they prescribe certain behaviour. In his terminology, economic instruments lead to a change in incentives that make an infringement of antitrust rules a non-profitable strategy, whereas regulatory instruments do not change these incentives and therefore need monitoring and enforcement (command-and-control regime).

Council Regulation 1/2003 proposes the terms 'structural' and 'behavioural' remedy without clear definition. In the present context, a structural remedy is defined as a measure that effectively changes the structure of the firm by a transfer of property rights regarding tangible or intangible assets, including the transfer of an entire business unit, that does not lead to any ongoing

[5] Motta et al (2003: 108).
[6] Ibid.

relationships between the former and the future owner. After its implementation, a structural remedy does not require any further monitoring.

This definition implies that a structural remedy removes the incentive or the means of a firm to repeat the infringement of the antitrust laws that was at the source of the administrative procedure.[7] One of the reasons why there is a need for monitoring behavioural remedies stems precisely from the fact that a company may still be facing incentives to circumvent or simply not implement the behavioural remedy. In other words, absent monitoring and enforcement, firm compliance is a dominated strategy. Although a structural remedy also needs some monitoring and—where necessary—enforcement until a divestiture is completed, this concerns only a limited amount of time (usually several months). After implementation, the firm no longer has an incentive to infringe competition law and no further monitoring or enforcement is necessary.[8] As stated by the OECD (2001),

> behavioural policies, unlike structural policies, do not eliminate the incentive of the regulated firm to restrict competition … despite the best efforts of regulators, regulatory controls of a behavioural nature, which are intended to control the ability of an integrated regulated firm to restrict competition, may result in less competition than would be the case if the regulated firm did not have the incentive to restrict competition.[9]

A behavioural remedy, on the other hand, requires permanent monitoring and enforcement.[10] The incentive to circumvent a behavioural remedy also has implications at the design stage. Requiring certain behaviour with respect to one dimension of the strategy space (quantity, price, quality, choice of contractual partners, etc) can easily lead to circumvention by changing the behaviour with respect to another dimension. As a result, behavioural remedies that are designed to prevent circumvention tend to be very detailed and complex. As a consequence, such remedies resemble firm-specific regulation that removes a lot of the flexibility that firms need in order to operate

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[7] A mandatory, exclusive and non-limited as well as irrevocable licence that is paid up front is in effect equivalent to a structural remedy.

[8] There exist structural remedies that may require a behavioural flanking in form of a line-of-business restriction. Without such a restriction, divestitures may only lead to temporary relief if the divested business can easily be replicated or repurchased in the future.

[9] See also OECD (2011a: 9, 119), reviewing the OECD Council Recommendation on Structural Separation in Regulated Industries.

[10] Given the similarities between behavioural remedies and regulation, the scope of structural remedies extends to situations where competition problems persist despite sector-specific regulation. For an example of structural remedies in a regulated sector see, eg Maier-Rigaud et al (2011), discussing the ENI case, or Hellström et al (2009), discussing, among other aspects, the *E.ON* case. Noteworthy is also the recent Article 9 decision in Case AT.39727—CEZ on capacity hoarding. On the friction between the US notion of a regulated conduct defence and the approach in the EU, see OECD (2011b), and in particular the contribution by Richard Brunell therein.

efficiently and compete effectively in a changing environment.[11] In such an environment, behavioural remedies usually require ongoing revision and adaptation in order to avoid becoming ineffective and/or detrimental to the competitive process.[12] The inflexibility in responding to future dynamic market developments, which cannot be properly antedated either by competition authorities or by market participants, is the key weakness of behavioural remedies.[13] Structural remedies, on the other hand, are within the logic of the market system and allow an efficient adaptation to changing market conditions. They are directly compatible with and have a direct bearing on the incentive structure of market participants. Structural remedies do not affect the flexibility of management to make appropriate business decisions on a lasting basis.[14] A fundamental property of structural remedies is that, from a spectator point of view, they cannot be distinguished from the usual workings of a market system in which mergers and divestitures are a characteristic feature of normal market developments. In that sense, they take full advantage of market allocation dynamics in resolving the competition problem in an efficient way and allow the concerned businesses to move on.

While it is possible to look at remedies from a property rights perspective, ie expropriation versus restriction of use, and therefore consider a divestiture as a harsher remedy than a behavioural one, one may well come to a different conclusion when considering the underlying economics. The primary goal of competition policy is to guarantee the proper and efficient functioning of markets in order to achieve the highest possible degree of welfare for society.[15] Structural remedies make use of the dynamics of markets in removing the incentives for committing similar infringements in the future, thereby eliminating competition problems. Behavioural remedies, on the other hand, do not make use of market dynamics but constrain market forces based on some strategy dimension of the firm,[16] thereby distorting market

[11] Only from a static point of view is the loss in flexibility the deliberate means to remedy the infringement.

[12] Besides the necessity to monitor compliance continuously, the market development has to be monitored to ensure the continued appropriateness of the remedy itself, ie to ensure that the remedy is neither creating advantages nor becoming too restrictive for the firm. The same obviously applies with respect to the impact of the remedy on other market players, requiring a corresponding impact assessment and potential adjustments to the remedy.

[13] The fundamental uncertainty about the future is the main reason for market-based allocation protected by competition policy to begin with and should not be confused with the rather static notion of asymmetric information that an antitrust authority may additionally face.

[14] See Levinson et al (2000).

[15] For present purposes, the question whether total or consumer welfare is the right measure is secondary.

[16] In fact, behavioural remedies typically try to simulate the outcome that would be produced by markets in the absence of an infringement by either imposing such an outcome directly (so-called performance or outcome remedies) or by imposing constraints on the