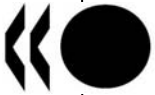


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**REMEDIES AND SANCTIONS IN ABUSE OF DOMINANCE CASES**

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**English/French**

## **FOREWORD**

This document comprises proceedings in the original language of a Roundtable on Remedies and Sanctions in Abuse of Dominance Cases which was held at the Competition Committee meeting in June 2006.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

## **PRÉFACE**

Ce document rassemble la documentation, dans la langue originale dans laquelle elle a été soumise, relative à une table ronde sur les mesures correctrices et les sanctions dans les cas d'abus de position dominante, qui s'est tenue lors de la réunion du Comité de la concurrence en juin 2006.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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## EXECUTIVE SUMMARY

*by the Secretariat*

Considering the discussion at the roundtable, the delegates' written submissions and the Secretariat's background paper, several key points emerge:

- (1) *There is an important difference between "remedies" and "sanctions."*

Remedies cure, correct, or prevent unlawful conduct, whereas sanctions penalise or punish it. Typically, a competition law remedy aims to stop the violator's illegal behaviour, its anticompetitive effects, and its recurrence, as well as to restore competition. Sanctions are usually meant to deter unlawful conduct in the future, and in some jurisdictions also to force violators to disgorge their illegal gains and compensate victims. Although there is general agreement about what these objectives are, there is some difference of opinion about which ones are most important.

- (2) *How to craft appropriate and effective remedies and sanctions is a subject that is just as important as how to define dominance or identify abusive conduct, but it has received substantially less attention.*

As several of the Competition Committee's recent roundtables have shown, it is by no means wrong to devote great care to defining dominance and identifying abusive conduct. It is often difficult to determine whether a firm is dominant, and it can be exceedingly hard to distinguish conduct that enhances competition from conduct that harms it. Correctly concluding that a firm is dominant and that it abused its dominance, however, may do little good for competition if the ensuing remedy or sanction is too lenient, too severe, too late, not administrable, or otherwise poorly conceived or implemented. Flawed remedies not only may allow continuing harm to competition by not properly addressing the competition problem, but also may themselves harm competition by preventing conduct by the dominant firm that would benefit consumers. The question of what to do with an abusive dominant firm therefore calls for equally serious attention. Nevertheless, relatively little attention has been paid to remedies and sanctions in abuse of dominance cases. This roundtable helps to lessen that disparity by comparing and contrasting the current policies of enforcement agencies based on their experience, guidelines and governing statutes, and by taking into account the scholarly literature that exists on the subject.

- (3) *Identifying appropriate and effective remedies and sanctions in abuse of dominance cases has generally proven to be difficult.*

One fundamental difficulty is that there is a diversity of opinion regarding the objectives that should be pursued when designing remedies and sanctions.<sup>1</sup> Deterring future anticompetitive

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<sup>1</sup> This roundtable focuses on remedies and sanctions in abuse of dominance cases brought by public enforcement agencies, as opposed to those brought by private plaintiffs. The roundtable also deals only with civil and administrative measures, not criminal ones.

conduct, restoring competition, compensating victims, and simply putting an end to the unlawful conduct are among the possible choices. Different jurisdictions tend to prioritise different objectives, but even within individual countries clear choices have not always been made. Furthermore, it is often hard to design remedies and sanctions that will achieve one or more of those objectives. For example, it can be difficult to ascertain the level of fines that will achieve deterrence without crippling the defendant or chilling other, legitimate conduct. Alternatively, even when conceptually sound behavioural remedies are identified, it may still be impractical or impossible to monitor a defendant's compliance with them. Moreover, relatively speaking, there has not been a great deal of experience in this area. There are not nearly as many abuse of dominance cases as there are merger and cartel cases. Making matters even more difficult for agencies and courts is the fact that there is not much agreement among scholars about the effectiveness of the remedies that have been implemented. In fact, the literature on this subject is noteworthy for the extent of its disagreement.

(4) *Each type of remedy and sanction has certain advantages and disadvantages.*

Structural remedies, which require firms to sever links from assets they hold, have the virtue of being able to eliminate market power rapidly while creating or invigorating competitors. They may also require less oversight by courts and agencies than other remedies do. On the other hand, some structural remedies may initially be more disruptive to the defendant's business than other remedies are, and they sometimes create immediate inefficiencies. In addition, history has shown that structural remedies are not always easy to administer.

Behavioural remedies, which obligate a company either to do something or to stop doing something, can be tailored to fit individual defendants and market circumstances. Overall, they are less controversial than divestitures and have been applied far more frequently in abuse of dominance cases. Nonetheless, behavioural remedies are sometimes criticised because they do not attack concentration and market power directly. They also tend to require ongoing, and occasionally extensive, oversight and intervention by courts and agencies. Furthermore, behavioural remedies are more susceptible to strategic neutralisation, minimisation, or evasion by defendants than other measures are.

Monetary sanctions, including fines, damages, and the disgorgement of profits, have the advantage of being relatively easy to understand and administer, requiring little if any ongoing supervision by the courts. Unless they are too weak, monetary sanctions also deter future infringements. It is difficult, however, to determine the "optimal" level of a monetary sanction by striking a balance between discouraging wrongful conduct and imposing a punishment that is too severe. Another problem is that sanctions, by themselves, do little to nothing to restore competition.

(5) *There is a consensus among Competition Committee delegates that remedies and sanctions should be proportionate to the violation.*

A proportional *remedy* is one whose scope and form does not exceed what is necessary to achieve the competition law's objectives; a proportional *sanction* is one that neither over-deters nor under-deters. In general, the more harmful the misconduct is, the stricter the measures imposed should be. Striving for proportionality can help to ensure that relief measures are appropriate for the conduct at issue, and that they are less arbitrary and thus more predictable. In some jurisdictions, such as the EU, competition statutes expressly require remedies to be proportionate to the infringement committed.

- (6) *There is a preference for behavioural remedies over structural ones in some jurisdictions.*

Most jurisdictions' competition laws authorise courts and/or competition agencies to impose both behavioural and structural remedies, but some allow structural remedies only when there is no equally effective behavioural remedy or when any such remedy would be more burdensome to comply with than the structural remedy. In many cases behavioural remedies will be sufficient to effectively end the competition infringement. In some cases, however, the only effective or less burdensome remedy is a structural one. Even in jurisdictions where the relevant statute does not state a preference one way or the other, some agencies prefer behavioural remedies because they are viewed as a more "light handed" approach. Other delegates pointed out that structural remedies offer certain advantages that behavioural remedies lack, and that behavioural remedies may lead to overregulation of business behaviour. Thus there is no such thing as a perfect remedy for every type of case.

- (7) *Competition authorities tend to monitor defendants' compliance with remedies very closely. The authorities typically do not track the effectiveness of the remedies very closely, though.*

In fact, the question of whether the remedies that have been implemented turned out to be sufficient deterrents to unilateral anti-competitive practices is rarely discussed. The same is true with respect to the question of whether the remedies have successfully restored competition in the relevant markets. (The competition authorities in Turkey and the UK are notable exceptions because they have carefully studied the effectiveness of their remedies recently.) Although monitoring remedies' effectiveness over time consumes some agency resources, the potential value of such exercises is high. Having information about which remedies have worked, which have not, and under what circumstances, would enable agencies to design remedies that come closer to meeting their enforcement objectives. Furthermore, in some cases, market conditions may have changed and remedies that were effective at the time they were imposed may no longer have desirable effects on competition. Therefore, it would be desirable for most agencies to implement a more systematic process for evaluating the effectiveness of past remedies.

- (8) *There is a variety of opinions among delegates regarding the question of whether it is appropriate for competition agencies to impose monetary sanctions in abuse of dominance cases.*

Some authorities are generally inclined to impose fines in abuse of dominance cases, while others believe that fines are either usually or always inappropriate in such cases. The US enforcement agencies, for example, do not impose fines for monopolisation violations. They emphasise that a great deal of case-by-case judgment is required to determine whether unilateral anti-competitive conduct was unlawful. They therefore consider it inappropriate to impose fines because it is so difficult to decide whether there was a violation in the first place. Interestingly, the US Federal Trade Commission has deemed it appropriate to seek disgorgement, as opposed to fines, in certain unilateral conduct cases.

Authorities in other countries, such as France, regularly impose fines or surcharges in abuse of dominance cases. They do so because such conduct could impede competition in the future unless it is deterred and because they wish to make the abusive firm disgorge its unlawful gains. Furthermore, some of the agencies that are more likely to impose fines acknowledge that there is some risk in doing so in abuse of dominance cases. They note, however, that there is also risk in not imposing fines because it may later be determined that the conduct in question was indeed an abuse, and that it was so effective that the market was monopolised, but by that time new firms will no longer have an opportunity to enter. Therefore, they conclude that while there is a risk in acting too quickly, there is also a risk in waiting too long to take action.

Finally, some authorities take a middle-ground position. The EC and the Bundeskartellamt, for example, hold the view that public authorities should always have the discretion to use a combination of rectifying actions and punishment. They also stress that one should be concerned not only about the risk of over-enforcement, but about the risk of under-enforcement, as well, because it may be even more problematic.

Nevertheless, there is some common ground among most of the delegates. The Committee members were in general agreement that fines are inappropriate in especially complicated cases where the practices are not obviously anticompetitive. Furthermore, most members agreed that fines can be useful, particularly when it is clear *ex ante* that the defendant has a dominant position and has abused that position.

Some of the points of contention may be related to the fact that private actions are still relatively rare in jurisdictions where fines are more likely to be imposed. In contrast, there may be less of a need for fines where private actions are more common, such as in the US.

## SYNTHÈSE

### *par le Secrétariat*

Au vu des éléments qui sont ressortis des débats ayant eu lieu lors de la table ronde, des contributions soumises par écrit par les délégués et de la note de référence du Secrétariat, plusieurs points essentiels méritent d'être retenus :

(1) *Il existe une différence importante entre les "mesures correctrices" et les "sanctions."*

Les mesures correctrices visent à combattre, corriger, ou prévenir les comportements illicites alors que les sanctions ont pour but de les réprimer ou de les punir. En règle générale, une mesure correctrice prévue par le droit de la concurrence a pour objet de mettre un terme au comportement illicite de l'auteur de l'infraction et à ses effets anticoncurrentiels et d'éviter qu'il ne se reproduise, mais elle vise également à rétablir la concurrence. Les sanctions sont généralement infligées afin de décourager des contrevenants éventuels de se livrer à des comportements contraires à la loi, et dans certains pays ou territoires, de contraindre en outre les auteurs d'infractions à restituer les gains acquis illégalement et à indemniser les victimes. Bien que le contenu de ces objectifs fasse quasiment l'unanimité, on note quelques divergences de vues sur l'importance attachée à certains par rapport aux autres.

(2) *Comment mettre au point des mesures correctrices et des sanctions efficaces et adaptées ? Voilà une question tout aussi importante que celle de la définition de l'abus de position dominante ou de la caractérisation d'un comportement abusif, question qui a toutefois nettement moins retenu l'attention.*

Comme l'ont montré les éléments dégagés à l'occasion de plusieurs discussions ayant eu lieu récemment dans le cadre de tables rondes organisées par le Comité de la concurrence, il n'est nullement vain de consacrer le plus grand soin à la définition de la notion de position dominante et à la caractérisation des comportements abusifs. Il est souvent difficile de déterminer si une entreprise se trouve en position dominante et il peut se révéler extrêmement complexe de distinguer un comportement qui intensifie la concurrence d'un comportement qui porte atteinte à la concurrence. Le fait de conclure à juste titre qu'une entreprise occupe une position dominante et qu'elle a abusé de cette situation risque toutefois de ne rien apporter de bon sur le plan de la concurrence si la mesure correctrice ou la sanction adoptée est trop clémente ou au contraire trop sévère, si elle intervient trop tard, si elle n'est pas applicable, ou encore si elle pêche au niveau de sa conception ou de sa mise en oeuvre. Si les sanctions sont mal conçues, non seulement elles ne règlent pas le problème car elles ne mettent pas fin au préjudice porté à la concurrence, mais en outre elles constituent elles-mêmes une atteinte à la concurrence dans la mesure où elles empêchent l'entreprise en position dominante d'avoir des réactions qui pourraient être bénéfiques pour les consommateurs. La question de savoir ce qu'il convient de faire face à une entreprise qui commet un abus de position dominante est donc une question qui appelle également une attention non moins soutenue. On constate néanmoins que les mesures correctrices et les sanctions en cas d'abus de position dominante sont un aspect qui a été dans une certaine mesure négligé. La table ronde a vocation à remédier à ce manque d'intérêt en comparant et en mettant en regard les politiques suivies actuellement par les autorités de tutelle

compte tenu de leurs expériences respectives, des principes qu'elles appliquent et des mandats qui leur sont confiés, et en s'appuyant sur les ouvrages de référence existant sur le sujet.

- (3) *Élaborer des mesures correctrices et des sanctions efficaces et adaptées en cas d'abus de position dominante est une tâche qui s'est généralement révélée ardue.*

L'une des difficultés essentielles tient à la diversité des opinions concernant les objectifs qui doivent guider la conception des mesures correctrices et des sanctions.<sup>1</sup> Décourager les contrevenants en puissance de se livrer à l'avenir à des comportements anticoncurrentiels, restaurer la concurrence, indemniser les victimes ou simplement mettre un terme aux comportements illicites, telles sont les options entre lesquelles doivent s'opérer des arbitrages. Les différents pays ne classent pas tous dans le même ordre de priorité ces différents objectifs et certains d'entre eux n'ont même pas clairement arrêté leur choix. De plus, il est souvent difficile de mettre au point des mesures correctrices et des sanctions permettant d'atteindre un ou plusieurs de ces objectifs. Il peut par exemple se révéler délicat de déterminer le niveau des amendes permettant d'obtenir un effet véritablement dissuasif sans risquer pour autant de paralyser totalement l'entreprise sanctionnée ou de décourager d'autres comportements légitimes. A l'inverse, même lorsque l'on parvient à concevoir des mesures correctrices théoriquement équilibrées, il peut se révéler malaisé, voire impossible, de vérifier que l'entreprise sanctionnée s'y conforme effectivement. En outre, les données d'expérience ne sont comparativement guère abondantes dans ce domaine. Il y a nettement moins de cas d'abus de position dominante que d'affaires de fusions ou d'ententes. Ce qui rend d'autant plus complexe la tâche des autorités et des tribunaux compétents, c'est le fait que les théoriciens ne s'accordent guère sur ce qu'il faut penser de l'efficacité des mesures correctrices qui ont déjà été mises en oeuvre. En fait, la netteté des divergences de vues entre les auteurs est ce qui caractérise les ouvrages consacrés à ce sujet.

- (4) *Chaque type de mesures correctrices et de sanctions présente des avantages et des inconvénients.*

Les mesures correctrices structurelles par lesquelles les entreprises se dessaisissent d'actifs qu'elles détiennent, présentent l'avantage de permettre l'élimination rapide du pouvoir de marché tout en suscitant l'entrée en scène de nouveaux concurrents ou en renforçant la position des concurrents en place. Il se peut qu'elles nécessitent moins de surveillance de la part des tribunaux et des autorités de tutelles que d'autres dispositifs. En revanche, certaines mesures correctrices structurelles peuvent dans un premier temps se révéler plus perturbatrices pour l'activité de l'entreprise sanctionnée et elles sont parfois à l'origine d'inefficiences à court terme.

Les mesures comportementales, qui obligent une entreprise à prendre des dispositions ou à mettre un terme à des agissements, peuvent être adaptées à chaque contrevenant et aux circonstances qui prévalent sur le marché. Dans l'ensemble, elles suscitent moins la controverse que les cessions d'actifs et elles sont beaucoup plus fréquemment appliquées dans des cas d'abus de position dominante. Néanmoins, on leur reproche parfois de ne pas permettre de s'attaquer directement au problème de la concentration et du pouvoir de marché. En outre, elles exigent généralement une surveillance et des interventions s'inscrivant dans la durée, et parfois de large portée, de la part des tribunaux et des autorités de tutelle. Les mesures comportementales se

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<sup>1</sup> Cette table ronde est principalement consacrée aux mesures correctrices et aux sanctions dans les cas d'abus de position dominante imposées par des organismes publics chargés de faire respecter la législation, par opposition à celles imposées à la suite de poursuites engagées à titre privé par des plaignants. Elle traite en outre uniquement des mesures administratives et des mesures de droit civil, et non des mesures de droit pénal.

prêtent par ailleurs plus facilement que d'autres à des actions stratégiques par lesquelles les contrevenants parviennent à les neutraliser, à en minimiser les effets ou à y échapper.

Les sanctions pécuniaires, notamment les amendes, les indemnités et la restitution des bénéfices illégalement acquis, présentent l'avantage d'être relativement faciles à comprendre et à appliquer dans la mesure où elles ne requièrent que peu de surveillance, voire aucune surveillance, de la part des tribunaux. Sauf si elles sont trop faibles, les sanctions pécuniaires ont également un effet dissuasif et préviennent les infractions futures. Il est cependant difficile de déterminer le niveau "optimal" d'une sanction pécuniaire correspondant au point d'équilibre entre la nécessité de décourager les comportements abusifs et celle d'infliger une punition qui ne soit pas trop sévère. Le fait que les sanctions en soi ne contribuent guère, voire pas du tout, au rétablissement de la concurrence est également un problème.

- (5) *Un consensus se dégage entre les délégués auprès du Comité de la concurrence sur le principe selon lequel les mesures correctrices et les sanctions doivent être proportionnées aux infractions commises.*

Une *mesure correctrice* proportionnée est une mesure qui, par sa portée et par sa forme, ne va pas au delà de ce qui est nécessaire pour atteindre les objectifs visés par le droit de la concurrence ; une *sanction* proportionnée est une sanction qui n'est ni trop, ni trop peu dissuasive. De façon générale, plus le comportement abusif est préjudiciable, plus les mesures adoptées doivent être strictes. En s'efforçant de respecter le principe de proportionnalité, on peut veiller à ce que les mesures de réparation soient à la mesure du comportement sanctionné et faire en sorte qu'elles soient moins arbitraires et plus prévisibles. Dans certains pays ou territoires, comme l'UE, le droit de la concurrence exige explicitement que les mesures correctrices soient proportionnelles aux infractions commises.

- (6) *Certains pays ou territoires marquent une préférence pour les mesures comportementales par opposition aux mesures correctrices structurelles.*

Dans la plupart des pays ou territoires, le droit de la concurrence autorise les tribunaux et les autorités de tutelle à imposer en parallèle des mesures correctrices structurelles et des mesures comportementales, mais certains n'autorisent les mesures correctrices structurelles que dans les cas où des mesures comportementales ne seraient pas aussi efficaces ou lorsqu'elles se révéleraient plus compliquées à respecter que des mesures structurelles. Dans nombre de cas, les mesures comportementales suffiront pour mettre effectivement un terme aux violations du droit de la concurrence. Dans certaines circonstances cependant, la seule réaction efficace ou celle qui sera la moins lourde à mettre en oeuvre passe par des mesures correctrices structurelles. Même dans les pays ou territoires où les dispositions applicables ne donnent pas la préférence à une méthode par rapport à une autre, les autorités de tutelle privilégient parfois les mesures comportementales dont elles estiment qu'elles incarnent une démarche plus "nuancée". D'autres délégués ont fait valoir que les mesures correctrices structurelles offrent des avantages qui font défaut aux mesures comportementales et que ces dernières risquent de conduire à une surréglementation. Aussi en arrive-t-on à la conclusion qu'il n'existe pas de solution parfaite adaptée à toutes les situations.

- (7) *Les autorités de la concurrence surveillent généralement de très près le respect des mesures correctrices par les entreprises sanctionnées. Pourtant, elles n'observent guère, la plupart du temps, l'efficacité de ces mesures.*

En fait, la question de savoir si les mesures correctrices qui sont mises en oeuvre ont des effets dissuasifs suffisamment puissants face à des pratiques anticoncurrentielles unilatérales est rarement abordée. Il en va de même de la question de savoir si les mesures correctrices amènent

un rétablissement de la concurrence sur les marchés concernés. (Les autorités de la concurrence de la Turquie et du Royaume-Uni constituent des exceptions notables à cette règle dans la mesure où elles se sont récemment penchées avec beaucoup d'attention sur l'efficacité des mesures correctrices prises par leurs services.) Même si l'observation de l'évolution de l'efficacité des mesures correctrices au fil du temps absorbe une fraction des ressources dont disposent les instances compétentes, l'intérêt que peut présenter ce type d'exercice est loin d'être négligeable. Disposer d'informations sur les mesures correctrices qui ont produit les effets escomptés et sur celles qui se sont soldées par des échecs selon les circonstances est pour les instances compétentes un moyen de mettre au point des mesures correctrices offrant de meilleures chances d'atteindre les objectifs qui leur sont assignés. En outre, il arrive parfois que les conditions qui prévalent sur le marché changent et que les mesures correctrices qui étaient efficaces au moment où elles ont été imposées n'aient plus, passé un certain délai, les effets souhaités sur la concurrence. C'est pourquoi il est souhaitable que les organismes compétents mettent en place un processus d'évaluation plus systématique de l'efficacité des mesures correctrices adoptées antérieurement.

- (8) *Les avis sont très partagés parmi les délégués à propos de la question de savoir s'il est opportun que les autorités de la concurrence infligent des sanctions pécuniaires en cas d'abus de position dominante.*

Certaines autorités de la concurrence ont tendance à infliger des amendes dans les cas d'abus de position dominante tandis que d'autres estiment que les amendes sont soit le plus souvent, soit dans tous les cas, inadaptées dans ce type d'affaires. Aux États-Unis par exemple, les autorités de la concurrence n'appliquent pas d'amendes en cas d'infractions aux dispositions sur les monopoles. Elles soulignent qu'il convient dans une large mesure d'apprécier au cas par cas si un comportement anticoncurrentiel unilatéral est contraire à la loi. Elles jugent donc inapproprié d'infliger des amendes sachant qu'il est déjà tellement difficile d'établir au préalable s'il y a eu violation de la loi. Il est intéressant de noter qu'aux États-Unis, la Federal Trade Commission considère qu'il est préférable, face à certains comportements unilatéraux, de rechercher la restitution des gains illégalement acquis plutôt que d'infliger des amendes.

Dans d'autres pays, notamment en France et au Japon, les autorités de la concurrence infligent régulièrement des amendes dans des cas d'abus de position dominante. Elles le font parce que les comportements de cette nature représentent une menace pour la concurrence si rien n'est fait pour dissuader les entreprises de s'y livrer à l'avenir et parce qu'elles entendent contraindre ainsi les contrevenants à restituer des gains illégalement acquis. De plus, certaines des instances qui sont le plus enclines à infliger des amendes reconnaissent que cette pratique n'est pas sans risque dans des affaires d'abus de position dominante. Elles observent toutefois qu'il est également risqué de ne pas infliger d'amendes dans la mesure où il peut apparaître plus tard que le comportement incriminé était réellement abusif et qu'il a eu pour effet de créer une situation de monopole sur le marché, mais où il est alors trop tard pour que d'autres entreprises puissent avoir une chance d'entrer sur le marché. C'est pour cette raison qu'elles arrivent à la conclusion qu'il est risqué d'agir trop vite, mais qu'il est également risqué d'attendre trop longtemps pour réagir.

Enfin, certaines autorités de tutelle adoptent une position de moyen terme. La CE et le Bundeskartellamt par exemple sont d'avis que les instances publiques devraient toujours avoir le pouvoir d'associer à leur guise mesures correctrices et sanctions. Ils insistent en outre sur le fait que l'on ne doit pas seulement se préoccuper du risque d'application excessive car le risque d'application insuffisante peut parfois être encore plus problématique.

On observe néanmoins certains points de convergence entre la plupart des délégués. Les membres du Comité s'accordent en général sur le fait que les amendes ne sont pas une solution

convenable dans des affaires particulièrement complexes où les pratiques incriminées ne sont pas de façon manifeste anticoncurrentielles. Par ailleurs, la plupart des membres conviennent que les amendes peuvent avoir leur utilité, en particulier lorsqu'il est d'emblée évident que le contrevenant est en position dominante et qu'il a abusé de cette position.

Certains des points de désaccord sont peut-être liés au fait que les actions privées sont encore relativement rares dans les pays ou territoires où la probabilité qu'une amende soit infligée est la plus grande. Il se peut en revanche que les amendes apparaissent moins nécessaires lorsque les actions privées sont plus fréquentes, comme aux États-Unis.



## BACKGROUND NOTE

### 1. Introduction

This roundtable on remedies and sanctions is the natural culmination of a series of Committee roundtables that have taken place over the past two years concerning themes related to the abuse of dominance.<sup>1</sup> Having addressed predatory foreclosure, competition on the merits, and barriers to entry, the Committee is now moving beyond pure liability issues and focusing on how agencies and courts should deal with companies that have been found to be in violation of abuse of dominance statutes.

The topic is a timely one, given that Council Regulation 1/2003, which overhauled the enforcement system of EU competition law and introduced new remedies, was recently put into force.<sup>2</sup> Furthermore, the abuse of dominance cases brought against Microsoft around the world over the past several years have at least temporarily boosted interest in remedies and sanctions for abuse of dominance. There was not always such a keen interest in this issue.

In fact, the subject of remedies and sanctions tends to be neglected in comparison to the attention lavished on the issues of how to define dominance and identify abusive conduct. As the recent roundtables have shown, particularly with respect to the latter subject, it is by no means wrong to examine those issues with great care. It is often difficult to determine whether a firm is dominant, and it can be exceedingly hard to distinguish conduct that enhances competition from conduct that harms it. Correctly concluding that a firm is dominant and that it abused its dominance, however, may do little good for competition if the ensuing remedy or sanction is too lenient, too severe, too late, not administrable, or otherwise poorly conceived or implemented. Worse still, flawed remedies and sanctions may cause harm to competition beyond what the dominant firm has already done. The question of what to do with an abusive dominant firm therefore calls for equally serious attention.

Identifying appropriate remedies and/or sanctions for abuses of dominance has generally proven to be challenging. First, there is not universal agreement regarding the objectives that should be pursued: deterring future anticompetitive conduct, restoring competition, compensating victims, and simply putting an end to the unlawful conduct are among the possible choices. Furthermore, it is not always clear how to design remedies and sanctions that will achieve one or more of those objectives. For example, it can be difficult to ascertain the amount of fines that will achieve deterrence without crippling the defendant or chilling other, legitimate conduct. Alternatively, even when conceptually sound behavioural remedies are identified, it may still be problematic to monitor a defendant's compliance with them.

Moreover, relatively speaking, there has not been a great deal of experience in this area. There are not nearly as many abuse of dominance cases as there are merger or cartel cases, which makes decisions about remedies and sanctions for the abuse of dominance a relatively rare bird on the competition policy landscape. Making matters even more difficult for agencies and courts is the fact that there is not a great

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<sup>1</sup> "Abuse of dominance" is used here as a shorthand term that is meant to encompass all of the standards that govern unilateral conduct in OECD member countries' competition laws. Thus it includes "monopolisation," as well, for example.

<sup>2</sup> Council Regulation 1/2003 took effect on 1 May, 2004.

deal of agreement among scholars about the effectiveness of the remedies that have been implemented. In fact, the literature is noteworthy for the extent of its disagreement on this subject.<sup>3</sup>

This Note focuses on remedies and sanctions in abuse of dominance cases brought by public enforcement agencies rather than those brought by private plaintiffs. The Note also deals only with civil and administrative measures, not criminal ones.<sup>4</sup> Part 2 examines the assortment of objectives that remedies and sanctions typically aim to achieve in abuse of dominance cases. Part 3 goes over some general suggestions for designing effective remedies. Part 4 covers specific types of remedies and sanctions, along with their respective strengths and weaknesses, in some detail. Finally, Part 5 discusses the remedies and sanctions applied in a few recent cases.

The main points of this paper are:

- Remedies cure, correct, or prevent, whereas sanctions penalise or punish. Typically, remedies aim to stop a violator's unlawful conduct, its anticompetitive effects, and their recurrence, as well as to restore competition. Sanctions are usually meant to deter unlawful conduct in the future, to compensate victims, and to force violators to disgorge their illegal gains. Although there is general agreement about what these objectives are, there is some difference of opinion about which ones are most important.
- There is a general consensus that remedies and sanctions should be proportionate to the violation. A proportional *remedy* is one whose scope and form does not exceed what is necessary to achieve the competition law's objectives; a proportional *sanction* is one that neither over-deters nor under-deters. In general, the more harmful the misconduct is, the stricter the measures taken should be. Striving for proportionality can help to ensure that relief measures are appropriate for the conduct at issue, and that they are less arbitrary and thus more predictable.
- Some have suggested that lighter measures should be imposed when the unlawful conduct had mixed effects, i.e., when it harmed consumer welfare but also had some positive welfare effects. This suggestion needs to be interpreted very carefully because, taken literally, it calls for consumer welfare balancing. The Committee has examined consumer welfare balancing before in the context of tests for determining liability, and it is a concept that was found to be difficult, if not impossible, to implement in practice. Nevertheless, there is some scope for considering pro-competitive effects in the context of remedies and sanctions in a manner that does not involve actual welfare balancing.
- A number of general suggestions can help agencies to design and implement effective remedies. First, it is helpful to spend time early in the investigative process defining the remedial objectives and developing a plan for attaining them. Otherwise, agencies may wind up expending the resources necessary to win the case, only to find that they have not given sufficient thought to the all-important issues of what an effective remedy would be and how it could be implemented. Second, having a thorough understanding of the relevant industry and how it is likely to evolve under various remedial scenarios is also extremely helpful. Other suggestions include making

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<sup>3</sup> Eleanor Fox & Paul Sirkis, "Antitrust Remedies – Selected Bibliography and Annotations," American Antitrust Institute Working Paper 06-01, p. 2 (June 2005).

<sup>4</sup> A subset of OECD countries' competition laws authorise criminal sentences for abuse of dominance violations, but such sentences are rarely sought nowadays. For example, although the Sherman Act technically authorises them for section 2 offences, criminal charges have not been brought under section 2 since 1940. William Kovacic, "Designing Antitrust Remedies for Dominant Firm Misconduct," 31 Connecticut Law Review 1285, 1292 & n.38 (1999).

adjustments for defendants with a history of misconduct, anticipating the defendant's strategic response to the remedy, identifying and trying to minimise negative side effects, and developing a practical implementation framework.

- Each type of remedy and sanction has certain advantages and disadvantages. Structural remedies, which require firms to sever links from assets they hold, have the virtue of being able to eliminate market power rapidly while creating or invigorating competitors. They may also require less oversight by courts and agencies than other remedies do. On the other hand, some structural remedies may initially be more disruptive to the defendant's business than other remedies are, and they sometimes create immediate inefficiencies. In addition, history has shown that structural remedies are not always easy to administer. The use of one type of structural remedy – divestiture – is controversial in abuse of dominance cases.
- Behavioural remedies, which obligate a company either to do something or to stop doing something, can be tailored to fit individual defendants and market circumstances. Overall, they are less controversial than divestitures and have been applied far more frequently in abuse of dominance cases. Nonetheless, behavioural remedies are sometimes criticised because they do not attack concentration and market power directly. They also tend to require ongoing, and occasionally extensive, oversight and intervention by courts and agencies. Furthermore, behavioural remedies are more susceptible to strategic neutralisation, minimisation, or evasion by defendants than other measures are. There is not as much scope for dodging a fine or a divestiture order as there is for frustrating a behavioural remedy by endlessly litigating its terms or finding anticompetitive ways to work around it that achieve the same ends as the prohibited conduct.
- Monetary sanctions, including fines, damages, and the disgorgement of profits, have the advantage of being relatively easy to understand and administer, requiring little if any ongoing supervision by the courts. Unless they are too weak, monetary sanctions also give defendants an incentive to monitor their own behaviour in the future to ensure that they do not violate the competition laws again and face the prospect of being forced to give up more money. Determining the optimal amount of a monetary sanction is typically a vexing problem, though. Another problem is that, by themselves, they may do little or nothing to restore competition.
- There is an important difference in perspective among some jurisdictions on the question of whether it is appropriate for agencies to apply monetary sanctions in abuse of dominance cases. The US enforcement agencies, for example, do not impose fines for civil violations of the antitrust laws, including unilateral conduct violations. The rationale for that policy is that too much case-by-case judgment is required to determine whether unilateral anti-competitive conduct was unlawful. It is considered inappropriate to impose a fine when there is so much uncertainty about whether there was a violation in the first place. Interestingly, the US Federal Trade Commission has deemed it appropriate to seek disgorgement, as opposed to fines, in certain unilateral conduct cases. Furthermore, punishment in the form of private treble-damages awards may follow either the FTC's or the Department of Justice's remedial actions. In Europe, on the other hand, fines are regularly imposed in abuse of dominance cases brought by enforcement agencies. However, private actions are still relatively rare in Europe.
- A number of commentators have criticised current systems for imposing fines for competition law violations in Europe. The main problem seems to be that there is not a clear scale for determining how a particular abuse of dominance violation will be categorised. Although the factors that agencies take into account are well known, it is not clear how they can be applied objectively and decisions do not always adequately explain how fines were calculated. Indeed,

some scholars have found that identical factual scenarios are sometimes treated differently, while different factual scenarios are sometimes given the same treatment. Therefore, there is some uncertainty regarding the amount that a firm can expect to be fined.

## 2. Potential Objectives of Remedies and Sanctions

Remedies and sanctions in abuse of dominance cases serve a number of objectives, and while the same ones tend to be mentioned again and again, opinions differ as to which objectives are the most important. Pitofsky, for example, states that “the principal goals of antitrust should be: first, to deter anticompetitive conduct . . . and second, to take illegal gains away from the law violators and restore those monies to the victims.”<sup>5</sup> Crandall and Elzinga believe that “[t]he primary objective of any antitrust remedy is to halt the defendant’s anticompetitive behaviour.”<sup>6</sup> According to Sullivan, “the remedy must fit the illegal conduct. In competition law, the ultimate goal also should be to restore competition.”<sup>7</sup>

It may be helpful to begin with some categorisations so as to clarify the terms being used. Although the words “remedy” and “sanction” are sometimes used interchangeably with respect to competition policy, those words can also be taken to have different meanings, and the differences matter. Specifically, the word “remedy” means something that cures, corrects, or prevents, whereas a “sanction,” at least in a legal context, is a penalty or punishment. Therefore, in a competition policy context, it may be useful to think of remedies as measures that aim to stop a defendant’s unlawful 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.

### 2.1 *Stopping the Conduct and Preventing Its Recurrence*

Putting a stop to unlawful conduct is an obvious but essential remedial objective. Simply meeting this goal alone, however, does not always lead to a sufficient remedy. Just as catching criminals and merely telling them to “Go and sin no more” would probably be ineffective as a policy against crime, a competition policy that went no further than to halt harmful practices would be unlikely to protect competition.

First, there needs to be some mechanism for preventing the defendant from simply going back to the market and repeating the same (or similar) conduct. Second, in some instances, a defendant will already have caused lasting harm to competition by the time the unlawful conduct is enjoined. In other words, it may have already accumulated and/or protected its market power as a result of the illegal behaviour. If the only remedial goal is to stop that behaviour, though, then the defendant could continue to benefit while the injury to competition that it caused goes untreated. Not only would this outcome leave intact conditions that damage consumers, it would also encourage more of the same kind of conduct. Other dominant firms would conclude that the worst thing that would happen as a result of abusing their dominance is that they would be ordered to stop at some point.

On the other hand, it is possible that in some cases competitive conditions will return as soon as the unlawful conduct ends. Even in those situations, though, some harm may have been done and it may therefore be desirable to force the firm to give up any profits it received from its unlawful activities, to

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<sup>5</sup> Robert Pitofsky, “Antitrust at the Turn of the Twenty-First Century: The Matter of Remedies,” 91 *Georgetown Law Journal* 169, 170 (2002).

<sup>6</sup> Robert Crandall & Kenneth Elzinga, “Injunctive Relief in Sherman Act Monopolization Cases,” 21 *Journal of Research in Law and Economics* 277 (2004).

<sup>7</sup> E. Thomas Sullivan, “Antitrust Remedies in the U.S. and EU: Advancing a Standard of Proportionality,” 48 *Antitrust Bulletin* 377, 424 (2003).

require it to compensate victims for the harm they suffered, and in general to remove any incentive for firms to engage in similar behaviour in the future. Those objectives are discussed further below.

## 2.2 *Restoring Competition*

This objective is vital, as well. A remedy sought by a competition agency must restore the level of competition that would have existed but for the violation if that remedy is to be considered a success from a consumer welfare standpoint. If the remedy fails to accomplish that objective, it leaves consumers exposed to ongoing harm from the reduction in competition caused by the defendant's unlawful activity. Accordingly, the US Supreme Court has held that merely stopping anticompetitive conduct is insufficient; courts should also "pry open to competition a market that has been closed by defendants' illegal restraints."<sup>8</sup>

If the dominant firm's unlawful conduct had the effect of raising entry barriers, for example, then ensuring that competition is going to be restored will require agencies and courts to look at the structural conditions that are likely to exist in the market after the remedy is applied. The remedy will have to lower those barriers to the pre-violation level; otherwise, the barriers will continue to give more protection to the dominant firm's position than it would have enjoyed but for its violation, and the previous level of competition will not be restored.<sup>9</sup>

Cavanagh takes a more aggressive position, asserting that entry analysis is "crucial" for evaluating remedies in every abuse of dominance case. In his view, "[i]f the monopolist's dominant position is insulated by high entry barriers, any decree that does not attempt to lower those barriers would not effectively restore competition and hence is doomed to failure."<sup>10</sup> The difference in his approach is significant because, despite his terminology, Cavanagh's proposal may go beyond restoring competition. If a dominant firm was operating in a market that featured high entry barriers to begin with and the barriers were unaffected by the conduct, then to demand remedies that would lower entry barriers may be to strive for a much more ambitious goal: that of making the market even more competitive than it would have been absent the unlawful conduct.

## 2.3 *Deterrence*

Deterrence is another objective with obvious value. When an abusive dominant firm is appropriately sanctioned, not only does it become less likely to repeat its violation, but other dominant firms become less likely to engage in abusive behaviour, as well. Furthermore, if dominant firms were always deterred from engaging in abusive behaviour, then no one would suffer the kinds of injuries that the competition laws are intended to prevent. The burden on courts and agencies of enforcing the competition laws would also disappear. There is such a thing as too much deterrence, though. If businesses are overly concerned about the likelihood and consequences of being found to have abused a dominant position, then they may exercise too much self-restraint and decide to avoid certain conduct that would actually have been pro-competitive. Therefore, competition and consumers can suffer both when there is too little deterrence and when there is too much of it.

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<sup>8</sup> International Salt Co. v. United States, 332 U.S. 392, 401 (1947).

<sup>9</sup> For much more detail on barriers to entry, see OECD, Barriers to Entry, available at [www.oecd.org/dataoecd/43/49/36344429.pdf](http://www.oecd.org/dataoecd/43/49/36344429.pdf).

<sup>10</sup> Edward Cavanagh, "Antitrust Remedies Revisited," 84 Oregon Law Review 147, 202-03 (2005); see also Sullivan, *supra* note 7 at 421 ("When restoration of competition is an important remedial goal, an understanding of conditions of entry in a market is crucial, given that a firm with a large market share will not be able to earn monopoly returns if there is ease of entry into the market.")

## 2.4 *Just Compensation*

Whether compensating the victims of abuses of dominance is a legitimate goal or not depends on one's perspective. If one believes that part of the reason for enforcing competition laws is to discourage and reverse wealth transfers from consumers to dominant firms that occurred as a result of abusive conduct, then compensation is an important objective. On the other hand, if one believes that promoting and protecting total economic efficiency is the only reason to have a competition law enforcement system in place, then compensating victims in abuse of dominance cases will seem to be a pointless exercise.<sup>11</sup> Even under the latter view, though, compensating victims can be viewed as a means to an end, if not as an end in itself. This is because making violators pay compensation to victims also serves the objective of deterring abusive conduct that harms efficiency.

If compensation is allowed for abuse of dominance violations, the compensation should be just. That means that compensation should be given only to those who are actually injured by the violations. Those who are not injured, or who are only slightly injured, should not be entitled to windfalls. On the other hand, injured parties should receive an amount that reflects the amount of their injury as well as the costs and risks involved in litigation.

## 2.5 *Disgorgement*

The concept of disgorgement stems from the idea that a firm should not be allowed to retain any financial benefit from its illegal activity. Thus, in the context of abuse of dominance, disgorgement occurs when a dominant firm is forced to give up the profits it gained as a result of its abusive conduct. The rationale behind this objective is another objective: deterrence. By taking away the profits that result from abusive conduct, the incentive for engaging in that conduct is eliminated and thus the conduct is deterred. Disgorgement may be achieved by any kind of monetary sanction, including fines and private damages awards, and in some jurisdictions it is also possible for agencies to seek disgorgement specifically.

## 2.6 *Proportionality*

There is a general consensus that remedies and sanctions should be proportionate to the violation. Some jurisdictions, such as the EU, have a proportionality standard incorporated directly into their competition laws.<sup>12</sup> Others do not, but the concept of proportionality is respected nonetheless.<sup>13</sup> A proportional remedy is one whose scope and form does not exceed what is necessary to achieve the competition law's objectives. The remedy is tailored to the violations that were actually found, the harm they actually caused, and the actual ways in which they caused it – not to completely different and unproven violations, harms, or practices. Proportional remedies do not attempt to inject more competition into the relevant market than that which would have existed but for the violation. Finally, proportional remedies are reasonably consistent from case to case. The more harmful the misconduct is, the stricter the remedy should be.<sup>14</sup> But the focus is on harm, not on immorality.

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<sup>11</sup> Wouter Wils, "Optimal Antitrust Fines: Theory and Practice," 29 World Competition Review (2006) (forthcoming).

<sup>12</sup> Council Regulation 1/2003 para. 12 and Article 7.

<sup>13</sup> Cavanagh, *supra* note 10 at 201-02.

<sup>14</sup> "[M]easures adopted by public authorities should not exceed the limits of what is appropriate and necessary in order to attain legitimate objectives in the public interest; when there is a choice between several appropriate measures recourse should be made to the least onerous, and the disadvantages caused (to the individual) should not be disproportionate to the aims pursued." Sullivan, *supra* note 7 at 414-15 (quoting Nicholas Emiliou, *The Principle of Proportionality in European Law* 2 (1996)).

A proportional sanction (as opposed to a proportional remedy) is one that neither over-deters nor under-deters. For certain violations, such as cartels, which are categorically considered to be harmful and without any possible offsetting benefits, over-deterrence is not much of a concern. Thus cartels are treated criminally in some jurisdictions and the participants may be imprisoned. But the conduct that constitutes an abuse of dominance often is very hard to distinguish from conduct that is pro-competitive, and as a result, abuse of dominance is a much less clear-cut violation than forming a cartel. Over-deterrence is therefore more of a possibility.

Proportionality is not a stand-alone objective in the way that the other objectives listed here are, given that it does not directly relieve any of the harm caused by abusive firms. It is, however, a desirable trait for remedies and sanctions to have because, depending on how it is put into practice, it can make the enforcement system more effective. Specifically, it can promote the implementation of relief measures that are appropriate for the conduct at issue, rather than measures that are too strong or too weak. It may also make relief less arbitrary and thus more predictable. Furthermore, proportionality helps to give the public confidence that all defendants are being treated fairly and impartially under the law.

There will not ordinarily be a precise way to evaluate proportionality across cases, but it is often possible to get a sense of whether the most harmful violations are treated most severely and the least harmful offences are treated more leniently. Accordingly, stern measures should be taken against a firm that engaged in abusive conduct that was indisputably and extraordinarily harmful to consumers. This could be the case, for example, if a defendant had bought all of the vital, irreplaceable input resources for an important market with inelastic demand, with the sole purpose of preventing competitors from using them and then restricting output and charging monopoly prices. In contrast, light or even symbolic measures might be taken against a firm that had engaged in technically unlawful conduct that did not cause much harm to competition. In addition, lighter measures might also be taken when the conduct has mixed effects, i.e., the conduct harmed consumer welfare and is determined to be unlawful, but it also had some positive welfare effects. That might be the case, for example, if a dominant firm maintained below-cost “introductory” prices on a new product for, say, three years or more.

Notice, however, that taking account of any pro-competitive effects by lightening the remedy or sanction by some supposedly proportional degree appears to be a new guise for something the Committee has considered before in a different context: consumer welfare balancing. In the roundtable on Competition on the Merits, consumer welfare balancing was examined as a means of determining liability in abuse of dominance cases.<sup>15</sup> One of the conclusions reached was that, although it may be possible to determine whether conduct enhances or reduces consumer welfare in some cases, it can be quite challenging, if not impossible, to measure the magnitude of those changes. When conduct has both positive and negative effects on consumer welfare, though, balancing tests require that those effects be weighed against each other to determine which effect is stronger. Thus one would need to know what the magnitudes are to be able to do the balancing. It is difficult to have confidence that balancing tests can be applied accurately, objectively, and consistently because they compare factors that can rarely, if ever, be measured. The same problems would inevitably arise if the same balancing process were undertaken in the context of remedies or sanctions. Measuring the consumer welfare effects of the dominant firm’s unlawful conduct in an effort to devise proportional relief would be no easier than it is during the liability phase.

This is not to say that pro-competitive effects should never be taken into account in any way when remedies are designed. For example, just because conduct happened to have anti-competitive effects at the time of the violation does not necessarily mean it will continue to have the same effects under the circumstances that will be present in the future. Technology or some other factor may be changing in a way that suggests the same conduct could have pro-competitive effects in tomorrow’s market. In that case,

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<sup>15</sup> OECD, Competition on the Merits, <http://www.oecd.org/competition> at pp. 11, 31-33.

a remedy that stops the conduct may not only be pointless and unnecessary, it may be harmful. Furthermore, agencies will need to pay careful attention to whether a contemplated remedy is overbroad, such that it might unnecessarily prevent other pro-competitive conduct in the future. Ordinarily, the remedy should permit as much pro-competitive conduct as possible while stopping and preventing the recurrence of the conduct that was found to be unlawful. But these considerations are different from the notion that a remedy should be scaled back whenever some pro-competitive effects were inextricably bound up with the unlawful conduct's harmful effects. In other words, these considerations do not imply that agencies should look back at the conduct's welfare effects and balance them to arrive at a proportional remedy.

Nevertheless, some commentators seem to expect that agencies and courts will engage in that kind of an exercise: "The remedy should also take into account the pro-competitive benefits of the conduct. Acts that are unambiguously harmful should be treated harshly. Where the offending conduct has redeeming pro-competitive benefits, however, less stringent relief would ordinarily be appropriate."<sup>16</sup> The problem with this is that if an agency succeeds in avoiding the subjectivity and lack of precision inherent in welfare balancing tests by using some other test to determine liability, but then it proportionally weakens the remedy according to its perception of any pro-competitive benefits that the conduct had, the drawbacks of welfare balancing will be reintroduced to the enforcement process. In other words, the agency will undermine the predictability and objectivity that non-balancing liability tests and the proportionality principle itself were promoting in the first place.

Furthermore, in the context of remedies, if this kind of exercise were carried out in the name of proportionality, that objective could be made to clash with the goals of stopping the unlawful conduct and restoring competition. Having made the determination that the defendant's conduct was an unlawful abuse of dominance, *despite any inextricable efficiencies or pro-competitive effects it may also have had*, an agency will ordinarily want to design a remedy that puts a stop to the conduct and restores the level of competition that would have existed but for the violation – no more, and no less. It would not make sense to spoil an effective structural or behavioural remedy that would have accomplished those goals by diluting it so that it is only semi-successful at stopping the conduct and restoring competition. If any pro-competitive effects of the conduct are going to be taken into account, that should be done in a manner that does not involve actual welfare balancing.

The situation is a bit different with respect to sanctions but the outcome is the same. Sanctions, particularly fines, are geared more toward the goal of deterrence than toward the goals of restoring competition or stopping the unlawful conduct. As we will see below in Part 4.4, there is a theoretically optimal monetary penalty in every case. Some scholars have proposed that it should be calculated by determining the *net* harm caused by the unlawful conduct and multiplying that figure by some amount to account for the probability of detection being less than 100 percent. The term "net harm" means the total harm caused to others by the conduct, minus any pro-competitive benefits the conduct happens to have. Thus, that theory of optimal fines supports the idea of reducing a sanction to some extent if the conduct at issue had any pro-competitive benefits. But net harm is what welfare balancing tests try to determine and, as mentioned earlier, welfare balancing is extraordinarily difficult to implement in practice in a rigorous, objective, and predictable manner. Therefore, optimisation is a theoretically sound idea that is not well-suited to application in the real world. From a practical standpoint, it does not seem advisable to try to take pro-competitive effects into account in the sanctions process, even when the sanction is a fine.

Again, this is not to say that pro-competitive effects have no relevance whatsoever to competition law enforcement in general or even to fines in particular. For example, an agency's policy might be to apply fines only against some categories of unilateral conduct, such as conduct that has been repeatedly

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<sup>16</sup> Cavanagh, *supra* note 10 at 203.

determined to have no legitimate business justification. But that approach is different from the idea of proportionally reducing a fine by some amount that corresponds to the pro-competitive effects of the unlawful conduct on a case by case basis.

One situation in which using lighter measures does not appear to be controversial is when the conduct at issue has never been dealt with by the jurisdiction's courts before and there could have been reasonable doubt *ex ante* about whether the conduct would be found unlawful. On the other hand, conduct that has been found unlawful again and again would warrant harsher remedies. Here the practical implications of proportionality and deterrence are closely aligned. Stronger deterrents are obviously needed if companies continue to engage in the same kind of behaviour that has been repeatedly condemned in the past. When a case is one of first impression, though, it is just as clear that there is not a problem with recidivism for the type of conduct at issue in the case (at least, not yet). Of course, a certain amount of scepticism is appropriate here because all defendants will have an incentive to argue that theirs is a case of first impression.

Unfortunately, determining where to locate a case on the spectrum that runs from mild to harsh remedial or punitive measures cannot be an exact science. Sometimes it may not even be clear which half of the spectrum is appropriate for a given case, so trying to ensure that a proportionality standard is met could be a daunting task. For example, suppose that a dominant firm senses that a fledgling competitor has the potential to develop into a formidable foe over the next several years, and decides to engage in efficiency-reducing conduct that has no justification or purpose other than to kill off that competitor. Does that conduct warrant severe treatment because it is so blatantly anticompetitive, or should it result in only a mild rebuke because of the uncertainty as to whether the victim would have grown into a powerful rival?

### 3. General Suggestions for Designing Remedies

In an influential 1999 article, Kovacic laid out a number of suggestions for competition law enforcement agencies regarding how to design remedies in abuse of dominance cases.<sup>17</sup> Most of the recommendations below are derived from that article.

#### 3.1 *Promptly define the remedial objectives and develop a plan for attaining them*

Ideally, competition agencies will define their remedial objectives and devise sound strategies for achieving them before taking any enforcement action in a matter. Otherwise, agencies may wind up expending the resources necessary to win the case, only to find that they have not given sufficient thought to the all-important issue of what an effective remedy would be. Perhaps worse, they may find that there is no workable remedy. Having enough evidence to prove liability does not necessarily mean that a successful remedy can be found in a given case. If it is not going to be possible to design and implement an appropriate remedy, then there is little point in pursuing a case,<sup>18</sup> and it is better to make that discovery earlier rather than later.

Consequently, consideration of remedies should begin at the start of the investigation. While gathering the information necessary to determine whether a violation has occurred, the agency should also be thinking about what it would like to happen in the event that there is a successful enforcement action. Then, Kovacic recommends, if competition authorities decide to intervene against a company they should

<sup>17</sup> Kovacic, *supra* note 4 at 1310-16.

<sup>18</sup> An exception would occur if the agency deems it appropriate to impose a fine, which is possible regardless of whether a workable remedy can be found (assuming that the statutory regime allows fines). Furthermore, the agency may wish to establish liability so that follow-on private actions for damages are facilitated.

disclose their remedial aims at the same time that the enforcement action is formally taken.<sup>19</sup> The disclosure should include the basic elements of the proposed remedy as well as a description of how it will counteract the harm caused by the impugned conduct. That will have the effect of ensuring that the agency pays attention to remedial issues as the case progresses. If the competition authorities find that their evidence is likely to be too vague or unpredictable to permit them to articulate a clear remedy at that stage, then that is an indication that the best course of action might be not to prosecute the case.

It is equally important for agencies to consider throughout their investigation whether and how the remedies they are contemplating can be administered. Designing a remedy that is theoretically perfect will do little good if it is highly impractical or impossible to put it into action. For example, it might be clear that competition would be restored by a remedy requiring a dominant automobile manufacturer to sell its proprietary and revolutionary metal stamping machines to rival auto manufacturers. Because there is no existing market for those machines, however, there will be no easy way to set the prices for them, and the court might have to engage in tiresomely frequent regulatory exercises to resolve disputes about what a fair price is under ever-changing market circumstances. Alternatively, a remedy might do a wonderful job of curing competitive ills, but if it seriously damages the defendant's employees or investors, a court will probably be reluctant to adopt it. For these reasons, agencies will probably want to have a solid plan for overcoming any fears that the court may have about a remedy's administrability or its impact on other parties.

To put this suggestion into action, agencies will need to make a deliberate and consistent effort to incorporate attention to remedies into their case preparation processes. The remaining suggestions provide some guidance on how to go about doing that.

### 3.2 *Understand the industry*

To design an effective remedy, the agency needs to have a thorough understanding of how the industry has developed, how it would probably evolve without any government intervention, and how various remedies would be likely to transform it. In rapidly changing markets, the agency must also take account of how new technologies will affect market performance in a future with and without the contemplated remedies.<sup>20</sup> Undoubtedly, making those kinds of predictions accurately can be difficult, but they are not altogether unlike the predictions that agencies have to make in merger cases.

In some cases, it simply may not be possible to restore competition because underlying market forces will not allow that to happen. Having a good understanding of the relevant industry will help enforcers to recognise such situations so that they do not make an ill-advised attempt to do the impossible. For example, at a time when enforcers were still learning this lesson, US antitrust authorities filed a Sherman Act suit against General Motors, alleging that GM had unlawfully monopolised the market for manufacturing intercity and transit buses through a variety of coercive tactics.<sup>21</sup> There was only one other competitor in the market. Eventually, a settlement was reached under which GM was forbidden from entering into certain exclusive supply contracts and was also required to grant licenses to its patents as well as to sell certain equipment to any bus operator or manufacturer that wanted to buy them.<sup>22</sup> The idea behind these remedies was to force GM to help stimulate entry and thus to revive competition. A key fact had not been taken into account, though: the minimum efficient scale for producing buses was very large in relation to the total demand for buses. The market simply could not support more than two competitors,

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<sup>19</sup> Id. at 1310-12.

<sup>20</sup> Id. at 1310.

<sup>21</sup> United States v. General Motors Corporation, Civil Action No. 15816 (D.Mich. 1956).

<sup>22</sup> United States v. General Motors Corporation, Consent Decree, CCH Trade Cases para. 71,624 (1965).

and even that was difficult. Thus, 15 years after the settlement, only the same two major manufacturers were in the market, and neither of them was able to operate efficiently. In addition, prices do not appear to have been affected by the settlement at all.<sup>23</sup>

### **3.3 *Make adjustments if there is a history of misconduct***

Some commentators recommend that the defendant's record of compliance with competition law be taken into account when designing the remedy. Holding all else equal, the more of a pattern of misconduct there is, the stronger the sanction should be. Making this adjustment will help to discourage recidivism in those defendants that prove to be difficult to deter. For example, if a 10 million euro fine would normally be considered appropriate for a given violation, but the defendant has already been fined twice in the past for the same type of violation, it is reasonable to expect that the agency would ask for a higher fine for that defendant.

In addition to influencing the strength of the remedy, considering the defendant's history of compliance may influence the selection of the type of the remedy. For example, if fines or conduct remedies have been imposed once or twice before on a defendant, but it continues to behave unlawfully, then it makes sense to consider whether a structural remedy would do a better job of deterring anti-competitive conduct and restoring competition.

### **3.4 *Anticipate the defendant's likely response***

The next step is to make judgments about the defendant's probable reaction to each of the remedies under consideration.<sup>24</sup> To some extent, this is really part of understanding the industry and may follow naturally from that earlier step. At this stage of the process, the competition agency needs to anticipate that the defendant will try to evade, minimise, or neutralise the remedy without technically violating its terms. The danger of this happening is higher with behavioural remedies than with other types, such as fines, which do not leave the firm with much room to manoeuvre so as to reduce or escape the sanction's impact (short of filing an appeal). In all cases, though, it is a good idea to try to seal off any tactical paths that might allow the defendant to avoid the intended consequences of the remedy.

That is likely to require a deep understanding of the business, which is one of the reasons that step 3.2 is so important. As Kovacic points out,

Compared to the government, the dominant incumbent generally will enjoy an information asymmetry about the future evolution of competition in its sector and can predict more accurately which elements of commercial freedom will be most important to future success. The government must cope with the danger that its proposed remedy will constrain behaviour that the defendant knows to be increasingly unimportant and fail to block alternative paths to reaching the same anticompetitive ends.

He further advises that agencies can reduce the informational imbalance to some degree by consulting the defendant's competitors and seeking information that will help the agency to predict and defuse strategies for circumventing the remedy. At the same time, the agency will need to be wary of giving those rivals a chance to opportunistically increase the burden on the defendant by distorting the true market situation. Therefore, agencies might do well to check with large customers, too, as they may also be quite knowledgeable, and possibly less biased against the defendant.

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<sup>23</sup> See Crandall & Elzinga, *supra* note 6, for a detailed explanation of this case.

<sup>24</sup> Kovacic, *supra* note 4 at 1311.

### 3.5 *Identify side effects*

Next, the agency needs to determine what the possible side effects would be if each of the contemplated remedies were imposed.<sup>25</sup> For instance, requiring a dominant firm to provide its competitors with access to a key asset could have the unintended consequence of discouraging investments by competitors that would have led to superior alternatives to that asset. It also may chill research and development activity in general if companies come to believe that their most valuable innovations will have to be shared with rivals. As was pointed out when the Committee considered the subject of competition on the merits, that chilling effect is plausible when a) the dominant firm's conduct would lead to both efficiency gains and harm to consumer welfare; and b) legal precedent is not clear enough to enable confident predictions about how courts will view the behaviour.<sup>26</sup>

### 3.6 *Analyse administrability*

In this step, the agency strives to determine the practicality of implementing each remedy under consideration. This means figuring out not only how easy or difficult it is to put each remedy into action, but also estimating how much each one would cost to implement, as well. While fines do not usually involve substantial administrative difficulties or costs, behavioural and structural remedies can be very difficult to implement, and nearly every one of them will cost something to administer – possibly a large amount. Those factors will need to be taken into account when selecting the best remedy in a case.

This is the stage at which it is appropriate to consider how much oversight a remedy will require. How many terms in the remedial order or decree are likely to become subjects of contention between the agency and the defendant? How much scope is there for the defendant to seek waivers for particular parts of the remedy? Does the remedy require the agency or court to approve decisions that the defendant will make, or to set, adjust, or monitor various aspects of its business on an ongoing basis?

If it appears that a remedy is going to require a great deal of management by a court, the process may get so bogged down and delayed that the remedy becomes ineffective. Furthermore, remedies that burden courts with the task of making decisions about the day to day administration of businesses put the courts in a role they are not designed to fulfil. As a practical matter, courts should not approve remedies for which they lack the expertise or resources to implement.<sup>27</sup> Remedies that cannot be practically implemented should be discarded at this stage.

### 3.7 *Select a remedy*

Having considered a number of potential remedies in light of the industry's and defendant's characteristics, and having analysed their likely side effects, administrability, and enforcement costs, the next step is to decide which remedy is the best one. Some commentators suggest following the principle "First, do no harm" when choosing remedies. This maxim suggests that non-intervention is preferable to intervention if there is a chance that intervening could cause some kind of damage, so these commentators would cast aside any remedy that is likely to have some negative side effects. Not everyone agrees, though, that doing no harm should have priority over actually curing the competition problem. Indeed, harm could just as easily be done by not acting as by acting. Furthermore, competition law enforcement

<sup>25</sup> Id. at 1310-11.

<sup>26</sup> OECD, Competition on the Merits, supra note 15. See also Howard Shelanski & J. Gregory Sidak, "Antitrust Divestiture in Network Industries," 68 University of Chicago Law Review 1, 28-31 (2001) (explaining the importance of taking dynamic efficiency into account in addition to static efficiency when choosing remedies).

<sup>27</sup> Shelanski & Sidak, supra note 25 at 34.

could be crippled by adhering to the do-no-harm rule because there will almost always be at least some uncertainty about how a remedy will affect incentives and the degree of competition in the future.<sup>28</sup> A better approach is to try to identify what the likely side effects of a remedy will be so that they can be taken into account in the decision of whether to impose that particular type of remedy, consider another type instead, or conclude that there is no remedy that would not do more harm than good. That decision would also take into account the likely net effects of doing too little (or nothing at all). A qualitative comparison of the alternatives would then be made, and that is what would guide the decision on remedies.<sup>29</sup>

Ideally, it would be possible to make a quantitative comparison. Some authors have proposed fairly specific strategies for determining how to choose among a variety of remedial actions, but they tend to involve variables that are extremely difficult to measure in practice. Shelanski and Sedak, for example, have proposed a three-step method that seems sound enough in theory but that would be all but impossible to apply rigorously in a real case. The authors' proposal is for the government first to determine whether the remedy will produce a net gain in short term static efficiency (in other words, whether the benefits of the price reductions and output and/ or quality increases caused by the remedy will exceed the costs of any resulting diminution in the firm's ability to lower its costs). If the answer in the first step is positive, then the next step is to incorporate the remedy's effect, whether positive or negative, on dynamic (long run) efficiency. This step therefore takes the remedy's expected impact on factors such as technological change and network effects into account. If the net gain is still positive, then the third step is to evaluate the remedy's enforcement costs. The ideal remedy can then be identified as the one that yields the largest overall efficiency gains after subtracting the costs of enforcement.<sup>30</sup>

Even if it is improbable that one could ever prove quantitatively that a potential remedy in a given case is the best possible alternative under the Shelanski and Sedak method, the factors they identify can still be used to structure a helpful, albeit more intuitive, analysis. The essential points are that a) it makes more sense to follow a "do no *net* harm" rule than it does to follow a "do no harm at all" rule; and b) just because a remedy may entail static efficiency benefits does not necessarily mean it will have dynamic benefits.

### **3.8 *Develop a practical implementation framework***

Regardless of the particular remedy chosen, there has to be a realistic and useful framework in place for implementing it.<sup>31</sup> This means that the agency will have to anticipate difficulties that will arise when it is time to put the remedy into effect. For example, if the remedy is divestiture, the government will have to figure out how to solve the problem of allocating employees and assets that currently serve multiple business units that are about to be separated. The defendant will surely raise such problems at some point in the hope of persuading a court that the contemplated remedy is impractical or impossible, so the agency will want to be ready with counterarguments and specific plans for surmounting the difficulties.

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<sup>28</sup> See American Bar Association Section of Antitrust Law, Remedies Forum Roundtable II 9-12 (2 April 2003), available at [www.abanet.org/antitrust/remedies/](http://www.abanet.org/antitrust/remedies/).

<sup>29</sup> Cavanagh, *supra* note 10 at 203.

<sup>30</sup> Shelanski & Sidak, *supra* note 25.

<sup>31</sup> Kovacic, *supra* note 4 at 1311.

#### 4. Specific Remedies and Sanctions and Their Strengths and Weaknesses

##### 4.1 *The Lawsuit as a Remedy*

Regardless of the particular remedy being sought, the fact that a lawsuit alleging abuse of dominance has been filed can serve as a remedy in itself. First, these lawsuits can have a swift inhibiting effect on the defendant's conduct. Realising that its operations are now being carefully inspected by a court, a competition agency (or a private plaintiff), and perhaps the media, the firm may scale back its strategic behaviour in an attempt to appear more benign. The defendant may even decide to discontinue altogether the practices that triggered the lawsuit. Furthermore, it may begin to have some or all of its business decisions reviewed by lawyers in an effort to avoid engaging in any other conduct that could appear to be anticompetitive. This will tend to create a more cautious and tentative mood within the firm. It will also cause delays in the execution of business plans. These inhibiting effects can create new opportunities for rivals and potential entrants.<sup>32</sup>

Dominant firms in rapidly changing markets are especially likely to be vulnerable to such effects because those firms usually need to make and execute business decisions relatively quickly. The delays associated with getting approval from new layers of authority within the organisation may result in substantial lost sales opportunities. Rivals, meanwhile, will eventually notice that the dominant firm is not as aggressive as it used to be. They may respond by implementing more ambitious tactics because they are confident that the defendant will not retaliate as fiercely as it would have prior to the lawsuit.<sup>33</sup>

Another effect that filing a lawsuit may have is that it could divert the defendant's employees from their usual duties while the firm prepares and presents its side of the case. Complying with document requests, providing testimony, and helping the legal team to formulate a trial strategy can take an enormous amount of time – time that is not being spent on the company's usual business. Moreover, spending all that time on the legal defence may distort employees' views about what their objectives are. "In subtle, unconscious degrees, the firm's employees may come to believe that their chief goal is to vanquish the antitrust plaintiff rather than surpass competitors."<sup>34</sup> This distraction may create business opportunities for rivals that they would not normally have had.

One of the best examples of both the "inhibition effect" and the "distraction effect" occurred as a result of the U.S. government's monopolisation case against IBM in the 1970s and 1980s. Although IBM did a masterful job of stifling the government's case, the lawsuit had a lasting and very considerable remedial result. To begin with, the government litigation led to more than 40 private antitrust actions. Even though IBM stifled nearly all of those, as well, while the legal battles wore on and IBM methodically wore down its opponents over the course of 13 years, lawyers began to have more influence on the company's strategies and it appeared to lose some of its competitive vigour. Employees spent vast amounts of time on antitrust matters rather than on business matters. Meanwhile, the computer industry was undergoing fundamental changes to which IBM did not seem to give adequate attention, such as the rising importance of personal computers.<sup>35</sup> Had it not been distracted and perhaps tamed by the government's lawsuit, IBM might have remained the seemingly invincible behemoth that it once was, dominating today's PC and server operating system and software markets.

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<sup>32</sup> Id. at 1288-89.

<sup>33</sup> Id. at 1289.

<sup>34</sup> Id.

<sup>35</sup> Id. at 1289-1290.

## 4.2 *Structural Remedies*

Structural remedies require firms to sever links from assets they hold. Although structural remedies in abuse of dominance cases tend to be viewed sceptically, they can still be useful arrows in a competition agency's quiver. The threat alone that is presented by an agency wielding these enforcement tools may have a significant deterrent effect. Furthermore, in some cases, it simply may not be possible to restore competition by enjoining the conduct or imposing a fine, and no affirmative conduct remedy may be sufficient, either.<sup>36</sup>

### 4.2.1 *Divestiture*

Divestiture remedies restructure defendants into two or more companies, or require them to sell some of their assets to another firm. They are generally considered to be the most drastic type of remedy and their use has been controversial in abuse of dominance cases, except when the defendants have achieved dominance through acquisitions. Despite the nagging worries about divestiture, though, it does have a number of advantages as a remedy for abusive conduct. First, divestitures can eliminate market power rapidly and create or invigorate competitors. Therefore, some commentators believe that divestitures are much more likely than behavioural remedies to have long-run pro-competitive effects.<sup>37</sup>

Second, divestitures can be easier to design than behavioural remedies. In complex cases it may be easier to restore competition and foster deterrence by splitting a company apart than it would be to craft an equally effective conduct remedy. This is related to the fact that divestitures change the defendant's strategic incentives so that it and its "offspring" (hopefully) find it desirable to stop engaging in the conduct that was found to be unlawful and to start behaving pro-competitively. Behavioural remedies, in contrast, do not change a firm's underlying incentive structure, but simply force it to do or not do certain things whether it wants to or not.

Third, a divestiture may require only one dose of judicial intervention, as opposed to the ongoing oversight that conduct remedies tend to entail. Courts that have imposed a pure divestiture remedy will not have to be bothered with recurrent squabbles about whether the defendant violated a certain aspect of a behavioural remedy, or with frequent requests for modifications. Therefore, divestitures can be more efficient to administer than behavioural remedies are.

Another advantage of divestitures as opposed to behavioural remedies is that divestitures leave the management of the defendant's business to those who are most competent to do it. Behavioural remedies, in contrast, put at least some of that responsibility in the hands of an agency or a court – institutions that are more qualified to answer legal questions than to make detailed business decisions. In extreme cases, behavioural remedies will put the agency or court in the position of having to dictate the company's prices.

On the other hand, divestitures are more disruptive at first than behavioural remedies are, and they sometimes create immediate inefficiencies. For example, a restructuring that creates several rivals out of one company will require at least some duplication of investment, and it may also result in the loss of scale economies. Critics also argue that divestiture is such a drastic measure that it causes over-deterrence. In

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<sup>36</sup> This is the reason that the EU's Regulation 1/2003 provides for structural remedies. Its predecessor, Regulation 17/62, did not. Elena Wind, "Remedies and Sanctions in Article 82 of the EC Treaty," [2005] *European Competition Law Review* 659, 659 & n.4.

<sup>37</sup> Cavanagh, *supra* note 10 at 191 (citing R. Craig Romaine & Steven Salop, "Slap Their Wrists? Tie Their Hands? Slice Them Into Pieces? Alternative Remedies for Monopolization in the Microsoft Case," 13 *Antitrust* 15, 18 (Summer 1999)).

other words, dominant firms may opt to avoid conduct that actually would have been pro-competitive because they are so fearful of doing anything that could result in a break-up order.

Furthermore, not every corporate structure can be easily carved up in a prudent fashion. In easy cases, the defendant firm is already composed of relatively independent units that are conveniently organised according to their functional lines and thus can be fairly easily separated and spun off as individual entities. Alternatively, there might be an easy way to divide a company into two or more competing, integrated “baby companies.” But even those cases will probably call for some tough decisions about how to allocate certain employees and capital. In more difficult cases, the defendant firm is tightly integrated and there is no intuitively sensible way to split it apart. That means the form of the divestiture will probably be hotly contested, and a court will have to determine how to do it even though courts are not well-qualified to make decisions about how to create new companies.

In addition, history has shown that courts and agencies are not always able to “fix it and forget it” when implementing divestitures. To begin with, most divestitures are coupled with some kind of conduct remedy that requires at least a modest amount of oversight. For example, remedial orders ordinarily contain a provision forbidding the defendant from buying back its divested assets (or preventing the separated parts of the defendant from reintegrating themselves as one firm again). The order might also require that the divested entities refrain from giving one another preferential treatment over other competitors. Thus, divestitures do not necessarily involve only a light administrative burden. In fact, some of them have required years and years of steady oversight after the initial divestiture order.<sup>38</sup>

Another potential problem with divestitures is that they do not always create successful, or even viable, new competitors. It may be difficult to find a capable buyer for part of a company, or, if the newly separated unit is going to stand alone, it may have a difficult time adjusting to its new status and surviving without help. One last disadvantage of divestitures is that once they happen, it can be quite difficult to undo them. In the event that market conditions were misjudged and the remedy turns out to be ill-advised, it will typically be easier to modify or terminate a behavioural remedy than to reverse a divestiture.<sup>39</sup>

In view of all of these pros and cons, it is not surprising that scholars have greatly differing opinions on the value of divestiture remedies. Comanor & Scherer compared two early US monopolisation cases, one brought against Standard Oil and the other against US Steel.<sup>40</sup> While Standard was split into 34 pieces, US Steel emerged from the litigation with barely a scratch. The companies’ performance over the next several decades differed just as greatly as their courtroom results did. While Standard’s descendants became leading participants in the global petroleum industry as it became more competitive, US Steel flagged under the pressure of foreign competition and the US eventually became heavily dependent on foreign steel. Comanor argues that this was not mere coincidence, but just part of a body of evidence showing that divestiture remedies ultimately create stronger, more competitive firms that survive in the marketplace longer. He also notes that his observation is applicable not only to early cases, but to more recent ones, as well. He contrasts the fortunes of AT&T, which was subjected to a divestiture remedy in 1983, and IBM, which was not. Between 1983 and 1993, the stock market valuations of AT&T and its corporate offspring accounted for the single largest increase in valuation on the New York Stock

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<sup>38</sup> See discussion of *United States v. AT&T* below.

<sup>39</sup> E. Thomas Sullivan, “The Jurisprudence of Antitrust Divestiture: The Path Less Traveled,” 86 *Minnesota Law Review* 565, 612 (2002); Sullivan, *supra* note 7 at 407.

<sup>40</sup> William Comanor & F.M. Scherer, “Rewriting History: The Early Sherman Act Monopolization Cases,” 2 *International Journal of Economics and Business* 263 (1995). The Standard Oil case is discussed in more detail below.

Exchange, while IBM suffered through the single largest decline over the same period.<sup>41</sup> Comanor concludes that

[w]hile of course one can never be certain about the prospective results that would flow from any particular divestiture or dissolution, the evidence surely indicates that prior instances of structural relief have been uniformly successful, if not immediately, at least in the long run. In contrast, there are many examples where the failure to take strong actions against dominant firms has had unfortunate consequences.<sup>42</sup>

On the other side of the debate, Crandall completed a study of divestitures in Sherman Act monopolisation cases and concluded that with the lone exception of the AT&T case, there is very little evidence that structural relief was ever successful in increasing competition, raising total output, and reducing prices.<sup>43</sup> Even Kovacic, who believes that the theoretical case for divestiture as an antitrust tool is strong, has acknowledged that the practical case for it is fairly weak. He notes that past deconcentration efforts in the US were continually hampered by three problems: 1) the government chose the wrong cases or used an unsupportable theory; 2) the litigation took so long that the remedial plan was rendered inappropriate by changing industry conditions; and 3) reluctant judges decided not to approve divestiture remedies even though liability was established.<sup>44</sup>

Others have also noticed that American courts now view divestiture measures as being riskier than conduct remedies.<sup>45</sup> The courts tend to worry most when the defendant has an impressive history of efficient operation and/or innovation. They are loathe to do anything that might ruin that superior performance, and they are right to fear the possibility that divestitures could do just that by erasing important efficiencies or incentives to innovate. In some cases, courts may also fear that restructuring may result in lost jobs for employees and lost capital for investors. A telling indication of the status of the divestiture remedy in the US is that the Supreme Court has not ordered it in a monopolisation case in 40 years.<sup>46</sup> For all of those reasons, Professor Kovacic has written that “government plaintiffs are well advised to devote additional effort to demonstrating that a divestiture plan will produce substantial net competitive benefits without substantial adverse effects.”<sup>47</sup>

Divestiture remedies for abuse of dominance are not available under the competition laws of many other OECD countries, and where they are available, they are treated somewhat sceptically by the legal frameworks in place there, too. In the EU, for instance, Council Regulation 1/2003 states that structural remedies should be imposed only if there is no equally effective behavioural remedy, or if there is an equally effective behavioural remedy but it would be more burdensome for the defendant than a structural remedy. The Regulation also states that changes to the pre-violation structure of a firm are appropriate

<sup>41</sup> William Comanor, “The Problem of Remedy in Monopolization Cases: The Microsoft Case as an Example,” 46 *Antitrust Bulletin* 115, 119-120 (2001). The AT&T case is also discussed in more detail below.

<sup>42</sup> *Id.* at 120.

<sup>43</sup> Robert Crandall, “The Failure of Structural Remedies in Sherman Act Monopolization Cases,” AEI-Brookings Joint Center for Regulatory Studies, Working Paper 01-05 (March 2001).

<sup>44</sup> William Kovacic, “Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration,” 74 *Iowa Law Review* 1105, 1144-46 (1989).

<sup>45</sup> Kovacic, *supra* note 4 at 1294.

<sup>46</sup> The most recent case in which the Supreme Court ordered divestiture as a remedy for monopolisation was *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

<sup>47</sup> Kovacic, *supra* note 4 at 1294.

only when “there is a substantial risk of a lasting or repeated infringement *that derives from the very structure of the undertaking*.”<sup>48</sup> That passage clearly suggests that divestitures cannot be used to alter the pre-violation structure of a firm when a competitive problem is rooted in the structure of the market. Instead, the problem has to be rooted in the corporate structure of the defendant itself. In Canada, the Competition Bureau is authorised to seek divestiture in abuse of dominance cases, but it has never done so.<sup>49</sup>

### Standard Oil

The subject of remedies is one for which it is especially helpful to examine older cases because the passage of time provides the opportunity to evaluate how the chosen method of intervention worked out. One can still learn much from early cases like *Standard Oil*, which continues to be used to support both sides of the divestiture debate. In that famous case, the US Department of Justice alleged that John D. Rockefeller’s holding company had monopolised the refining and marketing of petroleum products in the United States through a variety of tactics, including buying its competitors, corporate spying, bribery, and discriminatory price cuts. After ruling in the government’s favour, the district court ordered the dissolution of the company by forcing it to distribute the stock of Standard’s numerous subsidiaries to its shareholders.<sup>50</sup> The subsidiaries then became independent companies.

On appeal to the Supreme Court, Standard made many of the arguments that defendants facing a divestiture remedy would continue to make during the next century. It argued that the break-up was infeasible because the nature of the petroleum industry required companies to be integrated. It argued that the whole industry would suffer, shareholders would suffer, and indeed the entire American economy would suffer. It also argued that disintegrating Standard Oil would make it less efficient, causing petroleum prices to rise. Hundreds of thousands of people would lose their jobs, and foreign trade would be adversely affected, as well.<sup>51</sup>

The Supreme Court was unmoved by any of those arguments. It noted that Standard’s unlawful practices had contributed to the establishment of its monopoly, so merely enjoining those practices would, without more, be insufficient.<sup>52</sup> It therefore affirmed the lower court’s rulings on liability as well as on the dissolution. In the Court’s view, breaking up Standard Oil was not only appropriate, it was necessary.

The “parade of horrors” envisioned by Standard’s lawyers did not occur. Although some aspects of the restructuring were complex and entailed real risks of losing efficiencies associated with vertical integration, the reorganisation of Standard Oil was successfully accomplished, and the industry continued to produce its goods and services. One factor that made the remedy easier to implement was that many of Standard’s subsidiaries were already organised as independent companies that easily became self-sufficient after they were separated from the rest of the company. That substantially lightened the burden of the transition for them, since there was less of a need to create new departments and operating plans or to find and develop new executives. Another helpful factor was that demand for petroleum products was growing rapidly, making conditions quite favourable for the new companies while they adjusted to being independent.<sup>53</sup>

<sup>48</sup> Council Regulation No 1/2003 para. 12 (emphasis added).

<sup>49</sup> Competition Act section 79(2).

<sup>50</sup> *United States v. Standard Oil Co.*, 173 Fed. 177 (E.D. Mo. 1909).

<sup>51</sup> See Kovacic, *supra* note 4 at 1295-1300, which discusses this case in more detail.

<sup>52</sup> *Standard Oil Co. v. United States*, 221 U.S. 1, 77 (1911).

<sup>53</sup> Kovacic, *supra* note 4 at 1301-02.

Shareholders also fared quite well, despite Standard's predictions. Far from being impoverished, over the next six years they saw the aggregate value of the successor companies' shares rise nearly fourfold. In fact, the disintegration of Standard Oil proved to be one of the best things that ever happened to Rockefeller. His 25 percent ownership of Standard became a 25 percent ownership of each of the 34 former subsidiaries. Their soaring shares nearly made Rockefeller a billionaire at a time when the national debt of the United States was only \$1.2 billion.<sup>54</sup> Undoubtedly, that was not quite the outcome that the government had in mind for him.

But what about the key question of the remedy's effect on consumer welfare? Did the dissolution of Standard Oil wind up helping consumers or harming them? Commentators are still arguing about that. At a minimum, as Kovacic observes, the break-up did create several independent companies out of one dominant entity.<sup>55</sup> Then again, notes Sullivan, those companies were not really competing with each other, at least in the beginning. They were more like regional monopolists who respected each other's territories and allowed no competition among themselves. Consequently, one could argue that the government succeeded only in transforming one giant monopolist into 34 smaller monopolists.<sup>56</sup> In other words, it could be said that a divestiture had occurred in form, but not in substance. Eventually, however, competitive forces prevailed as the old shareholders who had major interests in all of the new companies began to divide their shares among heirs and charitable organisations. That cleared the way for the companies to infiltrate one another's markets as the demand for gasoline started to grow impressively.<sup>57</sup>

In any case, the lessons we can safely draw from the Standard Oil case are 1) defendants' predictions about a divestiture's effects are not necessarily more accurate than an enforcement agency's predictions; 2) divestitures are easier to implement when the defendant is already organised into clearly distinct units that can readily become independent companies; 3) divestitures are easier to implement when market demand is robust; and 4) to be most effective, divestitures should create competitors, not just smaller, fragmented monopolists.

## AT&T

Jumping forward about 70 years, another important and instructive divestiture took place in the US. In 1974, the Department of Justice filed a lawsuit against AT&T, alleging that the company had violated section 2 of the Sherman Act.<sup>58</sup> Among other things, DOJ claimed that AT&T had been using its monopoly in local exchange telecommunications service to monopolise the telephone equipment manufacturing and long distance telecommunications service markets. For example, AT&T was accused of failing to connect competing carriers with its network on reasonable terms and of reducing its prices only in the markets where it faced competition. Several years later, the litigation came to an end with a settlement agreement that imposed both structural and behavioural remedies.<sup>59</sup>

The structural part of the remedy was a vertical divestiture. AT&T agreed to divest its local service providers, leading to the formation of seven regional operating companies (called "RBOCs"). AT&T kept its long distance, equipment manufacturing, and research divisions, but it was required to transfer enough

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<sup>54</sup> Ron Chernow, *Titan* 556-57 (Vintage: 1998).

<sup>55</sup> Kovacic, *supra* note 4 at 1300.

<sup>56</sup> Sullivan, *supra* note 38 at 579 & n.83.

<sup>57</sup> F.M. Scherer, *Industrial Market Structure and Economic Performance* 529 (2d ed., Houghton Mifflin: 1980).

<sup>58</sup> *United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C 1982).

<sup>59</sup> *Id.*

assets to the RBOCs to allow them to operate. Those assets included, on a royalty free basis, all existing patents as well as all patents issued for the next five years. The behavioural relief took the form of regulatory provisions governing each RBOC. For example, to prevent the RBOCs from emulating AT&T's strategy, the decree required them to obtain the court's approval before expanding the scope of their business beyond local exchange services. The RBOCs were also obliged to provide every long-distance carrier equal access to their local exchange networks. A lone trial judge then began to oversee the process of breaking up what was, at the time, the largest corporation in the world.

It would be an understatement to say that not everyone approved of the decision to split AT&T apart. Opponents argued that the quality of service would decline, national security would be endangered, a precious research and development enterprise would be damaged and, as the defence team had argued in *Standard Oil*, shareholders would suffer.<sup>60</sup>

The outcome turned out to be substantially less bleak. A great deal of the restructuring was accomplished without much difficulty, thanks to the fact that the regional operating companies were already organised in a way that made it fairly easy to spin them off as independent companies. Furthermore, because AT&T's pre-divestiture structure was largely the product of regulation, the process was not plagued by doubts about the wisdom of meddling with a wonderfully efficient structure that had been shaped by market forces. In addition, just as Standard Oil's shareholders actually benefited greatly from the divestiture, so did the AT&T investors who held onto their shares.<sup>61</sup>

Even though a consensus has not been reached with respect to the consent decree's effects, it is fair to say that most observers believe the net effects were positive.<sup>62</sup> Cavanagh, for example, calls the divestiture "a resounding success," crediting it with reigniting competition and restoring the marketplace to "robust health."<sup>63</sup> He notes that when the lawsuit was initiated in 1974, wireless communication and the internet were virtually unknown, while telephone answering and facsimile machines were just beginning to develop. People still used rotary dial phones, and long-distance calls cost a fortune in comparison to today's rates.<sup>64</sup> Others have pointed out that post-divestiture competition among long-distance providers led to the rapid deployment of fibre optic cable that would later support the development of the internet.<sup>65</sup> Of course, we cannot be entirely sure how competition and innovation would have progressed without the divestiture, but at the very least it does not appear to have halted them.

Despite those positive factors, *AT&T* is perhaps the greatest counterexample to the claim that divestiture remedies are easier to administer than conduct remedies. The burden on the trial court turned out to be enormous by virtually any measure. Whenever the RBOCs sought to change the terms of the decree or to obtain waivers under it, which they often did, the court was called upon to hear arguments and settle disputes. The trial judge issued decisions on over 160 requests for waivers under a catch-all clause in the decree.<sup>66</sup> Overall, more than 900 waiver petitions were filed that asked the court to rule on the meaning

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<sup>60</sup> Kovacic, *supra* note 4 at 1303; Cavanagh, *supra* note 10 at 197.

<sup>61</sup> Kovacic, *supra* note 4 at 1303.

<sup>62</sup> *Id.* at 1303 & n.75.

<sup>63</sup> Cavanagh, *supra* note 10 at 195, 197; see also Sullivan, *supra* note 38 at 584 (calling the AT&T case "an effective use of the divestiture remedy").

<sup>64</sup> Cavanagh, *supra* note 10 at 196.

<sup>65</sup> Remedies Brief of Amici Curiae Robert E. Litan, Roger G. Noll, William D. Nordhaus, and Frederic Scherer, *United States v Microsoft Corp*, Civil Action No. 98-1232, (D.D.C., 27 April 2000).

<sup>66</sup> Sullivan, *supra* note 38 at 587.

and scope of the decree's line-of-business restrictions.<sup>67</sup> By 1994, the average waiver request had been pending for more than 48 months as the court struggled under the administrative load that had been placed on it.<sup>68</sup> Thus, even if the AT&T settlement produced net benefits, it undeniably generated significant costs. Therefore, as Shelanski and Sidak point out, "the correct comparison for remedial purposes is not between the post-divestiture era and the monopoly era, but between the post-divestiture era and what would have resulted under alternative remedies."<sup>69</sup>

We can take away a number of other significant points from the AT&T case, too. First, divestiture can still be the quickest way to stop abusive conduct and reverse its effects. It is difficult to imagine, for example, how purely behavioural remedies could possibly have been as effective as the divestiture without introducing substantially more inefficiency because of the need for even more oversight. Second, divestitures may unleash bursts of innovation that might not have taken place so quickly under a monopolistic market structure. Finally, divestitures – especially complicated ones – can involve significant unforeseen problems and costs. It is worthwhile to analyse the incentives that companies in the post-divestiture market will have, and to anticipate as many disputes, ambiguities, and other problems as possible *before* implementing the remedy so that the divestiture will proceed more quickly.

#### 4.2.2 *Mandatory Licensing*

Mandatory licensing of intellectual property could be labelled as either a behavioural remedy or a structural one, but it is listed in the latter category here because it has the capability to alter market structure by introducing new competitors. Compulsory licensing is in some respects an attractive tool for competition agencies, particularly when they are dealing with a dominant firm. Making key IP accessible can open up a market to competitors relatively quickly. Furthermore, it may permit follow-on innovation that had been blocked by the dominant firm's refusal to license.

Mandatory licensing remedies do have certain drawbacks, though. A major one is that they require competition authorities or courts – or both – to be involved in setting the terms of the licenses, and perhaps in monitoring their execution, as well. Without such involvement, the licensor may impose terms that amount to a virtual refusal to license. For example, the defendant may try to leave the truly critical IP out of the license, or it may charge royalties that are prohibitively expensive.<sup>70</sup> Furthermore, the defendant may claim that it has fulfilled its obligations under the license while the licensee argues that vital information was not provided at all, was provided too slowly, or was provided in a useless format. Consequently, agencies and courts may find it cumbersome to have initial and ongoing oversight duties related to licensing practices.<sup>71</sup>

<sup>67</sup> Shelanski & Sidak, *supra* note 25 at 36 (citing Michael Kellogg, John Thorne, & Peter Huber, *Federal Telecommunications Law*, sections 7.1-7.9 (Little, Brown: 1992)).

<sup>68</sup> *Id.* at 95 (citing Paul Rubin & Hashem Dezhbakhsh, "Costs of Delay and Rent-Seeking Under the Modification of Final Judgment," 16 *Managerial & Decision Economics* 385, 385-88 (1995)).

<sup>69</sup> *Id.* at 96.

<sup>70</sup> See *id.* at 55-56 & n.226 ("When a reasonable fee is ordered, the court must set the rate to be paid for the license on the theory that if it does not the 'compulsory' nature of the license would be meaningless. The results of these judicial ventures into rate-making are as problematic as other regulatory exercises in price setting, and are not generally considered successful.")

<sup>71</sup> For a thorough discussion of the difficulties associated with implementing and managing compulsory licensing remedies, see Richard Epstein, *Steady the Course: Property Rights in Genetic Material*, John M. Olin Law & Economics Working Paper, No. 152, The Law School of the University of Chicago (2003), at pp. 29-34, available at [www.law.uchicago.edu/Lawecon/index.html](http://www.law.uchicago.edu/Lawecon/index.html); see also *Verizon Communications v. Law Offices of Curtis Trinko*, 540 U.S. 398, 408 (2004) (noting that imposing obligations to grant access to

Moreover, forcing an IP owner to grant licenses eliminates some of the control over an invention that served as an enticement to create it in the first place. That may be more of a remedy than is healthy for the greater interests of consumer welfare. Indeed, if competition law generally prevented IP owners from refusing to license, it would proscribe exactly the same behaviour that IP law permits and would therefore damage the incentive to innovate. In addition, if a dominant firm is forced to license its technology to its competitors, then the competitors will no longer have the same incentive to invest in ways to invent around the original patent. Improvements that would otherwise have occurred may therefore be lost.

Kovacic notes that expert opinions vary as to whether compulsory licensing is an effective remedy. Many commentators have concluded that it has not done much to diminish market power, while others argue that even though it has induced entry in some cases, it also wound up harming domestic firms by giving their competitive advantages away to foreign competitors.<sup>72</sup>

### 4.3 *Behavioural Remedies*

Behavioural remedies (also called “conduct remedies”) obligate a company either to do something or to stop doing something. The latter type of remedy typically requires (perhaps among other things) that the defendant stop engaging in the conduct that was found to be unlawful. Such remedies directly serve the competition law enforcement objective of putting an end to the anticompetitive behaviour that motivated the case. Sometimes they may be sufficient to restore the pre-violation level of competition in the market, as well, but not always.

The former type of remedy – giving the defendant an affirmative obligation to take certain actions – could take the form of a requirement that the defendant sell its products on a non-discriminatory basis, or that it license its intellectual property, for example. Affirmative remedies can serve a number of objectives, including restoring competition. It is helpful for agencies to have them at their disposal because in some cases simply enjoining the unlawful conduct may be insufficient to restore competition in the affected market, and divestiture may not be appropriate or feasible for one reason or another.

Furthermore, conduct remedies are advantageous in that they usually can be tailored to individual firms and market circumstances so as to help achieve the desired results. This distinguishes them from divestitures, which often cannot be so meticulously moulded to fit the contours of each situation and which therefore tend to have more of a blunt effect on firms and markets.

Behavioural remedies have been applied far more frequently than structural remedies in abuse of dominance cases. In fact, as mentioned above, priority is expressly given to them over structural remedies in the EU’s new competition regulation.<sup>73</sup> Yet even though conduct remedies seem to be favoured in comparison to their more controversial cousin, they still do not have a very impressive reputation among academics. First, conduct remedies have long drawn fire from structuralists, who tend to believe that the level of competition in a market is inversely related to the level of concentration in that market. In their view, conduct remedies are poor substitutes for structural remedies, which attack concentration and market

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or deal with other firms would require courts to “act as central planners, identifying the proper price, quantity, and other terms of dealing – a role for which they are ill-suited”).

<sup>72</sup> Kovacic, *supra* note 4 at 1304-05 & nn.81, 82. See also William Kovacic, “Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration,” 74 *Iowa Law Review* 1105, 1106-07 & n.9 (1989) (“Most commentators have concluded that compulsory licensing decrees generally have contributed little to the accomplishment of deconcentration objectives”) (citing F.M. Scherer, *Innovation and Growth: Schumpeterian Perspectives* 207, 220 (MIT: 1984)).

<sup>73</sup> Council Regulation 1/2003 para. 12.

power directly. This criticism, however, does not carry the weight it once did because the structure-conduct-performance school of thought is no longer as influential as it used to be.<sup>74</sup>

Second, conduct remedies have the disadvantage of tending to require ongoing, and sometimes extensive, oversight and intervention by courts and agencies. Part of the reason for this is that conduct remedies typically do not change the defendant's incentive structure, so detailed compliance provisions and considerable supervision are often needed to ensure that the defendant is fully complying with the order. Another reason is that court and agency involvement is often needed to resolve disputes about the precise meaning of the order and to make or approve certain business decisions. Such oversight procedures can be expensive, time consuming and distracting, not only for the court and plaintiff, but for the defendant.

Remedies that require a defendant to give its rivals or customers access to an important asset are particularly likely to require substantial oversight. Thus, "[i]f a court decides to mandate access to a key asset, it must be prepared to specify the price and quality terms on which the defendant must provide access. In setting appropriate access charges, courts may find themselves enmeshed in ratemaking exercises for which they are institutionally ill-suited."<sup>75</sup> Non-discrimination provisions are also likely to necessitate continued oversight as parties can be expected to argue about the meaning of "discrimination" under the decree, as well as about whether it is occurring. To help control the oversight problem, Posner recommends that all conduct remedies be set to expire after a certain period specified in each case. In fact, he regards conduct remedies of indefinite duration as admissions of failure to restore competitive conditions and as indications that the associated cases were probably ill-conceived in the first place.<sup>76</sup>

Third, behavioural remedies are more susceptible to strategic neutralisation, minimisation, or evasion by defendants than other measures are. There is not as much scope for squirming out of a fine or a divestiture order as there is for frustrating a conduct remedy by endlessly litigating its terms or finding anticompetitive ways to work around it that achieve the same ends as the prohibited conduct. This problem can create an undesirable feedback loop leading to the previously mentioned problem about extensive oversight. The best way to ensure that conduct remedies are effective may be to continually adjust them so that they cover every new form of anticompetitive conduct that may arise as market conditions and tactics evolve. Still, as Posner has observed, "the problem with [using a behavioural remedy] is that if narrowly drawn to avoid preventing legitimate competitive activity by the defendant, it is likely to be porous and ineffectual, while if it is broadly drawn to close up all possible loopholes it is likely to handicap the firm in competing lawfully."<sup>77</sup>

Finally, some scholars have conducted studies many years after conduct remedies were implemented in certain monopolisation cases to see how the remedies fared over time. Their findings do not paint a flattering picture. Crandall and Elzinga, for instance, evaluated the economic welfare effects of conduct remedies in ten prominent US monopolisation cases and found that "in some cases the behavioural relief has had no consequence other than the cost of litigation and cost of compliance; in other cases, the remedies probably reduced consumer welfare."<sup>78</sup> These conclusions would probably be somewhat deceptive if extrapolated to today's environment, however, since the cases selected by the authors are quite

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<sup>74</sup> Andrew Gavil, William Kovacic & Jonathan Baker, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy* 1026 (Thomson West: 2002).

<sup>75</sup> Kovacic, *supra* note 4 at 1294.

<sup>76</sup> Richard Posner, *Antitrust Law* 273 (University of Chicago Press: 2d ed. 2001).

<sup>77</sup> *Id.*

<sup>78</sup> Crandall & Elzinga, *supra* note 6.

dated and enforcement agencies have learned a great deal about remedies since then. Some of that learning has probably come from the same cases that Crandall and Elzinga studied, and the lessons seem rather obvious today.

For example, trying to attack a defendant's market power directly by simply ordering it to reduce its market share to a certain percentage is not usually a good idea. This type of affirmative remedy will merely give the dominant firm an incentive to raise its price in an effort to shed customers and keep them away, thereby providing a price umbrella for competitors. The likely result is that consumers will be harmed by higher prices.<sup>79</sup>

#### **4.4 Monetary Sanctions**

Monetary sanctions have a number of distinct advantages. First, they are relatively easy to understand and administer, requiring little if any ongoing supervision by the courts. Second, once monetary sanctions are imposed, they are very difficult to dodge. This sets them apart from conduct remedies, which can sometimes be rendered ineffective by evasive strategies. Third, monetary sanctions, when they are correctly set, give the defendant an incentive to police its own behaviour so that it does not violate the competition laws again and possibly give up more money in the future. This can be a particularly valuable feature in a market that is undergoing rapid technological changes, for example. Whereas a conduct remedy might wind up addressing behaviour that is no longer relevant to the market within a year or two, the company's unpleasant memory of having had to pay a fine or damages for violating the competition laws will continue to have a disciplinary effect on its conduct even under the new circumstances. Structural remedies have a similar potential disadvantage in changing markets. By the time a case is investigated and litigated and the remedy is carried out, the market may have moved in a direction that makes the defendant perfectly willing to shed part of its business. The goal of deterrence would therefore be thwarted.<sup>80</sup>

Of course, monetary sanctions are sanctions, after all, so they do not always serve the policy objectives for remedies well. For example, by themselves, they may not do much to restore competition to a market. This is because they do not address the market power that a defendant may have amassed through its unlawful conduct. (Laurence, I broke this paragraph apart here, so the remaining paragraphs need to be renumbered and the text box will have to be moved so that it fits on a single page.)

Furthermore, determining the proper magnitude of a fine or a damages award can be difficult. For example, in a case involving an entrenched dominant firm that used unlawful conduct to defend its position, there may never have been a real-world competitive price to use as a benchmark for calculating a fine or damages. In addition, trying to account for non-price effects such as a loss of innovation or quality can be a very knotty problem. Suppose, for instance, that a defendant cuts off an input that a rival needed to develop a new product with superior quality. The loss of that product is a dimension of harm to consumers that should be accounted for, but that is far easier said than done. Even if that kind of harm could be accurately measured, there is still the question of who should receive the money the defendant is

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<sup>79</sup> Exactly this type of remedy was imposed in *United States v. Eastman Kodak Company*, CCH Trade Cases para. 67,920 (1954), but this was over 50 years ago. See Crandall & Elzinga, *supra* note 6.

<sup>80</sup> This happened in the Pullman railroad car case, for example. *United States v. Pullman Co.*, 330 U.S. 806 (1947). Pullman had long maintained a dominant position in the markets for operating and manufacturing sleeping cars in the US. A court eventually found that Pullman had violated the Sherman Act and gave it a choice: either divest its manufacturing division or its operating division. It chose the operating division because, by the time the decree was entered, the industry had changed and that division was an unprofitable burden to Pullman. The company was, in fact, pleased to be rid of it. Sullivan, *supra* note 38 at 580-82.

forced to pay. Which consumers would have bought the new product? Beyond that, what price would they have paid for it?<sup>81</sup>

Monetary sanctions are frequently imposed for abuses of dominance in OECD countries. The remainder of Part 4.4 first considers the issue of optimisation and then explores the attributes of particular types of monetary sanctions.

#### 4.4.1 *A Threshold Issue: Optimal Deterrence*

From an economic point of view, monetary sanctions serve the goal of deterrence by making unlawful conduct less profitable. Logically, firms should choose not to violate the law if the expected penalty is greater than the expected gain; they will choose to violate the law, on the other hand, if the expected gain is greater than the expected penalty. Therefore, the amount of the sanction can be calculated, at least in theory, so as to cause the defendant to refrain from engaging in the unlawful conduct. A challenge for agencies and courts is to find just the right magnitude, so that there is neither excessive nor inadequate deterrence. In other words, the conceptual task is to optimise monetary sanctions. In practice, however, actual optimisation will almost always be beyond any court or agency's grasp. As Wils has pointed out, "it does not appear feasible to measure econometrically the theoretically optimal fine for a given antitrust violation. The theory on optimal fines remains, however, useful as general guidance for the practice of affixing the amount of antitrust fines."<sup>82</sup> Box 1 therefore takes a closer look at the theory on optimal fines.

#### Box 1. Optimisation

##### *Harm or gains?*

In the theory of optimal deterrence, there is a threshold issue as to whether a monetary sanction should be based on the gain that accrues to a dominant firm from its abusive conduct or on the net harm that the conduct causes to others. (See Wouter Wils, "Optimal Antitrust Fines: Theory and Practice," 29 World Competition Review (2006) (forthcoming) (endorsing the illegal gain method) and William Landes, "Optimal Sanctions for Antitrust Violations," 50 University of Chicago Law Review 652 (1983) (endorsing the net harm method).) The essential difference between the two measures is that gain-based sanctions will deter all violations, whereas net-harm-based sanctions will deter only inefficient violations. Which measure is preferred depends, according to Wils, on what one believes the primary goal of competition law is. If the goal is to maximise total economic welfare, then the net harm method is favoured. If the goal is to prevent wealth transfers from consumers to producers with market power, then the unlawful gain method is favoured.

Regardless of the method used, optimisation is unlikely to be possible in practice because the variables involved are too difficult to observe or quantify. That may be especially problematic in abuse of dominance cases because even the threshold task of determining whether unilateral conduct is anti-competitive or pro-competitive can be very difficult. Trying to quantify the forces at work adds another substantial layer of complexity. For example, in predatory pricing cases, price initially declines so there is no harmful short term effect. In fact, there is a short term benefit for consumers. Under the net harm method, at least, that benefit would have to be weighed against the harm that occurs after the predatory episode ends and the recoupment phase begins. However, the predatory attack may not even be finished when a competition agency succeeds in stopping it. This occurred, for example, in *Aberdeen Journals*. (Case No. CA98/14/2002, *Predation by Aberdeen Journals Limited* (16 September 2002) (Decision of the Director General of Fair Trading)). Therefore, the likely harm to consumers in such a case will not even have

<sup>81</sup> These questions are raised in Willard Tom & Gregory Wells, "Raising Rivals' Costs: The Problem of Remedies," 12 *George Mason Law Review* 389, 393-94 (2003).

<sup>82</sup> Wils, supra note 11.

occurred at the time the sanction must be chosen. How is that harm supposed to be quantified? Another complicating possibility is that there may be an array of anticompetitive behaviour to analyse rather than just a single type of conduct.

#### *Adjusting for the likelihood of detection*

The expected punishment depends to some extent on the defendant's ex ante estimate of the likelihood that its unlawful activity will be detected and successfully prosecuted. Some competition law violations are easier to conceal than others, and some are easier to prove than others. Putting aside the choice of whether the basic amount of the monetary sanction should be based on harm or gains, it makes sense to adjust the chosen amount to account for the fact that the likelihood of detecting and establishing liability for the conduct is always less than 100 percent. Otherwise, dominant firms might conclude that the expected value of abusing their dominant position is positive because they know they will not get caught and have to pay every time. In theory, then, the adjustment is simply to multiply the basic amount by the inverse of the likelihood. For example, if the likelihood that a successful claim will be brought against the defendant is ten percent, then an economist would say that the basic sanction amount should be multiplied by ten ( $1 \div 0.1 = 10$ ). If the likelihood is 50 percent, then the amount should be multiplied by two ( $1 \div 0.5 = 2$ ).

Given that much potentially abusive conduct by dominant firms – such as tying, exclusive dealing, and offering fidelity rebates – is done openly and thus is relatively easy to detect, an argument could be made that the multiplier in abuse cases should be relatively low. The multiplier for harder-to-detect schemes such as cartels would be higher. It is not necessarily the case, though, that abuse of dominance cases are similar to cartel cases in terms of how difficult or easy they are to prove before a court. In any case, these calculations are just part of theoretical methods for achieving optimality, which assume that adequate data are available. In actual cases, “it would be impracticable, if not impossible, to set [] multiples based on the likelihood that differing antitrust violations will be detected and successfully prosecuted.” (Edward Cavanagh, “Antitrust Remedies Revisited,” 84 Oregon Law Review 147, 171 (2005).)

#### 4.4.2 *Fines*

By forcing violators to give up some or all of the profits they obtained as a result of their infringements, fines serve the goals of deterrence and disgorgement. They might also be considered to contribute to the goal of compensation, but because the proceeds from fines usually go into a public treasury rather than to the victims, this goal is served indirectly at best.

Like all remedies and sanctions, fines have certain strengths and weaknesses. There may be cases in which the only workable and effective remedy or sanction is a fine. That is one of the advantages of using fines – it is always possible to impose them. It may not be easy to come up with the optimal amount, but at least implementation is straightforward. There is no need for ongoing oversight by the court or agency, nor is there any reason to worry about whether the defendant's organisational structure is amenable to a fine. From a court or agency's point of view, relatively speaking, fines are easy. Furthermore, orders to pay fines are so straightforward that once they are imposed, it is very difficult, if not impossible, for firms to avoid paying them absent a successful appeal.

Fines are not perfect, though. As an initial matter, the problem of determining the theoretically perfect amount of a fine for optimising its deterrent effect in abuse of dominance cases is daunting. Beyond that, there may be some cases in which the defendant firm is so large and well-funded, or in which the nature of the business makes anticompetitive conduct likely to be so profitable, that any reasonable-sounding fine would amount to a slap on the wrist. On the other hand, very large fines may be beyond the

ability of a defendant to pay and may wind up harming employees and consumers.<sup>83</sup> Another possible shortcoming, depending on one's outlook, is that fines do not directly address a defendant's market power.

The US enforcement agencies do not impose fines for civil violations of the antitrust laws, including unilateral conduct violations. The Department of Justice can seek treble damages for antitrust violations, but only when the government has suffered harm from them.<sup>84</sup> The FTC, on the other hand, is able to seek the disgorgement of profits obtained by conduct that violates the FTC Act.<sup>85</sup> But as a matter of policy, single-firm anti-competitive conduct is virtually never viewed as suitable for punishment by the agencies because too much case-by-case judgment and ex post assessment are required to determine whether the conduct was unlawful in the first place. This is not to say, of course, that such conduct is viewed as unsuitable for being *remedied* by the agencies, because it obviously is. Furthermore, punishment in the form of private treble-damages awards may follow either agency's remedial actions.

In Europe, however, fines are imposed in abuse of dominance cases brought by enforcement agencies. That provides an opportunity to consider the question of what a sensible method for setting fines is in a more concrete way, in light of all the considerations above. Entire books have been written on that subject,<sup>86</sup> so a thorough answer is well beyond the scope of this Note. However, it seems clear enough that actual optimisation is infeasible and that to aim for it could actually be harmful because any method that relies on estimating welfare effects is bound to involve errors, subjective judgments, and inconsistent results. It appears that a better approach would be to put the goal of perfect optimisation aside and aim for a simpler, more objective method that produces consistent outcomes and is comprehensible to the public. For example, a method that bases fines on some percentage of turnover in the relevant market may have many virtues, even if theoretical optimisation is not one of them. Is this the kind of system in place in Europe? The answer seems to be "not quite."

Although the rules for calculating fines for violations of competition laws vary from jurisdiction to jurisdiction in Europe, they tend to limit fines to a maximum of ten percent of the violator's total worldwide annual revenue (also called "turnover") in the previous year.<sup>87</sup> It is not clear that this ceiling serves the policy objectives of proportionality and deterrence. If, for example, 50 percent of a company's total turnover is achieved through an abuse of dominance, management might rationally conclude that with a worst case scenario of paying ten percent of turnover in fines, the abuse would still be a profitable investment. Moreover, it is hard to find the proportionality principle at work when one compares that scenario to one in which only ten percent of a violator's turnover is achieved through an abuse of dominance and *all* of those ill-gotten gains could be absorbed by a fine. Although a system of unlimited

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<sup>83</sup> Wils, supra note 11.

<sup>84</sup> 15 U.S.C. s. 15a (2000). Technically, the Sherman Act authorises fines for violations of section 2, but the Department of Justice's policy is not to seek fines in section 2 cases.

<sup>85</sup> FTC v. Mylan Labs, Inc., 62 F.Supp. 2d 25 (D.D.C. 1999).

<sup>86</sup> E.g., Wouter Wils, *The Optimal Enforcement of EC Antitrust Law* 41 (Springer: 2002).

<sup>87</sup> See, e.g., Council Regulation (EC) No 1/2003 Article 23; Spanish Defense Competition Act 1989, Article 10.1. But see UK Office of Fair Trading, "OFT's Guidance as to the Appropriate Amount of a Penalty," OFT 243 sections 2.3, 2.7-2.8 (December 2004) (basing calculation of fines on relevant turnover, not total worldwide turnover, and capping the starting amount of the fine at 10% of that figure); Netherlands Competition Authority, "Guidelines for the Setting of Fines" para. 15 (December 2001) (basing calculation of fines on relevant turnover, not total worldwide turnover, and capping the starting amount of the fine at 10% of total annual turnover).

finances could also present a proportionality problem, and might even result in undesirable bankruptcies, the ten percent ceiling does have the appearance of being arbitrary.<sup>88</sup>

As for calculating the actual amount of a fine, the rules have generally drawn criticism for their vagueness. In line with the proportionality principle, they try to create a system wherein the more serious violations draw higher fines, and the less serious ones draw lesser fines. The problem is that there is not a clear scale for determining how a particular abuse of dominance violation will be categorised. Factors that are typically taken into account include:

- the type and scope of the unlawful conduct;
- the size of the affected market;
- the defendant's market share;
- the violation's effect on actual and potential competitors and consumers;
- the duration of the conduct;
- the degree of the defendant's recidivism;
- the existence of reasonable doubt by the defendant as to whether its conduct would constitute an infringement;
- the degree of the defendant's cooperation with the competition agency.<sup>89</sup>

It makes sense to consider all of these factors, provided that there is also guidance on how to apply them objectively. That is the hard part, and that is where scholars have noticed a breakdown in the system. Writing with respect to Spain's rules, for example, Marcos has observed that

[s]ome of these factors are not easily applicable, indeed the first one ("*type of the restriction upon competition*") does not lead to any conclusion. Indeed, the [Defence Competition Act] does not establish whether some restrictions are more severe than others. It is clear that there are some actions or practices which are more damaging to competition than others, but the DCA does not contain a gradation of violations. The foregoing is further accompanied by the deficient rulings of the [Defence Competition Tribunal] which have not led to a further and needed refinement and clarity of the above criteria. This is problematic as criminal law principles concerning punishment require [refinement and clarity, and these] principles apply to the punishment powers and rulings rendered by the DCT imposing administrative fines. It has even been argued that this may even provide a sound basis to consider that article 10 of DCA is unconstitutional.<sup>90</sup>

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<sup>88</sup> Wils attacks the 10% cap on other grounds. See Wils, *supra* note 85 at 41 (arguing that the cap will have to be removed if the EC is to be allowed to raise fines up to the level necessary for effective deterrence).

<sup>89</sup> There are two good reasons for reducing a fine when defendants cooperate. First, cooperation lowers the cost of the investigation and litigation. Second, if the violation was still occurring when the investigation started, the defendant's cooperation will help to end the unlawful conduct sooner. Wils, *supra* note 11.

<sup>90</sup> Francisco Marcos, "The Enforcement of Spanish Antitrust Law: A Critical Assessment of the Fines Setting Policy and of the Legal Framework for Private Enforcement Actions," Paper presented at the Workshop on Remedies and Sanctions in Competition Policy, University of Amsterdam, pp. 7-8, 17 February 2005 (citations omitted), available at <http://ssrn.com/abstract=695542>.

As a result of the lack of adequate guidelines, Marcos believes, the DCT's task is more difficult and most of its decisions do not include enough justification as to how fines were calculated. Therefore, there is some uncertainty regarding the amount that a firm can expect to be fined.<sup>91</sup>

Similarly, Geradin and Henry conclude that the EC's fining decisions are vague despite the Commission's 1998 guidelines on fines, a situation that "has left much room for conjecture as to how the Commission reached the final fine."<sup>92, 93</sup> The authors acknowledge that a certain amount of flexibility must be accorded to the Commission when it sets fines, since it is no easy task to categorise every case with precision and to determine the extent to which aggravating or mitigating circumstances apply. Nevertheless, they continue, the decisions should be coherent and provide legal certainty. Having reviewed all the Commission decisions and Court of First Instance judgments dealing with fines that have been adopted since the publication of the 1998 Guidelines, though, the authors find that identical factual scenarios are sometimes treated differently, while different factual scenarios are sometimes given the same treatment.<sup>94, 95</sup>

#### 4.4.3 *Private Damages*

There are considerable advantages to having a system in place for private actions. First, they help to ensure that the victims of abusive conduct by dominant firms are compensated. Second, private enforcement of competition laws can be a formidable deterrent to such conduct. Third, allowing private actions takes some of the enforcement burden off of public competition agencies, which do not always have sufficient funding to pursue every matter that is worth pursuing. In light of such advantages, Böge and Ost have written that it is "an undisputed fact that private antitrust enforcement plays an important and valuable role."<sup>96</sup>

Although the idea of allowing private actions for violations of the competition laws is nearly 400 years old,<sup>97</sup> it is an idea that has not quite taken off yet outside of a small number of jurisdictions. That is beginning to change, however, as more steps have been taken in recent years to encourage private actions elsewhere. The EC, for example, recently issued a Green Paper soliciting comments on a number of possible reforms intended to increase private competition law actions in member states' national

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<sup>91</sup> Id. at 8.

<sup>92</sup> Damien Geradin & David Henry, "The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts' Judgments," Paper presented at the Workshop on Remedies and Sanctions in Competition Policy, University of Amsterdam, p. 2, 17-28 February 2005.

<sup>93</sup> European Commission, "Guidelines on the Method of Setting Fines Imposed Pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty," OJ C 9, 14 January 1998, available at [http://europa.eu.int/comm/competition/antitrust/legislation/98c9\\_en.html](http://europa.eu.int/comm/competition/antitrust/legislation/98c9_en.html)

<sup>94</sup> Geradin & Henry, *supra* note 91 at 3, 11.

<sup>95</sup> It has been reported that the Commission, together with national competition authorities, is currently considering the adoption of new guidelines on fines. John Kallaugher & Andreas Weitbrecht, "Developments Under Articles 81 and 82 EC – The Year 2005 in Review," [2006] *European Competition Law Review* 144 & n.38.

<sup>96</sup> Ulf Böge & Konrad Ost, "Up and Running, or Is It? Private Enforcement – the Situation in Germany and Policy Perspectives," [2006] *European Competition Law Review* 197, 197.

<sup>97</sup> England's Statute of Monopolies 1623 (21 Jac. 1, c.3) introduced this concept. Kenneth Elzinga & William Breit, *The Antitrust Penalties: A Study in Law and Economics* (New Haven: Yale University Press, 1976).

courts.<sup>98</sup> In addition, the French government recently published three decrees that will facilitate private actions by setting up measures that will allow access to information in a way that protects business secrets, improving the dissemination of information from the Competition Council, the Minister of the Economy, and the parties, and naming the 16 courts that will be competent to hear matters concerning the competition laws.

On the other hand, there is also a sense among many members of the competition community that allowing private actions is problematic, particularly when damages awards are automatically doubled or trebled.<sup>99</sup> They argue that such systems lead to over-enforcement, and thus to inefficiency and an undesirable chilling of legitimate, competitive conduct or a deterioration of competitive conditions. The adverse effects are magnified when the legal system entitles numerous plaintiffs to sue a company in multiple forums for the same violation. These and other topics related to private actions have been the subject of an ongoing series of roundtables held by the Competition Committee's Working Party 3.<sup>100</sup>

The possibility of follow-on private actions should be taken into account by agencies in jurisdictions where such actions are permitted because they can obviously have a substantial impact on the remedies imposed on the defendant. The potential for follow-on actions is especially significant in the United States, where antitrust damage awards are trebled and private actions are relatively common.

#### 4.4.4 *Disgorgement*

In recent years the US Federal Trade Commission has succeeded in obtaining monetary sanctions that are specifically designed to achieve the objective of forcing abusive dominant firms to give up the profits they made as a result of their unlawful activities. At least in part, this novel approach was a response to the procedural barriers to private actions that have arisen over time in the US, such as the ban on indirect purchaser suits in federal courts. While sums collected from a defendant via a disgorgement action may be distributed to the victims of the abuse, the theoretical focus of disgorgement is to ensure that the defendant gives up its illegal profit rather than to ensure that all victims are fully compensated for the harm they suffered. Therefore, the amount of the disgorgement is calculated by determining the amount of profit that

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<sup>98</sup> European Commission Green Paper, "Damages Actions for Breach of the EC Antitrust Rules," 19 December 2005, SEC(2005) 1732, available at: [http://europa.eu.int/comm/competition/antitrust/others/actions\\_for\\_damages/gp\\_en.pdf](http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/gp_en.pdf). See also Neelie Kroes, Speech before the Harvard Club of New York, "Enhancing Actions for Damages for Breach of Competition Rules in Europe," (22 September 2005).

<sup>99</sup> E.g., Ulf Böge & Konrad Ost, "Up and Running, or Is It? Private Enforcement – the Situation in Germany and Policy Perspectives," [2006] *European Competition Law Review* 197, 201-202.

<sup>100</sup> For more information on private remedies, and particularly on issues such as the passing on defence and indirect purchaser standing, see the Summaries of Discussion in DAF/COMP/WP3/M(2005)2/ANN2 (May 2005), DAF/COMP/WP3/M(2006)1/ANN2 (February 2006), and DAF/COMP/WP3/M(2006)2/ANN2 (June 2006) (forthcoming) on Private Remedies in Antitrust Cases. For further reading on trebling private antitrust damages, see Edward Cavanagh, "Detrebling Antitrust Damages: An Idea Whose Time Has Come?," 61 *Tulane Law Review* 777 (1987) (advocating detrebling, citing the risk of overdeterrence, unfairness, market distortions, and baseless lawsuits as arguments to abolish or at least limit the applicability of trebling damages); Frank Easterbrook, "Detrebling Antitrust Damages," 28 *Journal of Law and Economics* 445 (1985) (arguing that the existence of a multiplier should depend on (a) the extent to which the violation is concealable and (b) whether the plaintiff is a business rival of the defendant); Steven Salop & Lawrence White, "Treble Damages Reform: Implications of the Georgetown Project," 55 *Antitrust Law Journal* 73 (1986) (examining policy implications for treble damages from a database containing information on over 2000 antitrust cases).

the defendant collected because of its unlawful conduct, rather than by determining the amount of money the victims lost. Disgorgement is further discussed below in the context of the *Mylan* case.<sup>101</sup>

## 5. Remedies and Sanctions in Recent Abuse of Dominance Cases

Although older cases are especially interesting to study in the context of remedies and sanctions because the results of the actions taken have had plenty of time to develop, certain recent cases are already interesting, as well.

### 5.1 *Bird's-Eye Wall's*

In 2000, the UK's Competition Commission completed an investigation of the wrapped impulse ice cream market and issued a report concluding that Birds-Eye Wall's ("BEW"), with a market share of about 65 percent, was engaged in a variety of practices that foreclosed the market and preserved its leading position.<sup>102</sup> The report concluded, among other things, that BEW's practices regarding freezer cabinet exclusivity and distribution exclusivity were restricting competition and operating against the public interest. Specifically, BEW's practice of lending ice cream cabinets to small retailers at no charge (as long as they were used to stock only BEW's products) was found to have the effect of raising switching costs and thus of raising entry barriers. The report also found that BEW's practice of operating its own exclusive distribution system had the effect of destroying independent wholesalers' long-term viability, thereby harming BEW's rivals who relied on those wholesalers.<sup>103</sup> The Commission's report recommended a number of remedies to the Department of Trade and Industry, which implemented them.

The remedies included two types of behavioural measures. First, BEW was largely prohibited from operating its own distribution system for wrapped impulse ice cream. BEW therefore had to rely on multi-brand wholesalers to distribute its products. Second, BEW was permitted to continue offering free on-loan ice cream cabinets to retailers, but it was allowed to require only that 50 percent of the cabinets' display space be used to stock BEW products. Furthermore, BEW was not permitted to demand that any of the cabinets' freezer storage space be dedicated solely to BEW products. Meanwhile, BEW's rivals were permitted to offer free on-loan ice cream cabinets and to insist on exclusivity.<sup>104</sup>

At first glance, these remedies seem to be somewhat risky. The first one imposes a middleman in BEW's chain of production, thereby possibly raising BEW's costs, worsening its service, and making it less competitive. The second one forces BEW either to stop supplying free cabinets to retailers or to subsidise its rivals by paying for their freezer space. One might expect BEW to choose the first option, but in that case, its rivals might use their ability to offer completely exclusive freezer loans and thereby to eat up BEW's market share rapidly. That does seem to be the objective of the remedies, though – to give other manufacturers a helping hand so that they could become viable, effective competitors.

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<sup>101</sup> See Part 5.2.

<sup>102</sup> Competition Commission, "The Supply of Impulse Ice Cream: A Report on the Supply in the UK of Ice Cream Purchased for Immediate Consumption," (January 2000), available at [www.competition-commission.org.uk/rep\\_pub/reports/2000/436ice.htm](http://www.competition-commission.org.uk/rep_pub/reports/2000/436ice.htm)

<sup>103</sup> Id.

<sup>104</sup> Derek Ridyard, "With the Benefit of Hindsight – the 2000 UK Impulse Ice Cream Investigation," [2005] *European Competition Law Review* 533, 534.

Five years later, Derek Ridyard re-examined the UK's wrapped ice cream market to see how the remedies had performed.<sup>105</sup> He reasoned that if BEW's exclusive freezer cabinet and distribution practices had been responsible for foreclosing the market, then BEW's market share would have dwindled while that of other manufacturers grew. What Ridyard found illustrates how difficult it can be to predict remedial effects. As of 2003, the latest year for which he was able to obtain data, BEW's market share had barely budged while its main rivals' shares had either stagnated or declined. Meanwhile, BEW had at first scaled back and then had altogether eliminated its free cabinet loan program. Most significantly, and perhaps surprisingly, the total market volume of wrapped impulse ice cream in the UK dropped by more than 20 percent between 1999 and 2003.<sup>106</sup> As Ridyard notes, the remedies were not the only factors that might have influenced overall market sales. A 20 percent drop is substantial, though, and it raises the possibility that the remedies not only failed to increase competition, but that they reduced investment and output.<sup>107</sup>

This case also helps to illustrate some of the differences between behavioural and structural remedies. First, although the conduct remedies that were implemented seemed to be fairly strong, they still failed to make a dent in the relative positions of the major players. If this is a case in which one believes that it was important to bring BEW's market share down while lifting those of its rivals up, a lesson that could be drawn from the experience is that even potent conduct remedies cannot always get the job done. That seems to be a point in favour of divestiture, which certainly could have directly eliminated BEW's market power and created more of a balance of power in the industry. However, the case also helps to illustrate why divestitures are considered to be risky in abuse of dominance cases. If a mistake is made about whether a defendant's conduct is really causing a competitive problem, a divestiture will have caused definite changes to the market that are possibly harmful and probably irreversible. A conduct remedy, on the other hand, may not have caused many changes at all, and if it did, even undesirable changes may be undone because the remedy can be revoked.

## 5.2 *Mylan*

This case illustrates how disgorgement works. In *Mylan*,<sup>108</sup> the US FTC sued the second largest generic drug manufacturer in the US for violating section 5 of the FTC Act, which prohibits unfair methods of competition.<sup>109</sup> Mylan was the leading producer and seller of two popular anti-anxiety sedative drugs. It signed long-term exclusive supply contracts with the only suppliers of a chemical necessary to produce the drugs. Having foreclosed the market from its competitors, Mylan proceeded to raise its prices. The price for one drug shot up from \$13.60 per 1000 units to \$378.40 per 1000, while the other drug went from \$22.72 to \$740.00 per 1000.<sup>110</sup> Robert Pitofsky, Chairman of the FTC at the time, characterised the number of ensuing complaints received by the Commission as "almost unprecedented."<sup>111</sup> The FTC estimated that Mylan had collected roughly \$120 million in extra profits (before adding interest) as a result of monopolising the market.

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<sup>105</sup> Id. at 533. Ridyard acknowledges that he had acted as an economic expert for the defendant with respect to the Competition Commission's investigation.

<sup>106</sup> Id. at 536-37. The market volume figure is adjusted to account for the effect of good and bad summer weather on ice cream sales.

<sup>107</sup> Id. at 537.

<sup>108</sup> *FTC v. Mylan Lab., Inc.*, 62 F. Supp. 2d 25 (D.D.C. 1999).

<sup>109</sup> 15 U.S.C. s. 45 (2000).

<sup>110</sup> *Mylan*, 62 F. Supp. at 34.

<sup>111</sup> Pitofsky, *supra* note 5 at 174.

As Pitofsky later explained, an order that did nothing more than terminate Mylan's exclusive contracts would have allowed the company to keep its illegal profits, subject only to private actions for damages. But because most of the people who paid the inflated prices for Mylan's drugs bought them from pharmacies rather than directly from Mylan, they were barred from seeking damages under American federal antitrust law. The FTC therefore decided to test its theory that it was entitled to seek disgorgement under the FTC Act.<sup>112</sup> The Commission's view was validated by the court, and a settlement followed under which Mylan agreed to surrender \$147 million to a special fund, from which payments were made to the victims of Mylan's overcharges.<sup>113</sup> Mylan also accepted injunctive relief barring it from engaging in similar conduct again.

The *Mylan* decision generated some criticism, notably from the American Bar Association's Section of Antitrust. The ABA raised the concern that, in general, when the FTC seeks disgorgement, the possibility arises that victims will receive multiple recoveries for the same conduct because injured parties may also seek treble damages in private actions.<sup>114</sup> Pitofsky's response is that this problem is avoidable because any private actions that are not already barred by federal law can be consolidated before the court that ordered the disgorgement, which can then manage the actions so as to ensure that no party collects monetary awards twice. That is how the FTC's case and a number of follow-on actions were handled.<sup>115</sup> Consolidation appears to be a good solution for any situation in which there is a possibility of multiple recoveries for the same violation. Therefore, in light of the difficulties that some private parties may have in seeking monetary relief in certain cases, it does not seem unwise for the FTC to pursue it for them.

This does not mean, however, that the FTC should seek or will seek disgorgement as a matter of course. In fact, the Commission has stated that it will rarely seek disgorgement, and only in cases involving a clear antitrust violation for which the illegal profits can be calculated with reasonable accuracy.<sup>116</sup> Although deterrence is one of the objectives that the FTC hopes to achieve when it seeks disgorgement,<sup>117</sup> it remains to be seen how much of a deterrent effect the addition of the disgorgement option provides. By itself, disgorgement is probably insufficient to meet the theoretically ideal level of deterrence. This is because the probability of detection and successful prosecution is less than 100 percent (even though abuse of dominance cases usually involve conduct that is not concealed), but the disgorgement concept does not include a multiplier to account for that probability gap. This may not be a problem if there are also private treble damages actions for the same violation, but that may not always happen. Furthermore, it is not even clear that treble damages are an adequate deterrent.<sup>118</sup> But as mentioned earlier, optimal deterrence is not a practical goal anyway, and at least the FTC now has a way to

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<sup>112</sup> Id. at 175.

<sup>113</sup> In re Lorazepam & Clorazepate Antitrust Litigation, 205 F.R.D. 369 (D.D.C. 2002).

<sup>114</sup> Letter from Roxane Busey, Chair of the American Bar Association Section of Antitrust Law, to Donald Clark of the FTC (11 March 2002), available at [www.abanet.org/antitrust/remedies/request.pdf](http://www.abanet.org/antitrust/remedies/request.pdf); see also David Balto, "Returning to the Elman Vision of the Federal Trade Commission: Reassessing the Approach to FTC Remedies," 72 Antitrust Law Journal 1113, 1120-24 (2005) (taking the position that by seeking disgorgement remedies, the FTC is duplicating the role of private and state antitrust enforcers).

<sup>115</sup> Pitofsky, supra note 5 at 175-76.

<sup>116</sup> US Federal Trade Commission, "Policy Statement on Monetary Equitable Remedies in Competition Cases," (25 July 2003), available at [www.ftc.gov/os/2003/07/disgorgementfrn.htm](http://www.ftc.gov/os/2003/07/disgorgementfrn.htm).

<sup>117</sup> Id.

<sup>118</sup> There is an ongoing debate over whether treble damages are adequate. See Robert Lande, "Are Antitrust 'Treble' Damages Really Single Damages?," 54 Ohio State Law Journal 115 (1993) (arguing that various factors reduce the true value of "treble damages" in American antitrust cases to something less than compensatory damages on average, leading to systematic underdeterrence).

get *some* money in certain cases where monetary relief seems appropriate. That must be more of a deterrent than simply forcing the abusive firm to stop its unlawful behaviour.

### 5.3 *The Microsoft Cases*

Despite the extraordinary attention paid to Microsoft's global antitrust problems, it is such an uncommon company and it operates under such idiosyncratic market conditions that a detailed study of these cases is unlikely to yield a great deal of widely applicable insight about remedies. Moreover, several of the cases, including the one brought by the European Commission, have not reached a final judgment yet, so it would be premature to discuss them all critically here. Yet the Microsoft cases are clearly "the elephant in the room," and there are at least a few generally relevant lessons and other stimulants for discussion that can be gleaned from the US and EC cases for this roundtable, even at this intermediate stage.

#### 5.3.1 *The US case*

In the Department of Justice's case against Microsoft, the trial court found that Microsoft had unlawfully maintained its monopoly in Intel-compatible PC operating systems, attempted to monopolise the internet browser market, and tied its browser to its operating system.<sup>119</sup> The government requested a combination of structural and behavioural remedies, including an order to split Microsoft into an operating systems company and an applications company. That request was granted without any significant changes. An appellate court subsequently altered the liability ruling, affirming with respect to the monopoly maintenance count, remanding the tying claim for consideration under a tougher standard, and reversing the attempted monopolisation claim.

The appellate court also vacated the remedies decree and ordered that remedies be reconsidered because, among other reasons, the trial court had not adequately justified its remedies. Although the appellate court did not rule that divestiture was out of the question, it did hold that there had to be a "causal connection between Microsoft's exclusionary conduct and the company's position in the [PC operating systems] market" for divestiture to be considered appropriate.<sup>120</sup> In other words, the behaviour that was found to be unlawful must also be found to have actually contributed to the maintenance of Microsoft's monopoly position. Merely being likely to have contributed to it would be insufficient. The court added that "[d]ivestiture is a remedy that is imposed only with great caution, in part because its long-term efficacy is rarely certain."<sup>121</sup>

The DOJ then decided to abandon its tying claim as well as its request for structural relief. A settlement involving purely behavioural remedies followed.<sup>122</sup> The remedies essentially aim to stop Microsoft from using the kinds of tactics it used to defuse the competitive threats presented by Netscape and Java. Microsoft was required to license the Windows operating system on a non-discriminatory basis and on publicised terms, to disclose interface specifications and communications protocols used by certain Microsoft software to interoperate with Windows. In addition, Microsoft was prohibited from entering into agreements that restricted computer OEMs' ability to use certain non-Microsoft software, and from retaliating against firms that did install rival software.

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<sup>119</sup> United States v. Microsoft Corp., 97 F. Supp. 2d 59 (D.D.C. 2000), affirmed in part, reversed in part, 253 F.3d 34 (D.C. Cir. 2001), certiorari denied, 534 U.S. 952 (2001).

<sup>120</sup> Microsoft, 253 F.3d at 80.

<sup>121</sup> Id. at 84.

<sup>122</sup> United States v. Microsoft Corp., 231 F. Supp. 2d 144 (D.D.C. 2002).

After the terms of the settlement were made public, a number of commentators weighed in on the issues of how the chosen remedies will affect Microsoft's monopoly position and whether they will encourage competition and innovation. Collectively, their writings form a Goldilocks tale of sorts, with some arguing that the remedies are too weak, some arguing that they are just right, and others arguing that they should never have been imposed in the first place but probably will not do any harm.<sup>123</sup> Although it is probably too early to judge how effective the remedies have actually turned out to be, something can be said about how the administration of the remedies is going.

Anyone who doubts that conduct remedies in unilateral conduct cases can require a great deal of ongoing attention from courts and enforcement agencies will find it worthwhile to take a look at the list of legal filings related to the Microsoft settlement.<sup>124</sup> Furthermore, the substance of some of the filings offers a glimpse at the kinds of problems that can arise in implementing a settlement of this complexity. For example, in January 2004, a joint status report revealed concerns on the part of the government that the settlement's communications protocol licensing program had fallen short of its remedial goals and was not likely to "spur the emergence in the marketplace of broad competitors to the Windows desktop."<sup>125</sup> Therefore, the government recommended, the program needed to be modified.<sup>126</sup> Two years later, the government told the court that out of more than 1000 technical documentation issues that had been submitted to Microsoft, the company had still not resolved over 700 of them.<sup>127</sup>

It seems that at least three lessons can safely be drawn from the remedial experience to date in this case: a) conduct remedies can be difficult and expensive to administer; b) they can be subject to unexpected problems that may frustrate their purpose; and c) applying conduct remedies to rapidly changing, high technology markets is not a simple undertaking.

Other points that can be drawn from the case relate to the appellate decision. First, the appellate court's warning about divestiture remedies (that they should be used only with great caution because their long term efficacy is rarely certain) is somewhat misleading. The truth is that the long term efficacy of most remedies, including the ones that wound up being implemented in this case, is rarely *certain*. Under that standard, agencies would have to exercise "great caution" virtually every time they contemplated doing anything to counteract anticompetitive behaviour, and little would ever be accomplished. Inevitably, law enforcement in the area of abusive of dominance would wither.

Furthermore, the court's causation requirement (that the violation found must be proven to have caused the harm being addressed by the remedy) may be too strict. It leads to what Salop has characterised as "reverse-deterrence" because it encourages dominant firms to destroy potential rivals early and often,

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<sup>123</sup> See Timothy Bresnahan, "A Remedy that Falls Short of Restoring Competition," 16 *Antitrust* 67 (Fall 2001) (arguing that the remedies in the settlement are too weak); Einer Elhauge, "Soft on Microsoft," *The Weekly Standard* pp. 17-18 (25 March 2002) (same); Charles James, "The Real Microsoft Case and Settlement," 16 *Antitrust* 58 (Fall 2001) (arguing that the remedies are appropriate); David Evans, Albert Nichols & Richard Schmalensee, "United States v. Microsoft: Did Consumers Win?" 1 *Journal of Competition Law and Economics* 497 (2005) (arguing that Microsoft never should have been found liable to begin with, but that the remedies are not objectionable).

<sup>124</sup> See [www.usdoj.gov/atr/cases/ms\\_index.htm](http://www.usdoj.gov/atr/cases/ms_index.htm).

<sup>125</sup> *United States v. Microsoft*, C.A. No. 98-1232 (CKK), Joint Status Report on Microsoft's Compliance with the Final Judgments, pp. 3-5 (16 January 2004), available at : [www.usdoj.gov/atr/cases/f202100/202129.htm](http://www.usdoj.gov/atr/cases/f202100/202129.htm).

<sup>126</sup> *Id.* at 8-9.

<sup>127</sup> *United States v. Microsoft*, C.A. No. 98-1232 (CKK), Joint Status Report on Microsoft's Compliance with the Final Judgments, p. 8 (8 February 2006), available at [www.usdoj.gov/atr/cases/f214500/214518.htm](http://www.usdoj.gov/atr/cases/f214500/214518.htm).

i.e., before it can be shown with certainty that those firms would have developed into significant competitors, which would have justified a harsher remedy under the court's standard. In addition, because the business people working in the industry will usually be better judges of the competitive threat posed by upstart firms than agencies or courts, the result of the court's ruling could be a significant weakening of deterrence in monopoly maintenance cases.<sup>128</sup>

### 5.3.2 *The EU case*

The European Commission's decision, in contrast, does not reflect as much concern about limiting corrective action so as to address only proven harms. The decision, which is currently on appeal to the Court of First Instance, concludes that Microsoft abused its dominant position by refusing to supply information that would facilitate interoperability between non-Microsoft work group server operating system products and the Windows client operating system, and by tying its Windows Media Player to the Windows client operating system.<sup>129</sup>

To address these violations, the Commission imposed a combination of monetary, behavioural, and structural measures. First, it ordered Microsoft to pay a record fine totalling over 497 million euros. In addition, it ordered Microsoft to stop the infringing practices, refrain from repeating them, license the protocols by which Microsoft's operating systems communicate with each other, and offer a version of the Windows client OS that does not have the Windows Media Player bundled with it. Interestingly, the unbundling approach had been specifically rejected by the DOJ in its case.<sup>130</sup> It is too early to tell which set of remedies will prove more effective in promoting competition, but the contrasting approaches in Europe and the US have created the potential for enforcers to learn valuable lessons.<sup>131</sup>

## 6. Conclusion

This review has described both the objectives that courts and agencies try to achieve in abuse of dominance cases and the various remedies and sanctions they use to achieve them. It has summarised the strengths and weaknesses of the measures that agencies have at their disposal, highlighting some of the theoretical issues but focusing on practical concerns. Overall, the impression given by a review of the academic literature is that designing and implementing remedies and sanctions in abuse of dominance cases is a very formidable problem – one that has by no means been mastered yet.

One of the best ways to improve the state of knowledge about remedies and sanctions and how best to design and implement them is to study actual experiences with measures that were imposed in the past, and in particular to examine their effects on consumer welfare. Ideally, enforcement agencies would make such evaluations routinely. While some agencies have made efforts along these lines with respect to merger remedies, more can and should be done with regard to abuse of dominance cases.<sup>132</sup>

<sup>128</sup> American Bar Association Section of Antitrust Law, Remedies Forum Roundtable II 5 (2 April 2003), available at [www.abanet.org/antitrust/remedies/](http://www.abanet.org/antitrust/remedies/).

<sup>129</sup> Microsoft Decision, Case COMP/C-3/37.792, art. 2(a), at 300.

<sup>130</sup> Charles James, "The Real Microsoft Case and Settlement," 16 Antitrust 58, 64 (Fall 2001).

<sup>131</sup> For an early prognosis of the EC's unbundling remedy, see Ian Ayres & Barry Nalebuff, "Going Soft on Microsoft? The EU's Antitrust Case and Remedy," 2 *The Economist's Voice* 1 (2005) (arguing that it would have been better to combine unbundling with a requirement that the OS version sold with the Windows Media Player included also include three other media players built in).

<sup>132</sup> See Balto, *supra* note 113 at 1117 (calling for the US FTC to use its power to conduct post-order reviews of the effectiveness of remedies).

## NOTE DE RÉFÉRENCE

### 1. Introduction

Cette table ronde sur les mesures correctrices et les sanctions est l'aboutissement naturel d'une série de tables rondes du Comité qui ont eu lieu ces deux dernières années sur des thèmes relatifs à l'abus de position dominante<sup>1</sup>. Après avoir abordé les pratiques d'éviction du marché, la concurrence par le mérite et les barrières à l'entrée, le Comité va désormais au-delà des questions de responsabilité pures et se concentre sur la manière dont les autorités et les tribunaux doivent réagir face aux entreprises déclarées en infraction aux règles de lutte contre les abus de position dominante.

Le sujet est d'actualité avec l'entrée en vigueur récente du Règlement n°1/2003 du Conseil, qui révisé le système d'application du droit de la concurrence de l'UE et introduit de nouvelles mesures correctrices<sup>2</sup>. En outre, les poursuites pour abus de position dominante engagées ces dernières années à l'encontre de Microsoft dans le monde ont, du moins temporairement, suscité l'intérêt pour les mesures correctrices et sanctions dans le cas d'abus de position dominante. L'intérêt pour la question n'a en effet pas toujours été aussi marqué.

En fait, on a tendance à négliger le thème des mesures correctrices et sanctions par rapport à ceux de la définition d'une position dominante et de l'identification d'un comportement abusif, qui bénéficient d'une attention considérable. Comme les tables rondes récentes l'ont démontré, notamment en ce qui concerne le comportement abusif, il n'est absolument pas absurde d'examiner minutieusement ces questions. Il est souvent difficile de déterminer si une entreprise occupe une position dominante, et il peut être excessivement ardu de faire la distinction entre un comportement qui renforce la concurrence et un comportement qui lui porte préjudice. Conclure valablement qu'une entreprise occupe une position dominante et qu'elle en abuse peut néanmoins s'avérer dommageable pour la concurrence si la mesure correctrice ou la sanction qui en découle est trop indulgente, trop sévère, trop tardive, impossible à administrer, ou autrement mal élaborée ou mise en œuvre. Plus grave encore, des mesures correctrices et sanctions imparfaites peuvent renforcer le préjudice déjà subi par la concurrence du fait du comportement de l'entreprise dominante. L'attitude à adopter face à une entreprise abusant de sa position dominante exige donc une attention tout aussi rigoureuse.

D'une façon générale, l'identification de mesures correctrices ou sanctions appropriées face à des abus de position dominante s'avère délicate. D'abord, il n'existe pas de consensus universel sur les objectifs à viser : parmi les choix possibles figurent la prévention de tout nouveau comportement anticoncurrentiel, le rétablissement de la concurrence, l'indemnisation des victimes et simplement l'interruption du comportement illicite. En outre, il n'est pas toujours évident de définir des mesures correctrices et sanctions qui permettront de réaliser un ou plusieurs de ces objectifs. Il peut être par exemple difficile de déterminer le montant des amendes qui auront un effet dissuasif sans porter un coup fatal au contrevenant ni paralyser un autre comportement légitime. Par ailleurs, même si des mesures de correction de comportement

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<sup>1</sup> Le terme « abus de position dominante » est utilisé dans la présente note comme un raccourci pour englober toutes les normes régissant le comportement unilatéral dans le droit de la concurrence des États membres de l'OCDE. À ce titre, il inclut par exemple également le concept de « monopolisation ».

<sup>2</sup> Le règlement n°1/2003 du Conseil est entré en vigueur le 1<sup>er</sup> mai 2004.

identifiées sont valables d'un point de vue conceptuel, il peut s'avérer problématique de contrôler leur mise en œuvre par le contrevenant.

De plus, toutes proportions gardées, l'expérience est limitée dans ce domaine. Il y a nettement moins de cas d'abus de position dominante que de problèmes de fusion ou d'entente. En conséquence, les décisions sur les mesures correctrices et sanctions pour abus de position dominante font figure d'exception dans le paysage de la politique de concurrence. Pour rendre les choses encore plus difficiles pour les autorités et les tribunaux, on constate un consensus très limité parmi les chercheurs sur l'efficacité des mesures correctrices appliquées. En effet, la documentation est remarquable par l'ampleur des désaccords sur le sujet<sup>3</sup>.

La présente note porte sur les mesures correctrices et sanctions dans des affaires d'abus de position dominante poursuivies par des autorités de tutelle publiques plutôt que par des plaignants. Il ne traite d'ailleurs que des mesures de droit civil et administratif, et non de droit pénal<sup>4</sup>. La deuxième partie analyse l'éventail des objectifs visés par les mesures correctrices et sanctions dans le cas d'abus de position dominante. La troisième partie formule des propositions générales pour la définition de mesures correctrices efficaces. La quatrième partie couvre de façon relativement détaillée des types de mesures correctrices et sanctions spécifiques, ainsi que leurs points forts et points faibles respectifs. Enfin, la cinquième partie aborde les mesures correctrices et sanctions appliquées dans quelques affaires récentes.

Cette note aborde principalement les points suivants :

- Les mesures correctrices éliminent, corrigent ou empêchent, tandis que les sanctions pénalisent ou punissent. D'une façon générale, les mesures correctrices visent à mettre un terme au comportement illicite d'un contrevenant, à ses effets anticoncurrentiels et à sa récurrence, ainsi qu'à rétablir la concurrence. Les sanctions s'efforcent de décourager tout comportement illicite à l'avenir, de dédommager les victimes et de contraindre les contrevenants à restituer leurs gains illégitimes. Malgré un consensus général sur ces objectifs, les opinions divergent quelque peu sur leur hiérarchisation.
- Tout le monde convient que les mesures correctrices et sanctions doivent être proportionnées à l'infraction. Une *mesure correctrice* proportionnée est une disposition dont le champ d'application et la forme permettent d'atteindre de façon mesurée les objectifs du droit de la concurrence. Une *sanction* proportionnée ne dissuade pas de façon excessive ou insuffisante. En générale, plus la faute est délétère, plus les mesures doivent être fermes. En s'efforçant de respecter la proportionnalité, on peut s'assurer que les mesures correctrices soient appropriées pour le comportement en question, qu'elles soient moins arbitraires et donc plus prévisibles.
- Certains ont laissé entendre que des mesures plus indulgentes doivent être imposées lorsque le comportement illicite a des effets ambivalents, c'est-à-dire lorsqu'il nuit au bien-être des consommateurs tout en ayant un impact positif sur la prospérité. Cette suggestion doit être interprétée avec beaucoup de précaution car entendue littéralement, elle préconise une mise en balance du bien-être des consommateurs. Le Comité a analysé la question par le passé dans le contexte de tests visant à déterminer la responsabilité. C'est un concept qui a été jugé difficile,

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<sup>3</sup> Eleanor Fox et Paul Sirkis, « Antitrust Remedies – Selected Bibliography and Annotations », American Antitrust Institute, Document de travail 06-01, p. 2 (juin 2005).

<sup>4</sup> Certaines lois sur la concurrence des pays de l'OCDE prévoient des condamnations pénales pour les infractions d'abus de position dominante, mais on n'y a rarement recours de nos jours. Par exemple, alors qu'aux États-Unis, la loi Sherman les autorise techniquement pour les infractions en vertu de l'article 2, aucune condamnation pénale n'a été demandée à ce titre depuis 1940. William Kovacic, « Designing Antitrust Remedies for Dominant Firm Misconduct », 31 Connecticut Law Review 1285, 1292 et n°38 (1999).

sinon impossible, à mettre en œuvre en pratique. Il est néanmoins possible d'envisager des effets favorisant la concurrence dans le contexte de mesures correctrices et sanctions d'une manière qui n'implique pas une mise en balance réelle du bien-être.

- Un certain nombre de propositions générales peuvent aider les autorités à définir et à appliquer des mesures correctrices efficaces. Premièrement, il est utile de passer du temps au début de l'enquête à définir des objectifs de correction de la situation et à élaborer un plan pour les atteindre. Sinon, les autorités sont susceptibles d'épuiser les ressources nécessaires pour avoir gain de cause, constatant qu'elles n'ont pas réfléchi suffisamment aux questions capitales : qu'est-ce qu'une mesure correctrice efficace et comment l'appliquer. Deuxièmement, il est extrêmement utile d'avoir une connaissance approfondie du secteur concerné et de son évolution probable en fonction des différents scénarios de redressement. D'autres suggestions consistent à procéder à des ajustements pour les contrevenants récidivistes, à anticiper la réaction stratégique du contrevenant à la mesure imposée, à identifier et tenter de minimiser les effets secondaires négatifs, et à développer un cadre de mise en œuvre pratique.
- Chaque type de mesure correctrice ou sanction présente des avantages et des inconvénients. Les mesures correctrices structurelles, par lesquelles les entreprises s'affranchissent d'actifs qu'elles détiennent, ont l'avantage de permettre l'élimination rapide de la puissance sur le marché tout en créant ou en renforçant des concurrents. En outre, ils peuvent nécessiter moins de surveillance par les tribunaux et autorités que d'autres mesures correctrices. En revanche, certaines mesures correctrices structurelles peuvent dans un premier temps s'avérer plus déstabilisatrices pour l'activité du contrevenant que d'autres mesures correctrices, et engendrer parfois un manque d'efficacité immédiat. En outre, l'expérience a montré que les mesures correctrices structurelles ne sont pas souvent faciles à administrer. Le recours à un type de mesure structurelle – la cession d'actifs – est sujet à controverse dans les cas d'abus de position dominante.
- Les mesures de correction de comportement, qui obligent une entreprise à prendre des mesures ou à cesser des agissements, peuvent être adaptées aux contrevenants individuels et aux circonstances du marché. Dans l'ensemble, elles sont moins controversées que les cessions d'actifs et sont appliquées beaucoup plus fréquemment dans le cas d'abus de position dominante. Elles sont néanmoins parfois critiquées car elles ne s'en prennent pas directement à la concentration et à la puissance sur le marché. Elles ont également tendance à nécessiter une surveillance et une intervention continues et parfois approfondies des tribunaux et autorités. En outre, par rapport à d'autres dispositions, les mesures de correction de comportement sont davantage sujettes à la neutralisation, à la minimisation ou à l'évasion stratégique par les contrevenants. Il n'est pas aussi facile d'éviter une amende ou un ordre de cession d'actifs que de déjouer une mesure de correction de comportement en contestant sans cesse ses modalités ou en trouvant des moyens anticoncurrentiels pour la contourner, afin d'arriver aux mêmes fins que le comportement prohibé.
- Les sanctions pécuniaires, qui comprennent les amendes, les dommages-intérêts et la restitution de bénéfices, ont l'avantage d'être relativement faciles à comprendre et à administrer, car elles n'exigent pas ou peu de suivi par les tribunaux. À moins d'être trop minimes, les sanctions pécuniaires incitent également les contrevenants à surveiller à l'avenir leur propre comportement, afin d'éviter d'enfreindre de nouveau le droit de la concurrence et de s'exposer à de nouvelles sanctions pécuniaires. La détermination du montant optimal d'une sanction pécuniaire est toutefois généralement un exercice épineux. L'autre difficulté, c'est qu'en soi, elles peuvent avoir un effet limité, voire nul, pour rétablir la concurrence.
- Les points de vue divergent considérablement entre certaines juridictions pour déterminer s'il convient que les autorités appliquent des sanctions pécuniaires dans le cas d'abus de position dominante. La ligne de conduite des autorités de tutelle américaines consiste par exemple à ne pas infliger d'amende pour une infraction civile au droit de la concurrence, y compris en cas de comportement unilatéral illicite. En effet, chaque jugement requiert une analyse au cas par cas pour déterminer si le comportement anticoncurrentiel unilatéral est illicite. Il apparaît mal à

propos d'infliger une amende alors que l'existence d'une infraction présente d'emblée tant d'incertitude. Il est intéressant de noter que dans certaines affaires de comportement unilatéral, la Federal Trade Commission (FTC) américaine a jugé inopportun d'exiger une restitution de fonds plutôt que des amendes. En outre, une condamnation à des dommages-intérêts triples civils peut faire suite aux mesures correctrices de la FTC ou du ministère de la Justice. Par contre, en Europe, des amendes sont régulièrement imposées dans les poursuites pour abus de position dominante engagées par les autorités de tutelle. En revanche, les actions civiles restent relativement rares sur le vieux Continent.

- De nombreux commentateurs ont critiqué les systèmes d'imposition d'amendes en vigueur pour sanctionner les infractions au droit de la concurrence en Europe. Le principal problème semble être l'absence de barème clair déterminant comment classer un cas donné d'abus de position dominante. Bien que les facteurs pris en compte par les autorités soient connus, il n'est pas évident de déterminer comment les appliquer de façon objective. Les décisions ne détaillent d'ailleurs pas toujours le calcul des amendes. En effet, certains chercheurs ont découvert que des scénarios identiques sont parfois traités différemment, tandis que des scénarios différents sont parfois traités de façon identique. En conséquence, on constate une incertitude quant au montant de l'amende qu'une entreprise est susceptible de se voir infliger.

## 2. Objectifs potentiels des mesures correctrices et sanctions

Les mesures correctrices et sanctions dans le cas d'abus de position dominante concourent à la réalisation d'un certain nombre d'objectifs et, même si ce sont toujours les mêmes qui ont tendance à être invoqués, les opinions diffèrent quant à leur hiérarchisation. Pitofsky déclare par exemple que « les principaux objectifs du droit de la concurrence doivent être : d'abord, de dissuader tout comportement anticoncurrentiel... et ensuite, de confisquer tous les gains illicites aux contrevenants et de restituer cet argent aux victimes »<sup>5</sup>. Crandall et Elzinga estiment que « [l]e principal objectif de toute mesure de correction en droit de la concurrence consiste à mettre fin au comportement illicite du contrevenant »<sup>6</sup>. Selon Sullivan, « la mesure correctrice doit correspondre au comportement illicite. L'objectif ultime du droit de la concurrence devrait également être de rétablir la concurrence »<sup>7</sup>.

Il peut être utile de commencer par quelques classifications pour clarifier les termes utilisés. Bien que les termes « mesure correctrice » et « sanction » soient parfois utilisés de manière interchangeable dans le domaine de la politique de la concurrence, ils peuvent également avoir d'autres sens, et les différences comptent. De façon spécifique, le terme « mesure correctrice » signifie quelque chose qui élimine, corrige ou empêche, tandis qu'une « sanction » désigne une pénalité ou une punition, du moins dans un contexte juridique. En conséquence, dans un contexte de politique de la concurrence, il peut être utile de considérer les mesures correctrices comme des mesures visant à mettre fin au comportement illicite d'un contrevenant et à ses effets anticoncurrentiels, à empêcher la récidive et à rétablir la concurrence. Les sanctions peuvent être considérées comme des mesures visant à décourager un comportement illicite et éventuellement à dédommager les victimes.

<sup>5</sup> Robert Pitofsky, « Antitrust at the Turn of the Twenty-First Century: The Matter of Remedies », 91 *Georgetown Law Journal* 169, 170 (2002).

<sup>6</sup> Robert Crandall et Kenneth Elzinga, « Injunctive Relief in Sherman Act Monopolization Cases », 21 *Journal of Research in Law and Economics* 277 (2004).

<sup>7</sup> E. Thomas Sullivan, « Antitrust Remedies in the U.S. and EU: Advancing a Standard of Proportionality », 48 *Antitrust Bulletin* 377, 424 (2003).

## 2.1 *Interrompre un comportement et empêcher sa réapparition*

Mettre fin à un comportement illicite est un objectif correcteur évident mais fondamental. Le simple fait d'atteindre ce seul objectif ne constitue cependant pas toujours un remède suffisant. De la même manière qu'arrêter des criminels et leur ordonner simplement de « cesser d'être en infraction » serait probablement une politique inefficace de lutte contre la criminalité, il est peu probable qu'une politique de la concurrence qui se limiterait à mettre fin aux pratiques nuisibles protège la concurrence.

Premièrement, un mécanisme est nécessaire pour dissuader le contrevenant de répéter un comportement identique (ou semblable) sur le marché. Deuxièmement, dans certains cas, le temps que son comportement illicite soit prohibé, un contrevenant aura déjà fait durablement du tort à la concurrence. En d'autres termes, il peut avoir déjà accumulé ou protégé sa puissance sur le marché en conséquence de son comportement illicite. Pourtant, si le seul objectif de correction consiste à mettre fin à ce comportement, le contrevenant peut continuer à tirer parti du tort causé à la concurrence tant que celui-ci n'est pas traité. Non seulement cette issue ne changerait rien aux conditions défavorables aux consommateurs, mais elle encouragerait encore davantage ce type de comportement. D'autres entreprises dominantes pourraient en conclure que si elles abusent de leur position dominante, on leur demanderait au pire d'arrêter.

Par ailleurs, il est possible que dans certains cas, un contexte concurrentiel se rétablisse dès que le comportement illicite s'interrompt. Pourtant, même dans ces situations, il est possible que le préjudice ait déjà été causé. Il peut donc être souhaitable d'imposer à l'entreprise de renoncer aux bénéfices tirés de ses activités illicites, de dédommager les victimes pour le préjudice subi, et d'une façon générale, de dissuader les autres entreprises d'adopter un comportement semblable à l'avenir. Ces objectifs sont détaillés ci-après.

## 2.2 *Rétablir la concurrence*

Cet objectif est également vital. Pour être considéré comme un succès du point de vue du bien-être des consommateurs, la mesure correctrice imposée par une autorité de tutelle doit permettre de rétablir le niveau de concurrence qui aurait régné en l'absence d'infraction. Si elle ne parvient pas à atteindre cet objectif, les consommateurs continuent à subir la concurrence réduite issue des activités illicites du contrevenant. En conséquence, la Cour suprême américaine considère que mettre simplement fin à un comportement anticoncurrentiel ne suffit pas. Les tribunaux doivent également « ouvrir à la concurrence un marché qui a été fermé par les restrictions illicites de contrevenants »<sup>8</sup>.

Si le comportement illicite de l'entreprise dominante engendre l'établissement par exemple de barrières à l'entrée, les autorités et les tribunaux doivent analyser les paramètres structurels susceptibles de régner sur le marché après l'application de la mesure correctrice pour y rétablir la concurrence. La mesure correctrice doit permettre de ramener ces barrières aux niveaux précédant l'infraction. Sinon, ces barrières continueront à protéger davantage la position dominante de l'entreprise qu'en l'absence d'infraction, et le niveau précédent de concurrence ne sera pas rétabli<sup>9</sup>.

Cavanagh adopte une position plus acerbe, affirmant qu'un examen des barrières à l'entrée est « crucial » pour évaluer les mesures correctrices dans tous les cas d'abus de position dominante. Selon lui, « [s]i la position dominante de l'entreprise en situation de monopole est protégée par d'importantes barrières à l'entrée, toute décision qui ne tente pas de réduire ces barrières ne permettra pas de rétablir

<sup>8</sup> International Salt Co. contre les États-Unis, 332 U.S. 392, 401 (1947).

<sup>9</sup> Pour en savoir plus sur les barrières à l'entrée, voir OCDE, Barriers to Entry, disponible à l'adresse [www.oecd.org/dataoecd/43/49/36344429.pdf](http://www.oecd.org/dataoecd/43/49/36344429.pdf).

efficacement la concurrence et est donc vouée à l'échec»<sup>10</sup>. Son approche présente une différence substantielle car malgré la terminologie employée, la proposition de Cavanagh peut aller au-delà du rétablissement de la concurrence. Si une entreprise dominante intervenait sur un marché caractérisé dès le départ par d'importantes barrières à l'entrée et si celles-ci n'ont pas été affectées par son comportement, imposer des mesures correctrices visant à les réduire peut revenir à poursuivre un objectif bien plus ambitieux : rendre le marché encore plus concurrentiel qu'il ne l'aurait été en l'absence de comportement illicite.

### 2.3 *Dissuasion*

La dissuasion est un autre objectif à l'intérêt évident. Lorsqu'une entreprise abusant de sa position dominante est sanctionnée correctement, cela permet non seulement de limiter les risques de récidives, mais également de dissuader les autres entreprises dominantes de se comporter de manière abusive. En outre, si les entreprises dominantes étaient systématiquement dissuadées de se comporter de manière abusive, personne ne pâtirait des préjudices que le droit de la concurrence vise à prévenir. La mission de mise en œuvre du droit de la concurrence par les tribunaux et les autorités disparaîtrait également. Il est toutefois improductif d'être trop dissuasif. Si les entreprises craignent outre mesure de se voir déclarer avoir abusé de leur position dominante et des conséquences, elles peuvent s'imposer une retenue démesurée et décider d'éviter certains comportements favorisant en réalité la concurrence. En conséquence, la concurrence et les consommateurs peuvent pâtir d'une dissuasion insuffisante comme d'une dissuasion excessive.

### 2.4 *Dédommagement seulement*

La finalité légitime ou non du dédommagement des victimes d'abus de position dominante dépend du point de vue d'où l'on se place. Si l'on estime que l'application du droit de la concurrence vise en partie à décourager et à inverser les transferts de richesse des consommateurs vers les entreprises dominantes du fait d'un comportement abusif, alors le dédommagement est un objectif important. En revanche, si l'on estime que promouvoir et protéger l'ensemble de l'efficacité économique suffisent à justifier l'existence d'un système d'application du droit de la concurrence, alors le dédommagement des victimes dans le cas d'abus de position dominante semble dépourvu de sens<sup>11</sup>. Toutefois, d'après ce point de vue, le dédommagement des victimes peut être considéré comme un moyen, sinon comme une fin en soi. En effet, en obligeant les contrevenants à dédommager financièrement les victimes, on contribue à atteindre l'objectif de dissuasion du comportement abusif qui est nuisible à l'efficacité.

Si le dédommagement est autorisé pour punir les abus de position dominante, il doit être juste. Il convient en effet de ne dédommager que ceux qui ont réellement pâti en conséquence de l'infraction. Ceux qui ont subi un préjudice faible, voire nul, ne devraient pas avoir droit à cette manne. En revanche, les parties ayant été affectées doivent recevoir une somme reflétant l'ampleur du préjudice, ainsi que les coûts et les risques liés au contentieux.

<sup>10</sup> Edward Cavanagh, « Antitrust Remedies Revisited », 84 Oregon Law Review 147, p. 202-03 (2005) ; voir également Sullivan, note 7 plus haut, p. 421 (« Lorsque le rétablissement de la concurrence est un objectif de correction important, il est crucial de connaître les conditions d'entrée sur le marché car une entreprise possédant une part de marché considérable ne pourra pas bénéficier d'un monopole s'il est facile de pénétrer le marché. »)

<sup>11</sup> Wouter Wils, « Optimal Antitrust Fines: Theory and Practice », 29 World Competition Review (2006) (à paraître).

## 2.5 *Restitution*

Le concept de la restitution découle de l'idée qu'une entreprise ne devrait pas être autorisée à conserver les gains financiers résultant de ses activités illicites. En conséquence, dans le contexte de l'abus de position dominante, la restitution survient lorsqu'une entreprise dominante est contrainte de renoncer aux profits réalisés en conséquence de son comportement abusif. La logique de cet objectif est un autre objectif : la dissuasion. En confisquant les bénéfices résultant d'un comportement abusif, le facteur incitant à adopter ce comportement est éliminé, ce qui a un effet dissuasif. La restitution peut consister en tout type de sanction monétaire, y compris des amendes et des dommages intérêts civils. Dans certaines juridictions, les autorités peuvent également demander spécifiquement une restitution.

## 2.6 *Proportionnalité*

Tout le monde convient que les mesures correctrices et sanctions doivent être proportionnées à l'infraction. Certaines juridictions, comme l'Union européenne, ont intégré directement une norme de proportionnalité dans leur droit de la concurrence<sup>12</sup>. Ce n'est pas le cas dans d'autres, mais le concept de proportionnalité y est néanmoins respecté<sup>13</sup>. Une mesure correctrice proportionnée est une disposition dont le champ d'application et la forme permettent d'atteindre de façon mesurée les objectifs du droit de la concurrence. La mesure correctrice est définie en fonction des infractions réellement identifiées, du préjudice réellement causé et des conséquences attestées du préjudice – et non en fonction d'infractions, de préjudices ou de pratiques totalement différents et non démontrés. Les mesures correctrices proportionnées ne s'efforcent pas d'établir une concurrence plus forte que celle qui règnerait sur le marché concerné en l'absence d'infraction. Enfin, les mesures correctrices proportionnées présentent une cohérence raisonnable d'une affaire à l'autre. Plus la faute est délétaire, plus la mesure correctrice doit être ferme<sup>14</sup>. L'accent est toutefois mis sur le préjudice et non sur l'immoralité.

Une sanction proportionnée (par opposition à une mesure correctrice proportionnée) ne dissuade pas de façon excessive ou insuffisante. Pour certaines infractions, comme les ententes, qui sont considérées catégoriquement comme préjudiciables et sans avantages compensateurs possibles, une dissuasion excessive ne pose pas vraiment de problème. Les ententes relèvent donc du droit pénal dans certaines juridictions et les participants peuvent être incarcérés. Il est en revanche très difficile de faire la distinction entre un comportement qui constitue un abus de position dominante et un comportement favorisant la concurrence. À ce titre, l'abus de position dominante représente une infraction nettement moins définie que la formation d'une entente. Dans ce cas, il existe un risque de dissuasion excessive.

Contrairement aux autres objectifs évoqués ici, la proportionnalité n'est pas un objectif autonome, car elle ne soulage pas directement le tort causé par des entreprises au comportement abusif. C'est en revanche une caractéristique souhaitable des mesures correctrices et sanctions car en fonction de sa mise en œuvre, elle peut renforcer l'efficacité du système d'application. Plus précisément, elle peut promouvoir l'exécution de mesures de réparation correspondant au comportement en question, plutôt que des mesures trop fortes ou trop faibles. Elle peut également engendrer une réparation moins arbitraire et donc plus prévisible. En outre, la proportionnalité permet de démontrer au public que tous les contrevenants sont traités de manière juste et impartiale en vertu de la législation.

<sup>12</sup> Règlement n°1/2003 du Conseil, Para. 12 et Article 7.

<sup>13</sup> Cavanagh, voir plus haut la note 10 p. 201-02.

<sup>14</sup> « [L]es mesures adoptées par les pouvoirs publics ne doivent pas outrepasser les limites appropriées et nécessaires pour atteindre des objectifs légitimes dans l'intérêt du public ; lorsqu'il y a le choix entre plusieurs mesures appropriées, il convient de recourir à la moins onéreuse, et les handicaps causés (à l'individu) ne doivent pas être disproportionnées par rapport aux objectifs visés. » Sullivan, voir plus haut la note 7 p. 414-15 (citant Nicholas Emiliou, *The Principle of Proportionality in European Law* 2 (1996)).

Il n'y a normalement pas de méthode précise pour évaluer la proportionnalité selon les cas, mais il est souvent possible de discerner si les infractions les plus préjudiciables sont traitées plus fermement et si les infractions les moins dommageables sont traitées avec plus de clémence. En conséquence, des mesures sévères doivent être prises à l'encontre d'entreprises au comportement abusif qui ont provoqué un préjudice indiscutable et considérable pour les consommateurs. Tel peut être le cas par exemple d'un contrevenant qui a acquis toutes les ressources vitales et irremplaçables destinées à un marché important caractérisé par une demande dépourvue d'élasticité, dans le seul but d'empêcher ses concurrents d'y avoir accès, de restreindre la production et d'appliquer des prix de monopole. En revanche, des mesures clémentes, voire symboliques, peuvent être prises à l'encontre d'une entreprise qui a eu un comportement techniquement illicite affectant peu la concurrence. Par ailleurs, on peut adopter des mesures encore plus indulgentes si le comportement a des effets ambivalents, c'est-à-dire lorsqu'il nuit au bien-être des consommateurs et est déclaré illicite, tout en ayant un impact positif sur la prospérité. Cela peut être par exemple le cas d'une entreprise dominante qui propose des prix « de lancement » inférieurs aux coûts pour un nouveau produit pendant une durée d'au moins trois ans.

Notons toutefois qu'en allégeant de façon soi-disant proportionnée la mesure correctrice ou la sanction pour tenir compte des effets favorisant la concurrence, un nouvel aspect émerge que le Comité considérait par le passé dans un contexte différent : la mise en balance du bien-être des consommateurs. Lors de la table ronde sur la Concurrence par les mérites, cet aspect a été jugé comme un moyen de déterminer la responsabilité dans les cas d'abus de position dominante.<sup>15</sup> L'une des conclusions tirées était que même s'il est possible de déterminer si le comportement favorise ou réduit le bien-être des consommateurs dans certains cas, il peut s'avérer ardu, sinon impossible, d'évaluer l'ampleur de ces changements. Toutefois, lorsqu'un comportement a des effets à la fois positifs et négatifs sur le bien-être des consommateurs, les critères de mise en balance requièrent que ces effets soient mis en balance pour déterminer lequel est le plus fort. Il n'est donc pas nécessaire de connaître leur ampleur pour effectuer la mise en balance. Il est difficile d'être certain que les critères de mise en balance sont appliqués de façon précise, objective et cohérente car ils comparent des facteurs qui sont rarement, voire jamais mesurés. Les mêmes problèmes surgiraient inévitablement si l'on appliquait le même processus de mise en balance dans le contexte de mesures correctrices ou sanctions. De fait, l'évaluation des effets du comportement illicite d'une entreprise dominante sur le bien-être des consommateurs en vue d'identifier une réparation proportionnée ne serait pas plus facile que lors de la phase de détermination de la responsabilité.

Cela ne veut pas dire qu'il ne faut jamais tenir compte des effets favorisant la concurrence lors de la définition de mesures correctrices. Par exemple, le simple fait que le comportement ait eu un impact anticoncurrentiel au moment de l'infraction ne signifie pas nécessairement qu'il continuera à avoir les mêmes effets dans un contexte futur. La technologie ou un autre facteur peut évoluer de telle manière que le même comportement aura peut-être des effets favorisant la concurrence sur le marché de demain. Dans ce cas, une mesure correctrice qui met fin au comportement peut non seulement être vaine et inutile, mais également dommageable. En outre, les autorités devront faire particulièrement attention de ne pas définir une mesure correctrice excessive susceptible d'empêcher inutilement un autre comportement futur favorisant la concurrence. La mesure doit encourager autant que possible un comportement favorisant la concurrence, tout en mettant fin et en empêchant que le comportement déclaré illicite ne se reproduise. Ces considérations diffèrent néanmoins de la notion selon laquelle une mesure correctrice doit être retirée à partir du moment où des effets favorisant la concurrence sont inextricablement liés aux effets préjudiciables du comportement illicite. En d'autres termes, les autorités ne sont pas tenues d'analyser à nouveau les effets du comportement sur le bien-être et de les mettre en balance pour arriver à une mesure correctrice proportionnée.

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<sup>15</sup> OCDE, Competition on the Merits, <http://www.oecd.org/competition>, pp. 11, 31-33.

Néanmoins, certains commentateurs semblent estimer que les autorités et tribunaux procéderont à cet exercice : « La mesure correctrice doit également tenir compte des aspects du comportement qui favorisent la concurrence. Les agissements qui sont clairement préjudiciables doivent être sévèrement réprimés. Cependant, si le comportement dommageable comporte des aspects favorisant la concurrence qui limitent le tort commis, une réparation moins intransigeante sera généralement appropriée<sup>16</sup>. » Le problème dans ce cas, c'est que si une autorité parvient à passer outre le caractère subjectif et l'absence de précision inhérents aux critères de mise en balance de bien-être en ayant recours à un autre critère pour déterminer la responsabilité, mais qu'elle adoucit proportionnellement la mesure correctrice en fonction de sa perception des aspects du comportement favorables à la concurrence, les inconvénients de la mise en balance du bien-être seront réintroduits dans le processus d'application. En d'autres termes, l'autorité remettra en question le caractère prévisible et objectif initialement offert par les critères de non mise en balance de la responsabilité et le principe de proportionnalité.

Par ailleurs, dans le contexte des mesures correctrices, si ce type d'exercice était réalisé au nom de la proportionnalité, cette finalité pourrait être en conflit avec les objectifs consistant à mettre fin au comportement illicite et à rétablir la concurrence. Après avoir jugé que le comportement du contrevenant a constitué un abus illicite de position dominante, *malgré ses éventuels effets favorisant la concurrence et efficiences inextricables*, une autorité souhaitera généralement définir une mesure correctrice qui mette fin au comportement et rétablisse le niveau de concurrence qui aurait régné en l'absence d'infraction – ni plus, ni moins. Il serait peu judicieux de gâcher une mesure correctrice structurelle ou comportementale efficace susceptible d'atteindre ces objectifs en l'édulcorant au point de ne pas vraiment parvenir à mettre fin au comportement et à rétablir la concurrence. Si l'on veut tenir compte de tous les effets du comportement favorisant la concurrence, il faut le faire de façon à ne pas faire intervenir une mise en balance réelle du bien-être.

La situation diffère légèrement pour les sanctions mais le résultat est le même. Les sanctions, et notamment les amendes, sont davantage orientées sur la dissuasion que sur les objectifs de rétablissement de la concurrence ou d'interruption d'un comportement illicite. Comme nous le verrons dans la partie 4.4, il existe une sanction pécuniaire théoriquement optimale pour chaque cas. Certains chercheurs ont proposé de la calculer en déterminant le préjudice *net* engendré par le comportement illicite et en multipliant le résultat par un montant donné correspondant à une probabilité de détection inférieure à 100 %. Le terme « préjudice net » désigne le préjudice total subi par des tiers en conséquence d'un comportement, moins tout avantage favorisant la concurrence résultant éventuellement de ce comportement. En conséquence, selon la théorie des amendes optimales, il convient de limiter une sanction dans une certaine mesure si le comportement en question présente des effets favorisant la concurrence. Toutefois, le préjudice net est ce que les critères de mise en balance du bien-être tentent de déterminer et, comme on l'a vu, la mise en balance du bien-être est extrêmement difficile à mettre en pratique de façon rigoureuse, objective et prévisible. En conséquence, l'optimisation est une idée judicieuse en théorie mais mal adaptée pour une application dans la réalité. Ainsi, du point de vue pratique, il semble peu recommandé de chercher à tenir compte des effets favorisant la concurrence dans le processus de définition de sanctions, même lorsque la sanction est une amende.

Là encore, il ne faut pas en déduire que les effets favorisant la concurrence n'ont pas d'intérêt dans l'application du droit de la concurrence en général, ni pour les amendes en particulier. Par exemple, la ligne de conduite d'une autorité peut consister à infliger des amendes uniquement pour certaines catégories de comportement unilatéral, tels que ceux qui ont été maintes fois déclarés ne pas avoir de justification économique légitime. Cette approche diffère toutefois de l'idée de réduction proportionnelle d'une amende au cas par cas, à hauteur d'un montant correspondant aux effets d'un comportement illicite favorisant la concurrence.

<sup>16</sup> Cavanagh, voir plus haut la note 10 p. 203.

Il existe une situation dans laquelle le recours à des mesures plus clémentes ne semble pas sujet à controverse : lorsque le comportement en question n'a jamais été traité auparavant par les tribunaux de la juridiction et qu'il y aurait pu y avoir un doute raisonnable *préalable* sur le caractère illicite éventuel du comportement. À l'inverse, un comportement jugé illicite à maintes reprises justifierait des mesures correctrices plus sévères. Dans ce cas, les implications pratiques de proportionnalité et de dissuasion vont très précisément dans le même sens. Des facteurs de dissuasion plus forts sont manifestement requis si les entreprises continuent d'adopter le même comportement condamné plusieurs fois par le passé. Toutefois, lorsqu'un cas est sans précédent, il est évident qu'il n'y a pas de problème de récurrence pour le type de comportement en question (du moins pas encore). Bien entendu, il convient dans cette situation de faire preuve d'un certain scepticisme car tous les contrevenants seront tentés d'affirmer que leur cas est sans précédent.

Malheureusement, situer un cas dans un barème de mesures correctrices ou punitives allant de clémentes à sévères ne peut être une science exacte. Alors qu'il est déjà parfois ardu de déterminer quelle moitié du barème convient à un cas donné, tenter de respecter une norme de proportionnalité peut être une véritable gageure. Supposons par exemple qu'une entreprise dominante ressent qu'un concurrent naissant a le potentiel de devenir un adversaire formidable au cours des prochaines années, et qu'elle décide d'adopter un comportement visant à réduire l'efficacité, qui n'a aucune justification ou fin autre que d'anéantir ce concurrent. Ce comportement justifie-t-il un traitement sévère du fait de son caractère anticoncurrentiel flagrant, ou doit-il n'engendrer qu'une simple réprimande puisque rien ne prouve que la victime aurait pu devenir un concurrent puissant ?

### 3. Propositions d'ordre général pour la définition de mesures correctrices

Dans un article important de 1999, Kovacic formulait diverses propositions à destination des autorités de la concurrence concernant la définition de mesures correctrices dans les cas d'abus de position dominante<sup>17</sup>. La plupart des recommandations ci-après sont tirées de cet article.

#### 3.1 Définir promptement des objectifs de correction et élaborer un plan pour les atteindre

Dans l'idéal, les autorités de la concurrence définiront leurs objectifs correctifs et élaboreront des stratégies solides pour y parvenir avant d'entreprendre toute mesure d'exécution concernant un cas. Sinon, elles sont susceptibles d'épuiser les ressources nécessaires pour avoir gain de cause, constatant qu'elles n'ont pas réfléchi suffisamment à la question capitale : qu'est-ce qu'une mesure correctrice efficace. Pire encore, elles peuvent s'apercevoir qu'il n'y a pas de mesure correctrice exploitable. Disposer de suffisamment de preuves pour démontrer la responsabilité ne débouche pas nécessairement sur une mesure correctrice efficace pour un cas donné. S'il s'avère impossible de définir et d'exécuter une mesure correctrice adéquate, il n'y a pas grand intérêt à engager des poursuites<sup>18</sup> et il vaut mieux s'en rendre compte trop tôt que trop tard.

En conséquence, il convient d'envisager des mesures correctrices dès le début de l'enquête. Tout en recueillant les informations nécessaires pour déterminer l'existence d'une infraction, l'autorité doit également songer aux conséquences recherchées en cas de succès des mesures d'application. Ensuite, selon les recommandations de Kovacic, si les autorités de la concurrence décident d'intervenir à l'encontre d'une entreprise, elles doivent dévoiler leurs objectifs de correction en même temps que le lancement formel des

<sup>17</sup> Kovacic, voir plus haut la note 4 p. 1310-16.

<sup>18</sup> Une exception pourrait survenir si l'agence juge approprié d'imposer une amende, ce qui est possible sans se soucier de savoir si une mesure correctrice exploitable peut être trouvée (en supposant que le régime statutaire permet les amendes). De plus, l'agence peut souhaiter établir une responsabilité pour que le suivi d'actions privées pour dommages soit facilité.

mesures d'application<sup>19</sup>. La communication doit présenter les éléments fondamentaux de la mesure correctrice proposée, ainsi qu'une description de la manière dont elle va enrayer le préjudice causé par le comportement contesté. De cette façon, l'autorité prêter attention aux aspects correctifs à mesure de l'avancée de l'affaire. Si, à ce stade, les autorités de la concurrence estiment que leurs preuves risquent d'être trop vagues ou imprévisibles pour leur permettre de définir une mesure correctrice claire, il vaut mieux ne pas engager de poursuites.

Il est tout aussi important que, tout au long de leur enquête, les autorités examinent si les mesures correctrices qu'elles envisagent peuvent être administrées et comment. Définir une mesure correctrice théoriquement parfaite peut avoir des conséquences fâcheuses s'il est trop difficile voire impossible de l'appliquer. Par exemple, il peut apparaître évident que la concurrence sera rétablie si une mesure correctrice impose à un constructeur automobile dominant qu'il vende ses machines d'emboutissage brevetées et révolutionnaires à ses concurrents. Toutefois, en l'absence de marché pour ces machines, il ne sera pas évident de déterminer leur prix, et le tribunal devra probablement intervenir fréquemment pour résoudre péniblement les conflits sur la fixation d'un prix juste dans un contexte de marché en évolution constante. Autre cas de figure, une mesure correctrice peut traiter de façon prodigieuse les répercussions négatives pour la concurrence, mais s'il porte un préjudice sérieux aux salariés et investisseurs du contrevenant, le tribunal sera probablement réticent à l'adopter. Pour ces raisons, les autorités ont probablement intérêt à disposer d'une stratégie solide pour surmonter toutes les craintes que le tribunal est susceptible d'avoir concernant l'applicabilité d'une mesure correctrice ou son impact sur les tiers.

Pour mettre en pratique cette suggestion, les autorités devront faire un effort délibéré et cohérent pour intégrer la question des mesures correctrices dès la préparation des poursuites. Les propositions qui suivent donnent des indications sur la démarche à suivre.

### 3.2 *Connaître le secteur*

Pour définir une mesure correctrice efficace, l'autorité doit avoir une connaissance approfondie du développement du secteur, de son évolution possible en l'absence d'intervention du gouvernement et de l'impact probable de différentes mesures correctrices. Sur des marchés en évolution rapide, l'autorité doit également tenir compte de l'impact des nouvelles technologies sur les performances futures du marché avec et sans l'intervention des mesures correctrices envisagées<sup>20</sup>. Il peut bien entendu s'avérer difficile de faire ce genre de conjectures avec précision, mais elles ne sont pas complètement différentes des prévisions que les autorités doivent faire dans le cas de fusions.

Dans certains cas, il peut être simplement impossible de rétablir la concurrence car les mécanismes sous-jacents du marché ne le permettent pas. Avoir une connaissance approfondie du secteur concerné permet aux autorités de tutelle de reconnaître ces situations afin de ne pas s'engager dans une tentative malencontreuse de faire l'impossible. Par exemple, à une époque où elles avaient encore peu d'expérience en la matière, les autorités américaines de la concurrence engagèrent des poursuites à l'encontre de General Motors en vertu de la loi Sherman, prétendant que le groupe avait illicitement monopolisé le marché de la construction d'autobus urbains et interurbains au moyen d'une série de tactiques coercitives<sup>21</sup>. Il n'y avait qu'un autre concurrent sur le marché. Finalement, un accord fut trouvé aux termes duquel GM se vit interdire de s'engager dans certains contrats de fourniture exclusive et fut contraint d'accorder des licences pour ses brevets et de vendre certains équipements aux autocaristes ou constructeurs d'autobus qui

<sup>19</sup> Idem, p. 1310-12.

<sup>20</sup> Idem, p.1310.

<sup>21</sup> États-Unis contre General Motors Corporation, Action civile n° 15816 (D.Mich. 1956).

souhaiteraient en acheter<sup>22</sup>. L'objectif de ces mesures correctrices était d'obliger GM à stimuler l'entrée sur le marché et donc à relancer la concurrence. Un aspect déterminant n'avait toutefois pas été pris en compte : le niveau minimum d'efficacité pour produire les autobus était considérable par rapport à la demande totale. Le marché ne pouvait simplement pas absorber plus de deux concurrents, et même cette double présence était difficile. Ainsi, 15 ans après la décision, les deux mêmes constructeurs demeurent seuls sur le marché et aucun d'entre eux n'est en mesure d'opérer avec efficacité. En outre, les prix ne semblent pas avoir été affectés par la décision<sup>23</sup>.

### **3.3 Procéder à des ajustements en cas d'antécédents de faute**

À l'heure de définir une mesure correctrice, certains commentateurs recommandent de tenir compte des antécédents du contrevenant en matière de respect du droit de la concurrence. Abstraction faite de tous les autres aspects, plus il y a de fautes, plus la sanction doit être sévère. Procéder à cet ajustement permettra de décourager toute récidive chez les contrevenants qui s'avèrent difficiles à dissuader. Par exemple, si une amende de 10 millions EUR est d'ordinaire jugée appropriée pour une infraction donnée, mais que le contrevenant a déjà été condamné deux fois par le passé pour le même type d'infraction, il est raisonnable de penser que l'autorité demandera une amende supplémentaire pour ce même contrevenant.

En plus d'influencer la sévérité de la mesure correctrice, analyser les antécédents du contrevenant en matière de respect du droit de la concurrence peut avoir un impact sur la sélection du type de remède. Par exemple, si des amendes ou des mesures correctrices ont déjà été imposées une fois ou deux à un contrevenant et qu'il continue néanmoins à se comporter de manière illicite, il est ensuite logique d'envisager si une mesure structurelle serait plus efficace pour dissuader un comportement anticoncurrentiel et rétablir la concurrence.

### **3.4 Anticiper la réaction possible du contrevenant**

L'étape suivante consiste à estimer la réaction probable du contrevenant à chaque mesure correctrice envisagée<sup>24</sup>. En un sens, cette étape fait partie intégrante de la connaissance du secteur, dont elle peut découler naturellement. À ce stade du processus, l'autorité de tutelle doit anticiper le fait que le contrevenant tentera d'esquiver, de minimiser ou d'anéantir la mesure correctrice sans en enfreindre techniquement les modalités. Les risques que cela se produise sont supérieurs avec les mesures de correction de comportement qu'avec d'autres types de mesure, comme les amendes, qui ne laissent à l'entreprise qu'une faible marge de manœuvre pour réduire ou échapper à l'impact de la sanction (sauf si elle fait appel). Dans tous les cas cependant, il est judicieux de s'efforcer de contrer toutes les solutions tactiques auxquelles le contrevenant est susceptible de recourir pour éviter des conséquences recherchées de la mesure correctrice.

Pour ce faire, une connaissance approfondie du secteur d'activité est probablement nécessaire, ce qui explique en partie pourquoi l'étape 3.2 est aussi importante. Comme Kovacic le souligne,

Par rapport au gouvernement, le titulaire dominant bénéficie généralement d'une quantité disproportionnée d'informations sur l'évolution future de la concurrence dans son secteur et peut ainsi prévoir plus précisément quels éléments de liberté commerciale seront les plus importants pour sa prospérité future. Le gouvernement est confronté au risque que la mesure correctrice proposée

<sup>22</sup> États-Unis contre General Motors Corporation, Accord à l'amiable, CCH Trade Cases para. 71 p. 624 (1965).

<sup>23</sup> Voir Crandall et Elzinga, note 6 plus haut, pour une explication détaillée de cette affaire.

<sup>24</sup> Kovacic, voir plus haut la note 4 p. 1311.

restreigne un comportement que le contrevenant sait être de plus en plus insignifiant et qu'il ne parvienne pas à bloquer les moyens de rechange permettant d'atteindre les mêmes objectifs anticoncurrentiels.

Il ajoute que les autorités peuvent réduire dans une certaine mesure le déséquilibre d'information en s'adressant aux concurrents du contrevenant et en recherchant des informations leur permettant de prévoir et de désamorcer des stratégies permettant de contourner la mesure correctrice. Parallèlement, elles doivent veiller à ne pas donner à ces concurrents la possibilité d'alourdir de façon opportuniste la charge sur le contrevenant en donnant une représentation fautive de la situation réelle du marché. En conséquence, les autorités ont intérêt à faire également des vérifications auprès de clients importants. Ceux-ci peuvent en effet être bien informés et avoir moins de parti pris à l'encontre du contrevenant.

### **3.5 Identifier les effets secondaires**

Ensuite, l'autorité doit évaluer les effets secondaires éventuels de chaque mesure correctrice envisagée<sup>25</sup>. Par exemple, contraindre une entreprise de fournir à ses concurrents l'accès à un actif essentiel pourrait avoir pour conséquence involontaire de décourager les investissements des concurrents qui auraient engendré la mise au point de solutions de rechange supérieures à cet actif. Cela peut également paralyser globalement les activités de recherche et développement si les entreprises en déduisent qu'elles devront partager leurs innovations les plus précieuses avec leurs concurrents. Comme il a été souligné lorsque le Comité s'est penché sur le sujet de la concurrence fondée sur les mérites, cet effet de paralysie est plausible a) lorsque le comportement de l'entreprise dominante engendre des gains d'efficacité et nuit au bien-être des consommateurs, et b) quand le précédent juridique n'est pas suffisamment clair pour permettre de prévoir avec certitude la façon dont les tribunaux considéreront le comportement<sup>26</sup>.

### **3.6 Analyser l'applicabilité**

À cette étape, l'autorité s'efforce de déterminer la viabilité de l'application de chaque mesure correctrice envisagée. Cela revient à évaluer la facilité ou la difficulté de mise en œuvre de chaque mesure, mais également à estimer le coût de leur application. Contrairement aux amendes qui n'impliquent généralement pas de difficultés d'administration ni de coûts substantiels, les mesures correctrices à caractère comportemental et structurel peuvent être très difficiles à mettre en œuvre et leur administration implique souvent un coût, qui sera probablement élevé. Ces facteurs doivent être pris en compte à l'heure de sélectionner la mesure correctrice optimale.

C'est l'étape à laquelle il convient de s'interroger sur l'ampleur du suivi requis par une mesure correctrice. Combien de clauses de l'ordonnance ou du jugement correctif sont susceptibles de faire l'objet d'un litige entre l'autorité et le contrevenant ? De quels moyens le contrevenant bénéficie-t-il pour tenter de déroger à certains aspects de la mesure correctrice ? Cette mesure exige-t-elle que l'autorité ou le tribunal approuve les décisions prises à l'avenir par le contrevenant, ou définisse, ajuste ou surveille régulièrement divers aspects de ses activités ?

S'il apparaît qu'une mesure correctrice va exiger un suivi important par un tribunal, le processus peut devenir tellement laborieux et prendre un tel retard que la mesure correctrice sera inefficace. En outre, les mesures correctrices qui imposent aux tribunaux de prendre des décisions sur l'administration quotidienne

<sup>25</sup> Idem, p.1310-11.

<sup>26</sup> OCDE, Competition on the Merits, voir note 15 plus haut. Voir également Howard Shelanski et J. Gregory Sidak, « Antitrust Divestiture in Network Industries », 68 Université de Chicago, Law Review 1, p.28-31 (2001) (sur l'importance de prendre en compte l'efficacité dynamique en plus de l'efficacité statique à l'heure de sélectionner des mesures correctrices).

des entreprises leur confèrent une mission pour laquelle ils ne sont pas compétents. Sur le plan pratique, les tribunaux ne doivent pas approuver les mesures correctrices pour la mise en œuvre desquelles ils n'ont pas l'expertise ou les ressources suffisantes<sup>27</sup>. À cette étape, il convient de renoncer aux mesures correctrices qui ne peuvent physiquement pas être mises en œuvre.

### 3.7 *Le choix d'une mesure correctrice*

Après avoir envisagé un certain nombre de mesures correctrices potentielles en fonction des caractéristiques du secteur et du contrevenant, et après avoir analysé leurs effets secondaires possibles, leur nature administrable et les coûts de leur application, l'étape suivante consiste à décider quelle est la mesure la plus appropriée. Certains commentateurs suggèrent de suivre le principe « Avant tout, ne pas faire de tort » pour choisir des mesures correctrices. Cette maxime insinue que l'absence d'intervention est préférable à toute intervention susceptible d'engendrer un préjudice. Ces commentateurs préfèrent ainsi écarter toute mesure correctrice qui présente des risques d'effets secondaires négatifs. Tout le monde ne convient cependant pas qu'il faille avant tout ne pas faire de tort sans se soucier d'abord de l'élimination concrète du problème de concurrence. En effet, il peut être aussi facile de provoquer des dommages si l'on s'abstient d'intervenir que si l'on intervient. En outre, l'application du droit de la concurrence pourrait être compromise si l'on adhère à la règle d'absence de tort, car il y aura toujours un minimum d'incertitude sur la manière dont une mesure correctrice affectera les mesures d'incitation et le niveau de concurrence future<sup>28</sup>. Une approche plus appropriée consiste à tenter d'identifier les effets secondaires éventuels d'une mesure correctrice afin d'en tenir compte dans la décision d'imposer ou non ce type de mesure spécifique, d'envisager à la place un autre type, ou d'en déduire qu'aucune mesure correctrice ne fera pas plus de mal que de bien. Cette décision prendrait également en compte les effets nets possibles d'une intervention trop faible (voire nulle). Il faudrait alors procéder à une comparaison qualitative des alternatives, ce qui permettrait d'orienter le choix des mesures correctrices<sup>29</sup>.

Dans l'idéal, on pourrait procéder à une comparaison quantitative. Certains auteurs ont proposé des stratégies assez spécifiques pour définir le mode de sélection parmi une série de mesures correctrices, mais celles-ci ont tendance à impliquer des variables extrêmement difficiles à évaluer en pratique. Shelanski et Sedak proposent par exemple une méthode en trois étapes qui semble judicieuse en théorie mais qui serait quasiment impossible à appliquer avec rigueur dans la réalité. Selon la proposition de ces auteurs, le gouvernement doit d'abord déterminer si la mesure correctrice engendrera un gain net d'efficacité statique à court terme (en d'autres termes, si les avantages des réductions de prix et des augmentations de production ou de qualité engendrés par les mesures correctrices seront supérieurs aux coûts liés à la diminution ultérieure de la capacité de l'entreprise à réduire ses charges). Si la réponse à la première étape est positive, l'étape suivante consiste à tenir compte des effets de la mesure correctrice, qu'ils soient positifs ou négatifs, sur l'efficacité dynamique (à long terme). Cette étape tient ainsi compte de l'impact attendu de la mesure correctrice sur des facteurs comme l'évolution technologique et les effets de réseau. Si le gain net demeure positif, la troisième étape consiste à évaluer les coûts d'application de la mesure correctrice. La mesure idéale peut alors être identifiée comme celle qui produit les gains d'efficacité globaux les plus importants après déduction des coûts d'application<sup>30</sup>.

Malgré l'improbable capacité à démontrer quantitativement qu'une mesure correctrice potentielle est la meilleure solution possible dans un cas donné selon la méthode de Shelanski et Sedak, il est possible

<sup>27</sup> Shelanski et Sidak, voir plus haut la note 25 p. 34.

<sup>28</sup> Voir l'American Bar Association Section of Antitrust Law, Remedies Forum Roundtable II 9-12 (2 avril 2003), disponible en anglais sur [www.abanet.org/antitrust/remedies/](http://www.abanet.org/antitrust/remedies/).

<sup>29</sup> Cavanagh, voir plus haut la note 10 p. 203.

<sup>30</sup> Shelanski et Sidak, voir plus haut la note 25.

d'utiliser les facteurs qu'ils identifient pour structurer une analyse utile, quoique plus intuitive. Les points essentiels sont les suivants : a) il est plus judicieux de suivre le principe « ne pas faire de tort *net* » que « ne pas faire de tort du tout » et b) le fait qu'une mesure correctrice ait un effet positif en termes d'efficacité statique n'implique pas nécessairement qu'elle contribue à l'efficacité dynamique.

### **3.8 Développer un dispositif pratique de mise en œuvre**

Quel que soit la mesure correctrice retenue, il faut se doter d'un dispositif réaliste et utile pour l'appliquer<sup>31</sup>. En d'autres termes, l'autorité devra anticiper les difficultés qui surviendront à l'heure d'exécuter la mesure. Par exemple, en cas de cession d'actifs, le gouvernement devra déterminer comment résoudre le problème de la répartition des salariés et actifs actuellement au service des différentes entités sur le point d'être séparées. Le contrevenant soulèvera certainement ces problèmes à un moment donné dans l'espoir de persuader le tribunal que la mesure envisagée est irréaliste ou impossible. L'autorité doit donc avoir des contre arguments et des stratégies spécifiques pour contrer ces obstacles.

## **4. Mesures correctrices et sanctions spécifiques, leurs points forts et leurs points faibles**

### **4.1 L'engagement de poursuites en tant que mesure correctrice**

Quel que soit la mesure correctrice spécifique recherchée, le fait que des poursuites soient engagées pour abus de position dominante peut constituer en soi une mesure correctrice. D'abord, les poursuites peuvent avoir un effet inhibiteur rapide sur le comportement du contrevenant. Réalisant que ces opérations sont désormais minutieusement contrôlées par un tribunal, une autorité de tutelle (ou un plaignant civil) et peut-être par des médias, celui-ci peut alors atténuer son comportement stratégique pour tenter de lui donner une apparence plus inoffensive. Le contrevenant peut même décider d'interrompre totalement les pratiques à l'origine des poursuites. En outre, il peut décider de faire analyser tout ou partie de ses décisions économiques par des juristes pour éviter d'adopter tout autre comportement d'apparence anticoncurrentielle. Cela se traduira généralement par une attitude plus prudente et hésitante au sein de l'entreprise, et provoquera également des retards dans l'exécution des plans d'activité. Ces effets inhibiteurs peuvent créer des opportunités pour les concurrents actuels et potentiels<sup>32</sup>.

Les entreprises dominantes sur des marchés en évolution rapide ont plus de chances d'être vulnérables à ces effets car elles sont généralement contraintes de prendre et d'exécuter leurs décisions économiques avec une certaine rapidité. Les retards liés à l'obtention de l'aval de nouvelles strates d'autorité au sein de l'organisation peuvent engendrer d'importantes opportunités de vente manquées. Pendant ce temps, les concurrents finiront par remarquer que l'entreprise dominante n'est plus aussi dynamique que par le passé. Ils peuvent adopter en conséquence des stratégies plus ambitieuses car ils savent que le contrevenant ne ripostera pas aussi féroce que qu'il l'aurait fait avant le début des poursuites<sup>33</sup>.

Autre effet des poursuites, elles peuvent détourner les salariés du contrevenant de leurs fonctions habituelles tandis que l'entreprise prépare et présente sa défense. Répondre aux demandes de documentation, fournir des témoignages et aider le département juridique à formuler une stratégie de défense peut prendre un temps considérable, qui n'est pas consacré aux activités habituelles de l'entreprise. Par ailleurs, tout le temps passé à la préparation de la défense peut influencer sur les opinions des salariés concernant leurs objectifs. « À des niveaux subtiles et inconscients, les salariés de l'entreprise peuvent finir par croire que leur principal objectif est de vaincre le plaignant plutôt que de damer le pion aux

<sup>31</sup> Kovacic, voir plus haut la note 4 p. 1311.

<sup>32</sup> Idem, p. 1288-89.

<sup>33</sup> Idem, p.1289.

concurrents<sup>34</sup>. » Cette distraction peut créer des opportunités économiques pour les concurrents dont ils n'auraient autrement pas pu bénéficier.

L'un des meilleurs exemples des « effets inhibiteurs » et des « effets de distraction » concerne une affaire de monopole opposant le gouvernement américain à IBM dans les années 70 et 80. Même si IBM avait magistralement étouffé les poursuites initiées par le gouvernement, celles-ci ont eu des conséquences correctrices durables et considérables. Pour commencer, la procédure entamée par le gouvernement avait donné lieu à plus de 40 actions civiles relevant du droit de la concurrence. IBM les a quasiment toutes enrayerées. Pourtant, à mesure que les batailles judiciaires se poursuivaient lentement et que le groupe épuisait progressivement et méthodiquement ses adversaires pendant 13 ans, les avocats ont commencé à influencer davantage sur ses stratégies et le groupe a paru perdre un peu de sa compétitivité. Ses salariés ont consacré un temps considérable à la défense du groupe plutôt qu'à remplir leurs fonctions normales. Parallèlement, des changements fondamentaux se produisaient dans le secteur informatique auxquels IBM ne semblait pas accorder l'attention nécessaire, comme l'importance croissante des PC<sup>35</sup>. S'il n'avait pas été distrait et probablement captivé par les poursuites engagées par le gouvernement, IBM aurait pu rester le monstre apparemment invincible qu'il fut autrefois, dominant aujourd'hui les marchés des PC et des systèmes d'exploitation et logiciels pour serveurs.

#### 4.2 *Mesures correctrices structurelles*

Les mesures correctrices structurelles contraignent les entreprises à se séparer des actifs qu'elles détiennent. Bien que le recours à ces mesures dans le cas d'abus de position dominante soit généralement vu avec scepticisme, ils peuvent néanmoins constituer une corde supplémentaire à l'arc des autorités de la concurrence. La seule menace posée par une autorité brandissant ces instruments de répression peut avoir un effet dissuasif notable. Par ailleurs, dans certains cas, il peut simplement s'avérer impossible de rétablir la concurrence en interdisant un comportement ou en infligeant une amende, et aucune mesure volontariste de correction de comportement n'est suffisante non plus<sup>36</sup>.

##### 4.2.1 *Cession d'actifs*

Les mesures correctrices imposant la cession d'actifs consistent à restructurer les contrevenants en deux entreprises ou plus, ou à les contraindre à vendre une partie de leurs actifs à d'autres entreprises. Ils passent généralement pour le type de mesure correctrice le plus draconien et leur utilisation est controversée dans le cas d'abus de position dominante, sauf lorsque les contrevenants avaient obtenu leur position dominante par le biais d'acquisitions. Toutefois, malgré les craintes tenaces liées aux cessions d'actifs, celles-ci présentent un certain nombre d'avantages en tant que mesure visant à corriger un comportement abusif. Premièrement, elles peuvent éliminer rapidement la puissance sur le marché et créer ou raviver la concurrence. À ce titre, certains commentateurs estiment que les cessions d'actifs ont beaucoup plus de chances que les mesures de correction des comportements de favoriser la concurrence à long terme<sup>37</sup>.

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<sup>34</sup> Idem

<sup>35</sup> Idem, p. 1289-1290.

<sup>36</sup> C'est pourquoi le règlement n°1/2003 de l'UE prévoit les mesures correctrices structurelles, ce qui n'était pas le cas du règlement précédent n°17/62. Elena Wind, « Remedies and Sanctions in Article 82 of the EC Treaty », [2005] *European Competition Law Review* 659, 659 et n°4.

<sup>37</sup> Cavanagh, voir plus haut la note 10 p. 191 (citant R. Craig Romaine et Steven Salop, « Slap Their Wrists? Tie Their Hands? Slice Them Into Pieces? Alternative Remedies for Monopolization in the Microsoft Case », 13 *Antitrust* 15, 18 (été 1999)).

Deuxièmement, les cessions d'actifs peuvent être plus faciles à définir que les mesures de correction de comportement. Dans des affaires complexes, il peut être plus facile de rétablir la concurrence et de miser sur la dissuasion en divisant une entreprise que de définir une mesure de correction de comportement d'efficacité équivalente. En effet, les cessions d'actifs modifient les motivations stratégiques du contrevenant de telle manière que (si tout va bien) son « rejeton » et lui-même estiment souhaitable d'abandonner le comportement déclaré illicite et adoptent une attitude concurrentielle. À l'inverse, les mesures de correction de comportement ne changent pas la structure de motivation sous-jacente d'une entreprise, mais la contraignent simplement à adopter ou non certaines mesures, qu'elle le veuille ou non.

Troisièmement, une cession d'actifs peut exiger seulement une intervention judiciaire ponctuelle, contrairement à la surveillance continue requise par les mesures de correction de comportement. Les tribunaux qui ont imposé une mesure de cession d'actifs pure ne seront pas ennuyés par les querelles récurrentes pour déterminer si le contrevenant a enfreint un certain aspect d'une mesure de correction de comportement, ni par les demandes fréquentes de modifications. À ce titre, les cessions d'actifs peuvent être plus efficaces à administrer que les mesures de correction de comportement.

Autre avantage des cessions d'actifs sur les mesures correctrices comportementales, la gestion des activités du contrevenant est confiée aux entités les plus compétentes en la matière. À l'inverse, les mesures de correction de comportement placent une partie de cette responsabilité dans les mains d'une autorité ou d'un tribunal, qui sont des institutions plus qualifiées pour répondre aux questions juridiques que pour prendre des décisions économiques spécifiques. Dans des cas extrêmes, les mesures correctrices comportementales placent l'autorité ou le tribunal dans une position où il/elle doit imposer les prix pratiqués par l'entreprise.

En revanche, les cessions d'actifs sont dans un premier temps plus déstabilisatrices que les mesures de correction de comportement, et elles engendrent parfois un manque d'efficacité immédiat. Par exemple, une restructuration qui donne lieu à la création de plusieurs concurrents issus d'une entreprise unique impliquera en tout cas une répétition des mêmes investissements. Elle peut également se traduire par la perte des économies d'échelle. Les détracteurs de ces mesures estiment également que la cession d'actifs est tellement radicale qu'elle engendre une dissuasion excessive. En d'autres termes, les entreprises dominantes peuvent choisir d'éviter un comportement qui favoriserait en réalité la concurrence car elles craignent que cela n'entraîne une obligation de démantèlement.

En outre, toutes les entreprises ne peuvent être facilement morcelées de façon judicieuse. Dans les cas simples, l'entreprise contrevenante est déjà composée d'unités relativement indépendantes commodément organisées en fonction de leurs domaines d'activité. Il est donc relativement facile de les scinder et de les essayer sous forme d'entités individuelles. Sinon, il peut être commode de diviser une entreprise en deux ou plusieurs petites entreprises concurrentes et intégrées. Toutefois, dans ces situations également, il convient probablement de prendre des décisions délicates sur la répartition de certains salariés et fonds propres. Dans les cas plus difficiles, l'entreprise contrevenante est étroitement intégrée et il n'existe pas de méthode intuitivement pratique pour la démembrer. En conséquence, la forme de la cession d'actifs sera probablement très contestée et un tribunal devra intervenir pour décider comment procéder, même si les tribunaux ne sont pas qualifiés pour dicter la création de nouvelles entreprises.

Par ailleurs, l'expérience montre qu'en matière de cession d'actifs, les tribunaux et autorités ne sont pas toujours capables de prendre une décision et de s'y tenir. Tout d'abord, la plupart des cessions d'actifs sont associées à un type de mesure de correction de comportement qui exige un minimum de suivi. Par exemple, les ordonnances correctives comportent d'ordinaire une clause interdisant au contrevenant de racheter les actifs cédés (ou empêchant les entités essaimées du contrevenant de se regrouper au sein d'une entreprise unique). Elle peut également prévoir que les entités cédées s'abstiennent de s'accorder des régimes préférentiels réciproques au détriment des concurrents. En conséquence, les cessions d'actifs

n'impliquent pas nécessairement une faible charge administrative. En fait, certaines ont requis des années de surveillance constante suivant l'ordonnance initiale de cession d'actifs<sup>38</sup>.

Autre problème potentiel des cessions d'actifs, elles ne donnent pas systématiquement lieu à la création de nouveaux concurrents prospères, voire viables. Il peut s'avérer difficile de trouver un acheteur apte pour une partie d'une entreprise ou, si l'unité essaimée va être autonome, elle peut éprouver des difficultés à s'adapter à son nouveau statut et à survivre sans aide. Les cessions d'actifs présentent un autre inconvénient : une fois exécutées, il peut être difficile de faire marche arrière. Si le contexte de marché a été mal évalué et que le remède s'avère peu judicieux, il sera généralement plus facile de modifier ou d'annuler une mesure de correction de comportement que de revenir sur une cession d'actifs<sup>39</sup>.

Compte tenu de tous ces facteurs positifs et négatifs, il n'est pas surprenant que les chercheurs aient des opinions très différentes sur la valeur des mesures correctrices de cession d'actifs. Comanor et Scherer ont comparé deux affaires anciennes de monopoles aux États-Unis, l'une à l'encontre de Standard Oil et l'autre de US Steel<sup>40</sup>. Alors que Standard Oil fut démantelée en 34 unités, US Steel sortit du contentieux avec à peine une égratignure. Les performances des deux entreprises au cours des décennies suivantes furent aussi différentes que les jugements dont elles firent l'objet. Alors que les descendants de Standard Oil sont devenus des acteurs de premier plan dans le secteur pétrolier mondial à mesure de l'accroissement de la concurrence, US Steel a vu sa position faiblir sous la pression de la concurrence étrangère et les États-Unis ont fini par dépendre fortement des importations d'acier. Comanor estime qu'il ne s'agit pas là d'une simple coïncidence, mais d'un élément de preuve que les mesures correctrices de cession d'actifs engendrent finalement des entreprises plus fortes et plus compétitives qui survivent plus longtemps sur le marché. Il constate également que son observation ne s'applique pas uniquement aux premières affaires recensées, mais également aux plus récentes. Il compare le sort d'ATH&T, qui a été soumise à des mesures de cession d'actifs en 1983, et d'IBM, qui y a échappé. Entre 1983 et 1993, les valorisations boursières d'AT&T et de ses rejetons ont enregistré la plus forte augmentation à la Bourse de New York, tandis qu'IBM accusait le repli le plus prononcé sur la même période<sup>41</sup>. Comanor en déduit que

[m]ême si l'on ne peut bien entendu jamais être certain des conséquences potentielles d'une cession d'actifs ou d'une dissolution, il est évident que les exemples antérieurs de mesures structurelles ont régulièrement été couronnés de succès, sinon immédiatement, au moins à long terme. En revanche, dans de nombreux cas, l'absence de mesures draconiennes à l'encontre des entreprises dominantes a eu des conséquences malheureuses<sup>42</sup>.

D'opinion opposée, Crandall a réalisé une étude sur les cessions d'actifs dans les affaires de monopole en vertu de la loi Sherman. Il en a déduit qu'à l'exception d'AT&T, on trouve peu d'éléments prouvant que les mesures structurelles ont contribué à favoriser la concurrence, à augmenter la croissance totale ou à réduire les prix<sup>43</sup>. Même Kovacic, qui proclame l'intérêt théorique de la cession d'actifs en tant qu'outil

<sup>38</sup> Voir l'affaire *États-Unis contre AT&T* ci-après.

<sup>39</sup> E. Thomas Sullivan, « The Jurisprudence of Antitrust Divestiture: The Path Less Traveled », 86 *Minnesota Law Review* 565, 612 (2002) ; Sullivan, voir plus haut la note 7 p. 407.

<sup>40</sup> William Comanor et F.M. Scherer, « Rewriting History: The Early Sherman Act Monopolization Cases », 2 *International Journal of Economics and Business* 263 (1995). L'affaire Standard Oil est détaillée ci-après.

<sup>41</sup> William Comanor, « The Problem of Remedy in Monopolization Cases: The Microsoft Case as an Example », 46 *Antitrust Bulletin* 115, 119-120 (2001). L'affaire AT&T est détaillée ci-après.

<sup>42</sup> *Idem*, p.120.

<sup>43</sup> Robert Crandall, « The Failure of Structural Remedies in Sherman Act Monopolization Cases », AEI-Brookings Joint Center for Regulatory Studies, document de travail 01-05 (mars 2001).

favorable à la concurrence, reconnaît sa faiblesse en pratique. Il constate que les efforts passés de démantèlement aux États-Unis ont été continuellement entravés par trois problèmes : 1) le gouvernement choisissait les mauvais cas et avait recours à une théorie insoutenable ; 2) le contentieux durait tellement longtemps que le plan de correction devenait inapproprié du fait de l'évolution du contexte sectoriel ; et 3) les juges réticents décidaient de ne pas approuver les mesures correctrices de cession d'actifs bien que la responsabilité du contrevenant ait été démontrée<sup>44</sup>.

D'autres ont également constaté que les tribunaux américains considèrent les mesures de cession d'actifs plus risquées que les mesures de correction de comportement<sup>45</sup>. Les tribunaux ont tendance à être le plus préoccupés lorsque le contrevenant a de nombreux antécédents d'exploitation ou d'innovation efficaces. Ils répugnent à faire quoi que ce soit qui anéantirait ces performances supérieures, et ils ont raison de craindre que les cessions d'actifs n'aient de telles conséquences en détruisant des efficiences ou des facteurs d'innovation importants. Dans certains cas, les tribunaux peuvent également redouter que la restructuration n'entraîne des suppressions d'emplois et la perte de capital pour les investisseurs. Le fait que la Cour suprême n'a pas ordonné de cession d'actifs dans une affaire de monopole depuis 40 ans fournit une indication de leur statut<sup>46</sup>. Pour toutes ces raisons, selon le Professeur Kovacic, « il faudrait que plaignants publics fassent plus d'efforts pour démontrer qu'un plan de cession d'actifs aura un impact positif net substantiel en termes de concurrence, sans conséquences négatives lourdes<sup>47</sup> ».

Le droit de la concurrence de nombreux autres pays de l'OCDE ne prévoit pas de mesures de cession d'actifs pour les abus de position dominante, et lorsqu'elles sont prévues, elles sont également traitées avec scepticisme par les structures juridiques en place. Dans l'UE par exemple, le Règlement n°1/2003 du Conseil prévoit que les mesures correctrices structurelles ne soient imposées que s'il n'existe pas de mesure de correction de comportement qui soit aussi efficace ou si, à efficacité égale, cette dernière devait être plus contraignante pour l'entreprise concernée que la mesure structurelle. Le Règlement stipule également que la modification de la structure d'une entreprise avant l'infraction n'est appropriée que si « *cette structure même* entraînait un risque important que l'infraction ne perdure ou ne soit répétée<sup>48</sup> ». Ce passage suggère clairement qu'il ne faut pas recourir aux cessions d'actifs pour modifier la structure d'une entreprise en place avant l'infraction si le problème de concurrence provient de la structure du marché. Il doit en effet tirer ses racines dans la structure de l'entreprise contrevenante. Au Canada, le Bureau de la concurrence est autorisé à demander la cession d'actifs dans les cas d'abus de position dominante, mais il ne l'a jamais fait<sup>49</sup>.

## Standard Oil

Les mesures correctrices sont un sujet pour lequel il est particulièrement utile d'examiner les affaires antérieures car le passage du temps permet d'évaluer les résultats de la méthode d'intervention choisie. De nombreuses leçons peuvent encore être tirées d'affaires passées comme *Standard Oil*, qui continue à être utilisée pour alimenter la thèse et l'antithèse du débat sur la cession d'actifs. Dans ce cas réputé, le ministère américain de la Justice affirmait que la société holding de John D. Rockefeller exerçait un

<sup>44</sup> William Kovacic, « Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration », 74 Iowa Law Review 1105, 1144-46 (1989).

<sup>45</sup> Kovacic, voir plus haut la note 4 p. 1294.

<sup>46</sup> La dernière affaire en date pour laquelle la Cour suprême a ordonné une cession d'actifs en tant que mesure de correction d'un monopole opposait les États-Unis à Grinnell Corp., 384 U.S. 563 (1966).

<sup>47</sup> Kovacic, voir plus haut la note 4 p. 1294.

<sup>48</sup> Règlement n°1/2003 du Conseil, para. 12 (souligné par l'auteur).

<sup>49</sup> Loi sur la concurrence, article 79(2).

monopole dans le raffinage et la commercialisation de produits pétroliers aux États-Unis par le biais de diverses tactiques, dont le rachat de ses concurrents, l'espionnage économique, la corruption et des baisses de prix discriminatoires. Après s'être prononcé en faveur de la demande du gouvernement, le tribunal de district ordonna la dissolution de la société en l'obligeant à distribuer le capital des nombreuses filiales de Standard Oil à ses actionnaires<sup>50</sup>. Ces filiales devinrent ensuite indépendantes.

Faisant appel devant la Cour suprême, Standard Oil présenta les nombreux arguments que les contrevenants condamnés à une mesure de cession d'actifs continueraient à évoquer au cours du siècle suivant. La société affirma qu'un démantèlement était infaisable car la nature du secteur pétrolier exigeait que les entreprises soient intégrées. Elle soutint que l'ensemble du secteur, les actionnaires et toute l'économie américaine en feraient les frais. Elle souligna également que démanteler Standard Oil la rendrait moins efficiente, provoquant la hausse des cours pétroliers. Des centaines de milliers de personnes perdraient leur emploi et le commerce extérieur en serait également gravement affecté<sup>51</sup>.

La Cour suprême demeura insensible à tous ces arguments. Elle déclara que les pratiques illicites de Standard Oil avaient contribué à la création de son monopole, l'abandon simple donc de ces pratiques serait insuffisant<sup>52</sup>. Elle confirma donc le jugement du tribunal de district sur la responsabilité et la dissolution. Selon l'opinion de la Cour, démanteler Standard Oil n'était pas seulement approprié, mais nécessaire.

La série d'impacts potentiels négatifs envisagée par les avocats de Standard Oil ne s'est pas concrétisée. Même si certains aspects de la restructuration étaient complexes et impliquaient des risques réels de perte des efficacités résultant de l'intégration verticale, la réorganisation de Standard Oil fut menée à bonne fin et le secteur continua à produire ses biens et services. L'exécution de la mesure correctrice fut favorisée par le fait que de nombreuses filiales de Standard Oil étaient déjà organisées sous forme d'entreprises indépendantes, qui devinrent facilement autonomes après leur scission du reste de l'entreprise. Ce facteur permit d'alléger considérablement la charge de la transition pour ces entités, du fait des besoins moindres de création de nouveaux départements et de plans d'exploitation, ou de recrutement et de formation de nouveaux dirigeants. Autre facteur propice, la demande de produits pétroliers était en rapide augmentation, ce qui rendait les conditions plutôt favorables pour les entreprises créées au moment où elles s'adaptaient à leur nouvelle autonomie<sup>53</sup>.

Les actionnaires furent également récompensés, contrairement aux prévisions de Standard Oil. Loin d'être appauvris, ils virent la valeur totale des actions des sociétés créées multipliée par quatre environ en six ans. En fait, la désintégration de Standard Oil s'avéra être l'une des meilleures choses qui étaient arrivées à Rockefeller. Sa participation de 25 % de Standard Oil devint 25 % de chacune des 34 anciennes filiales. La flambée du cours de leurs actions fit de Rockefeller un milliardaire à une époque où la dette publique américaine était de seulement 1,2 milliard USD<sup>54</sup>. Incontestablement, ce n'était pas tout à fait le résultat que le gouvernement attendait à son sujet.

Mais qu'en est-il de la question déterminante de l'impact d'une mesure correctrice sur le bien-être des consommateurs ? En fin de compte, la dissolution de Standard Oil a-t-elle eu un impact positif ou négatif sur les consommateurs ? Les commentateurs débattent encore sur le sujet. Au minimum, comme Kovacic

<sup>50</sup> États-Unis contre Standard Oil Co., 173 Fed. 177 (E.D. Mo. 1909).

<sup>51</sup> Voir Kovacic, plus haut la note 4 p. 1295-1300, qui donne des précisions sur cette affaire.

<sup>52</sup> Standard Oil Co. contre États-Unis, 221 U.S. 1, 77 (1911).

<sup>53</sup> Kovacic, voir plus haut la note 4 p. 1301-02.

<sup>54</sup> Ron Chernow, Titan 556-57 (Millésime : 1998).

le constate, le démantèlement a créé plusieurs sociétés indépendantes à partir d'une entité dominante<sup>55</sup>. Après tout, note Sullivan, ces entreprises n'étaient pas vraiment en concurrence, du moins au début. Elles détenaient plutôt des monopoles régionaux et respectaient les territoires de chacune sans autoriser de concurrence entre elles. En conséquence, on peut affirmer que le gouvernement est parvenu uniquement à transformer un monopole géant en 34 monopoles de taille réduite<sup>56</sup>. En d'autres termes, on peut dire qu'il y a eu cession d'actifs dans la forme, mais pas dans le fond. Toutefois, les facteurs de concurrence sont finalement apparus lorsque les anciens actionnaires, qui possédaient des intérêts majeurs dans toutes les nouvelles entités, ont commencé à distribuer leurs parts entre leurs héritiers et des organisations caritatives. De cette manière, les entreprises ont pu infiltrer les marchés des unes et des autres alors que la demande de carburant entamait une croissance vertigineuse<sup>57</sup>.

En tout cas, les leçons que l'on peut tirer en toute confiance du cas Standard Oil sont les suivantes : 1) les prévisions des contrevenants concernant les effets d'une cession d'actifs ne sont pas nécessairement plus justes que celles des autorités de tutelle ; 2) les cessions d'actifs sont plus faciles à exécuter lorsque le contrevenant est déjà structuré en unités clairement distinctes qui peuvent aisément devenir autonomes ; 3) les cessions d'actifs sont plus faciles à exécuter lorsque la demande du marché est solide ; et 4) pour être plus efficaces, les cessions d'actifs doivent créer des concurrents, pas uniquement des monopoles fragmentés et de taille réduite.

#### AT&T

Soixante-dix ans plus tard, une autre cession d'actifs importante et instructive a eu lieu aux États-Unis. En 1974, le ministère de la Justice engagea des poursuites à l'encontre d'AT&T, faisant valoir que la société avait enfreint l'article 2 de la loi Sherman<sup>58</sup>. Entre autres choses, le ministère de la Justice affirmait qu'AT&T avait exploité son monopole dans les services de centres de télécommunications locales pour monopoliser les marchés de la fabrication des équipements téléphoniques et des services de télécommunications longue distance. AT&T fut par exemple accusé de ne pas connecter les opérateurs concurrents à son réseau dans des conditions raisonnables et de réduire ses prix uniquement sur les marchés concurrentiels. Dix ans plus tard, le contentieux prit fin avec un accord à l'amiable imposant des mesures correctrices d'ordre structurel et comportemental<sup>59</sup>.

Le volet structurel des mesures correctrices consistait en un démantèlement vertical. AT&T accepta de céder ses prestataires de services locaux, ce qui donna lieu à la formation de sept sociétés d'exploitation régionales (appelées « RBOC »). AT&T conserva ses divisions de télécommunications longue distance, de fabrication d'équipement et de recherche, mais fut contraint de transférer suffisamment d'actifs aux RBOC pour leur permettre de fonctionner. Ces actifs comprenaient le transfert gratuit de tous les brevets existants et de tous les brevets déposés au cours des cinq années suivantes. La mesure de correction de comportement consistait en des dispositions réglementaires régissant chaque RBOC. Par exemple, pour empêcher que les RBOC n'imitent la stratégie d'AT&T, le jugement leur imposa d'obtenir l'approbation du tribunal avant d'élargir leur champ d'activité au-delà des services de centre téléphonique local. Les RBOC durent également fournir à tous les opérateurs longue distance un accès équitable à leurs réseaux locaux.

<sup>55</sup> Kovacic, voir plus haut la note 4 p. 1300.

<sup>56</sup> Sullivan, voir plus haut la note 38 p. 579 et n°83.

<sup>57</sup> F.M. Scherer, *Industrial Market Structure and Economic Performance* 529 (2ème édition, Houghton Mifflin : 1980).

<sup>58</sup> États-Unis contre AT&T Co., 552 F. Supp. 131 (D.D.C 1982).

<sup>59</sup> Idem

Un juge unique commença alors à superviser le processus de démantèlement de l'entreprise qui était à l'époque la plus grande au monde.

Ce serait un euphémisme de dire que tout le monde n'approuvait pas la décision de démanteler AT&T. Ses détracteurs affirmaient que la qualité du service chuterait, que la sécurité nationale serait compromise, que cela porterait préjudice à une société de recherche et développement inestimable et, comme la défense avait affirmé pour *Standard Oil*, que cela nuirait aux actionnaires<sup>60</sup>.

Le résultat s'avéra nettement moins sombre. Une grande partie de la restructuration fut exécutée sans grande difficulté, car les sociétés d'exploitation régionales étaient déjà organisées de telle manière que leur essaimage sous forme d'entités indépendantes fut facile à réaliser. En outre, la réglementation ayant déterminé en grande partie la structure d'AT&T avant la cession d'actifs, le bien-fondé de la métamorphose d'une structure merveilleusement efficace façonnée par les mécanismes du marché ne remit pas en question le processus. Par ailleurs, à l'instar des actionnaires de *Standard Oil* qui tirèrent en réalité le plus grand profit de la cession d'actifs, les investisseurs qui conservèrent leurs actions AT&T furent récompensés<sup>61</sup>.

Malgré l'absence de consensus concernant les conséquences de l'accord à l'amiable, il n'est pas exagéré de dire que d'après la plupart des observateurs, les effets nets étaient positifs<sup>62</sup>. Cavanagh qualifie par exemple la cession d'actifs de « succès retentissant », lui attribuant la relance de la concurrence et le rétablissement de la « belle santé » du marché<sup>63</sup>. Il constate que lorsque les poursuites furent engagées en 1974, les communications sans fil et l'Internet étaient pour ainsi dire inconnus, tandis que les répondeurs téléphoniques et les télécopieurs commençaient à se répandre. Les gens utilisaient encore les téléphones à cadran et les appels longue distance coûtaient une fortune par rapport aux prix pratiqués aujourd'hui<sup>64</sup>. D'autres ont souligné que la concurrence existant après la cession d'actifs entre les opérateurs longue distance se traduisit par le déploiement rapide des câbles à fibres optiques, qui contribueraient par la suite au développement de l'Internet<sup>65</sup>. Bien entendu, il est impossible de dire avec certitude comment la concurrence et l'innovation auraient évolué sans la cession d'actifs, mais elle semble au moins ne pas les avoir anéanties.

Malgré ces facteurs positifs, *AT&T* est peut-être le meilleur contre-exemple de l'argument selon lequel les mesures correctrices de cession d'actifs sont plus faciles à administrer que les mesures de correction de comportement. La charge du tribunal de première instance s'avéra considérable. À chaque fois que les RBOC tentaient de modifier les modalités du jugement ou d'obtenir des dérogations, ce qui arriva fréquemment, il incombait au tribunal d'entendre les arguments et de régler les conflits. Le juge statua ainsi sur plus de 160 demandes de dérogations dans une clause fourre-tout du jugement<sup>66</sup>. Au total, plus de 900 demandes de dérogations furent déposées pour demander au tribunal de statuer sur la signification et l'ampleur des restrictions d'activité<sup>67</sup>. En 1994, la demande de dérogation moyenne avait été en instance

<sup>60</sup> Kovacic, voir plus haut la note 4 p. 1303 ; Cavanagh, voir plus haut la note 10 p. 197.

<sup>61</sup> Kovacic, voir plus haut la note 4 p. 1303.

<sup>62</sup> Idem, page 1303 et n°75.

<sup>63</sup> Cavanagh, voir plus haut la note 10 p. 195, 197 ; voir également Sullivan, note 38 plus haut p. 584 (qualifiant le cas AT&T comme « une utilisation efficace du remède de cession d'actifs »).

<sup>64</sup> Cavanagh, voir plus haut la note 10 p. 196.

<sup>65</sup> Remedies Brief of Amici Curiae Robert E. Litan, Roger G. Noll, William D. Nordhaus et Frederic Scherer, États-Unis contre Microsoft Corp, Action civile n° 98-1232, (D.D.C., 27 avril 2000).

<sup>66</sup> Cavanagh, voir plus haut la note 38 p. 587.

<sup>67</sup> Shelanski et Sidak, voir plus haut la note 25 p. 36 (citant Michael Kellogg, John Thorne et Peter Huber, Loi fédérale sur les télécommunications, articles 7.1-7.9 (Little, Brown : 1992)).

depuis plus de 48 mois car le tribunal ployait sous la charge administrative qui lui avait été confiée<sup>68</sup>. En conséquence, même si la résolution sur AT&T a eu des conséquences positives nettes, elle a indéniablement engendré des coûts importants. Dès lors, comme Shelanski et Sidak l'indiquent, « la comparaison appropriée des objectifs correctifs ne porte pas sur la période suivant la cession d'actifs et l'ère du monopole, mais sur la période suivant la cession d'actifs et les conséquences possibles d'autres mesures correctrices<sup>69</sup>. »

Nous pouvons également tirer un certain nombre de leçons importantes de l'affaire AT&T. D'abord, la cession d'actifs demeure la méthode la plus rapide pour mettre fin au comportement abusif et inverser ses effets. Il est par exemple difficile d'imaginer comment des mesures correctrices d'ordre purement comportemental auraient pu être aussi efficaces qu'une cession d'actifs sans impliquer une inefficience nettement inférieure du fait des besoins de surveillance accrue. Ensuite, les cessions d'actifs peuvent donner lieu à des bouffées d'innovation qui ne seraient pas survenues aussi rapidement dans une structure de marché monopolistique. Enfin, les cessions d'actifs – notamment celles qui sont complexes – peuvent engendrer des problèmes et coûts inattendus d'une ampleur considérable. Il est utile d'analyser les facteurs d'incitation dont les entreprises bénéficieront à la suite de la cession d'actifs, et d'anticiper autant de conflits, ambiguïtés et autres problèmes que possible *avant* d'exécuter la mesure correctrice afin d'assurer plus rapidement la mise en œuvre du démantèlement.

#### 4.2.2 Octroi obligatoire de licence

L'octroi obligatoire de licence de propriété intellectuelle pourrait être considéré comme une mesure correctrice d'ordre comportemental ou structurel. Nous l'avons cependant placé ici dans la deuxième catégorie car il a la capacité de modifier la structure de marché en introduisant de nouveaux concurrents. À certains égards, l'octroi obligatoire de licence est un outil attrayant pour les autorités de la concurrence, notamment lorsqu'elles sont confrontées à une entreprise dominante. En rendant accessible une propriété intellectuelle déterminante, le marché peut s'ouvrir relativement vite à la concurrence. Cela débouche également sur de l'innovation qui aurait été bloquée par le refus d'octroi de licence par l'entreprise dominante.

Les mesures correctrices d'octroi obligatoire de licence présentent toutefois certains inconvénients. Désagrément majeur, elles supposent que les autorités de la concurrence ou les tribunaux – ou les deux – participent à la définition des modalités d'octroi des licences, et peut-être à la surveillance de leur exécution. Sans leur intervention, le donneur de licence peut imposer des conditions qui reviennent à un refus quasi-total d'accorder une licence. Le contrevenant peut par exemple tenter d'exclure une propriété intellectuelle cruciale de la licence, ou imposer des redevances exorbitantes<sup>70</sup>. Par ailleurs, le contrevenant peut prétendre avoir rempli ses obligations liées à la licence tandis que le preneur de licence affirme que les informations vitales n'ont pas été fournies, ont été fournies trop tardivement, ou dans un format

<sup>68</sup> Idem, p. 95 (citant Paul Rubin et Hashem Dezhbakhsh, « Costs of Delay and Rent-Seeking Under the Modification of Final Judgment », 16 *Managerial & Decision Economics* 385, 385-88 (1995)).

<sup>69</sup> Idem, p. 96.

<sup>70</sup> Voir idem, p. 55-56 et n°226 (« Lorsqu'une redevance raisonnable est imposée, le tribunal doit fixer le montant à payer pour la licence en fonction du principe que s'il ne le fait pas, la nature « obligatoire » de la licence perd tout son sens. Les conséquences de la fixation des redevances par le pouvoir judiciaire sont aussi problématiques que les autres missions de détermination de prix par les autorités de réglementation, et elles ne sont généralement pas considérées comme heureuses. »)

inutilisable. Par conséquent, les autorités et tribunaux peuvent estimer pesant leur devoir de surveillance initiale et continue en matière de pratiques de licence<sup>71</sup>.

En outre, en contraignant le détenteur d'une propriété intellectuelle à accorder des licences, on lui retire une partie du contrôle qui l'avait initialement motivé à mettre au point une invention. Il s'agit probablement davantage d'une mesure correctrice que d'une solution saine servant au mieux le bien-être des consommateurs. En effet, si le droit de la concurrence empêchait globalement les détenteurs de propriété intellectuelle de refuser d'accorder une licence, cela reviendrait à proscrire le comportement que la loi sur la propriété intellectuelle autorise, ce qui découragerait l'innovation. Par ailleurs, si une entreprise dominante est contrainte d'accorder une licence d'exploitation de sa technologie à ses concurrents, ceux-ci ne seront en conséquence pas autant motivés pour rechercher des moyens contournant le brevet original. Les améliorations qui en auraient autrement découlé peuvent donc être perdues.

Kovacic constate que les opinions des experts varient concernant l'efficacité de l'octroi obligatoire de licence en tant que mesure correctrice. De nombreux commentateurs estiment qu'il n'a pas réellement contribué à la diminution de la puissance sur le marché, tandis que d'autres considèrent que même s'il a stimulé l'entrée sur le marché dans certains cas, il a également fini par nuire aux entreprises nationales contraintes de transférer leur avantages concurrentiels aux concurrents étrangers<sup>72</sup>.

#### 4.3 Mesures de correction de comportement

Les mesures de correction de comportement peuvent contraindre une entreprise à prendre des dispositions ou à cesser des agissements. Le deuxième type de mesures implique généralement (probablement entre autres choses) que le contrevenant mette fin au comportement qui a été déclaré illicite. De telles mesures correctrices contribuent directement à l'objectif d'application du droit de la concurrence, à savoir abandonner le comportement anticoncurrentiel qui a motivé l'affaire. Elles peuvent parfois suffire à rétablir le niveau de concurrence qui régnait sur le marché avant l'infraction, mais ce n'est pas systématique.

Le premier type de mesure correctrice – qui impose de façon volontariste au contrevenant de prendre des dispositions – peut l'obliger par exemple à vendre ses produits de façon non discriminatoire ou à accorder une licence sur sa propriété intellectuelle. Les mesures correctrices volontaristes peuvent contribuer à réaliser un certain nombre d'objectifs, comme rétablir la concurrence. Elles sont utiles aux autorités car dans certains cas, l'abandon simple du comportement illicite peut être insuffisant pour rétablir la concurrence sur le marché concerné et pour une raison ou une autre, la cession d'actifs peut ne pas être appropriée ou faisable.

<sup>71</sup> Pour une étude approfondie des difficultés liées à la mise en œuvre et à la gestion des mesures correctrices d'octroi obligatoire de licence, voir Richard Epstein, *Steady the Course: Property Rights in Genetic Material*, John M. Olin Law & Economics Working Paper, n° 152, Faculté de droit de l'Université de Chicago (2003), pp. 29-34, disponible en anglais à l'adresse <http://www.law.uchicago.edu/Lawecon/index.html> ; voir également *Verizon Communications contre Law Offices of Curtis Trinko*, 540 U.S. 398, 408 (2004) (qui souligne qu'en obligeant à accorder l'accès ou à traiter avec d'autres entreprises, les tribunaux devraient « intervenir en tant que planificateurs centraux pour identifier le prix correct, la quantité adéquate et les autres conditions économiques – un rôle pour lequel ils ne sont pas qualifiés »).

<sup>72</sup> Kovacic, voir plus haut la note 4 p. 1304-05 et n°81, 82. Voir également William Kovacic, « Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration », 74 Iowa Law Review 1105, 1106-07 et n°9 (1989) (« La plupart des commentateurs en ont déduit que les jugements d'octroi obligatoire de licence ont globalement peu contribué à la réalisation des objectifs de démantèlement »), citant F. M. Scherer, *Innovation and Growth: Schumpeterian Perspectives* 207, 220 (MIT : 1984).

Autre avantage, les mesures de correction de comportement peuvent d'ordinaire être adaptées à chaque entreprise et contexte de marché de façon à obtenir les résultats attendus. Elles se distinguent en cela des cessions d'actifs, qui ne peuvent généralement pas être hautement personnalisées en fonction de chaque situation et ont donc tendance à avoir un effet plus approximatif sur les entreprises et sur les marchés.

Les mesures de correction de comportement ont été appliquées nettement plus fréquemment que les mesures correctrices structurelles dans le cas d'abus de position dominante. En fait, comme on l'a vu, le nouveau droit de la concurrence de l'UE leur accorde expressément la priorité par rapport aux mesures correctrices structurelles<sup>73</sup>. Pourtant, même si les mesures de correction de comportement semblent être préférées à leur cousine plus controversée, elles n'ont pas une réputation extraordinaire parmi les chercheurs. Premièrement, les mesures de correction de comportement ont longtemps suscité les critiques chez les structuralistes, qui ont tendance à penser que le niveau de concurrence sur un marché est inversement corrélé à son niveau de concentration. Selon eux, les mesures de correction de comportement sont des substituts médiocres des mesures correctrices structurelles, qui s'attaquent directement à la concentration et à la puissance sur le marché. Cette critique n'a toutefois pas le poids qu'elle avait autrefois car l'école structure-comportement-performances n'est plus aussi influente que par le passé<sup>74</sup>.

Deuxièmement, les mesures de correction de comportement ont l'inconvénient de nécessiter généralement une surveillance et une intervention continues et parfois approfondies par les tribunaux et autorités. Cela s'explique en partie par le fait qu'elles ne modifient généralement pas fondamentalement les motivations du contrevenant. En conséquence, il faut souvent des conditions de respect détaillées et un suivi approfondi pour garantir que le contrevenant observe l'ordonnance dans son intégralité. En outre, l'intervention du tribunal et d'une autorité est souvent requise pour résoudre les conflits sur la signification précise de l'ordonnance, et pour prendre ou approuver certaines décisions économiques. De telles procédures de surveillance peuvent être onéreuses, déstabilisatrices et demander un temps considérable, non seulement pour le tribunal et le plaignant, mais également pour le contrevenant.

Les mesures correctrices exigeant que le contrevenant accorde à ses concurrents ou clients l'accès à un actif important sont particulièrement susceptibles de nécessiter un suivi substantiel. En conséquence, « [s]i un tribunal décide d'obliger l'accès à un actif essentiel, il doit être disposé à définir les modalités de prix et de qualité auxquelles le contrevenant doit se soumettre. En déterminant des prix d'accès appropriés, les tribunaux peuvent se retrouver confrontés à des exercices de fixation de coûts pour lesquels ils ne sont pas qualifiés sur le plan institutionnel<sup>75</sup>. » Il est également probable que les clauses de non-discrimination exigent une surveillance constante puisque les parties peuvent se quereller sur la signification et l'existence d'une « discrimination » aux termes du jugement. Pour atténuer le problème du suivi, Posner recommande que toutes les mesures de correction de comportement soient assorties d'un délai d'expiration défini au cas par cas. En fait, il considère les mesures de correction de comportement à durée indéterminée comme un aveu d'échec vis-à-vis du rétablissement de conditions concurrentielles, et comme un signe que les affaires associées étaient probablement d'emblée mal conçues<sup>76</sup>.

Troisièmement, les mesures de correction de comportement ouvrent davantage la voie à des initiatives de neutralisation, de minimisation ou d'évasion stratégique par les contrevenants que d'autres mesures. Il n'est pas aussi facile d'échapper à une amende ou de contourner un ordre de cession d'actifs que de déjouer

<sup>73</sup> Règlement n°1/2003 du Conseil para. 12.

<sup>74</sup> Andrew Gavil, William Kovacic et Jonathan Baker, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy* 1026 (Thomson West : 2002).

<sup>75</sup> Kovacic, voir plus haut la note 4 p. 1294.

<sup>76</sup> Richard Posner, *Antitrust Law* 273 (University of Chicago Press : 2ème édition 2001).

une mesure de correction de comportement en contestant sans cesse ses conditions ou en trouvant des moyens anticoncurrentiels pour le contourner, afin d'arriver aux mêmes fins que le comportement prohibé. Cet aspect peut avoir pour effet indésirable de retomber dans le problème précédemment mentionné du suivi approfondi. Le meilleur moyen de s'assurer de l'efficacité des mesures de correction de comportement peut consister à les adapter sans cesse afin qu'elles tiennent compte de toute nouvelle forme de comportement anticoncurrentiel susceptible de découler de l'évolution du contexte de marché et des tactiques. Malgré tout, comme Posner l'a observé, « le problème du [recours à une mesure d'ordre comportemental] est que si elle est définie de façon rigoureuse pour éviter d'entraver les activités concurrentielles légitimes du contrevenant, elle peut s'avérer poreuse et inefficace. Alors que si elle est définie à grands traits de manière à colmater toutes les failles, elle risque d'empêcher l'entreprise d'être en concurrence légitime<sup>77</sup> ».

Enfin, certains chercheurs ont réalisé des études longtempes après l'exécution de mesures correctrices comportementales dans certaines affaires de monopole pour analyser leur impact à long terme. Leurs conclusions ne dressent pas un constat flatteur. Crandall et Elzinga ont par exemple évalué les effets des mesures correctrices comportementales sur le bien-être économique dans dix affaires célèbres de monopoles aux États-Unis. Selon eux, « dans certains cas, les mesures comportementales n'ont eu aucune conséquence autre que le coût du contentieux et de l'exécution ; dans d'autres cas, les mesures correctrices ont probablement pesé sur le bien-être des consommateurs. »<sup>78</sup> Ces conclusions seraient probablement quelque peu trompeuses si elles étaient extrapolées au contexte actuel. Toutefois, les affaires choisies par les auteurs sont plutôt anciennes et les autorités de tutelle ont depuis beaucoup appris sur les mesures correctrices. Ces conclusions sont sans doute issues en partie des mêmes affaires étudiées par Crandall et Elzinga, et les leçons semblent plutôt évidentes à l'heure actuelle.

Par exemple, ce n'est naturellement pas une bonne idée de vouloir s'attaquer directement à la puissance sur le marché d'un contrevenant en lui imposant simplement de réduire sa part de marché à un pourcentage donné. Cette mesure volontariste incitera simplement l'entreprise dominante à augmenter son prix pour se débarrasser de clients et les tenir à l'écart, assumant ainsi une fonction de coordination des prix vis-à-vis de ses concurrents. Il est probable que les consommateurs pâtissent de l'augmentation des prix<sup>79</sup>.

#### 4.4 *Sanctions pécuniaires*

Les sanctions pécuniaires présentent un certain nombre d'avantages distincts. Premièrement, elles sont relativement faciles à comprendre et à administrer, et exigent un suivi limité, voire nul, par les tribunaux. Deuxièmement, une fois que des sanctions pécuniaires sont imposées, il est difficile d'y échapper. Cela les distingue des mesures de correction de comportement, qui peuvent être parfois rendues inefficaces par des stratégies dilatoires. Troisièmement, lorsqu'elles sont fixées correctement, les sanctions pécuniaires incitent le contrevenant à surveiller son propre comportement de façon à ne pas enfreindre une fois de plus le droit de la concurrence et à s'exposer à de nouvelles sanctions financières. Il peut s'agir d'un outil très utile par exemple sur un marché en mutation technologique rapide. Alors qu'une mesure d'ordre comportemental peut finir par sanctionner un comportement qui n'a plus d'intérêt sur un marché dans un délai d'un ou deux ans, le souvenir amer d'avoir dû payer une amende ou des dommages intérêts pour infraction au droit de la concurrence continuera à avoir un impact disciplinaire sur le comportement de l'entreprise condamnée, même si le contexte de marché a changé. Les mesures correctrices structurelles peuvent présenter

<sup>77</sup> Idem

<sup>78</sup> Crandall et Elzinga, voir plus haut la note 6.

<sup>79</sup> Ce type même de remède a été imposé dans l'affaire États-Unis contre Eastman Kodak Company, CCH Trade Cases para. 67 920 (1954), mais cela remonte à plus de 50 ans. Crandall et Elzinga, voir plus haut la note 6.

l'inconvénient similaire sur des marchés en mutation. Le temps qu'une affaire fasse l'objet d'une enquête et de poursuites et que la mesure correctrice soit appliquée, le marché peut avoir évolué de telle manière que le contrevenant sera parfaitement disposé à se séparer d'une partie de ses activités. L'objectif de la dissuasion serait donc déjoué<sup>80</sup>.

Bien entendu, les sanctions pécuniaires restent des sanctions et à ce titre, elles ne permettent pas toujours d'atteindre les objectifs de principe des mesures correctrices. Par exemple, à elles seules, elles peuvent ne pas avoir beaucoup d'effet pour rétablir la concurrence sur un marché, car elles n'agissent pas sur la puissance sur le marché qu'un contrevenant peut avoir accumulée par le biais de son comportement illicite.

En outre, il peut s'avérer délicat de déterminer le montant approprié d'une amende ou de dommages intérêts. Par exemple, dans le cas d'une entreprise dominante solidement établie qui a eu recours à un comportement illicite pour défendre sa position, il n'y a peut-être jamais eu de prix concurrentiel réel sur lequel se fonder pour calculer une amende ou des dommages intérêts. En outre, la prise en compte d'autres facteurs que les prix, comme le recul de l'innovation ou la baisse de la qualité, peut se révéler épineuse. Supposons par exemple qu'un contrevenant cesse de proposer une matière première dont un concurrent a besoin pour mettre au point un produit de qualité supérieure. La perte de ce produit constitue un facteur de préjudice pour les consommateurs dont il faut tenir compte, mais c'est là une variable très difficile à évaluer. Même si ce type de préjudice pouvait être évalué de façon précise, il resterait à déterminer qui recevrait l'argent que le contrevenant est contraint de payer. Quels consommateurs aurait acheté le nouveau produit ? Et quel prix auraient-ils été prêts à payer<sup>81</sup> ?

Des sanctions pécuniaires sont fréquemment imposées pour les abus de position dominante dans les pays de l'OCDE. Le reste de la Partie 4.4 analyse d'abord la question de leur optimisation puis elle explore les caractéristiques de types de sanctions pécuniaires spécifiques.

#### 4.4.1 Une question de seuil : dissuasion optimale

Du point de vue économique, les sanctions pécuniaires visent à dissuader en freinant la rentabilité d'un comportement illicite. Logiquement, les entreprises choisissent de ne pas enfreindre la loi si la pénalité attendue est supérieure au gain prévu. En revanche, elles choisiront d'y déroger si le gain attendu est supérieur à la pénalité prévue. En conséquence, le montant de la sanction peut être calculé, du moins en théorie, en vue de dissuader le contrevenant à adopter un comportement illicite. Les autorités et tribunaux sont confrontés au défi de trouver l'échelle de grandeur appropriée de façon à ce que la dissuasion ne soit ni excessive, ni insuffisante. En d'autres termes, il s'agit théoriquement d'optimiser les sanctions pécuniaires. En pratique cependant, l'optimisation proprement dite sera quasiment toujours un aspect pour lequel un tribunal ou une autorité n'est pas qualifié. Comme Wils l'a souligné, « il semble irréalisable d'évaluer économétriquement l'amende théoriquement optimale correspondant à une infraction au droit de la concurrence. La théorie des amendes optimales reste cependant utile à titre de recommandations

<sup>80</sup> C'est ce qui est par exemple arrivé dans le cas des wagons de chemin de fer Pullman. États-Unis contre Pullman Co., 330 U.S. 806 (1947). Pullman entretenait depuis longtemps une position dominante sur les marchés en tant qu'exploitant et fabricant de wagons-lits aux États-Unis. Un tribunal déclara finalement que Pullman avait enfreint la loi Sherman et lui donna le choix : se séparer de sa division de fabrication ou de sa division d'exploitation. La société décida de céder sa division d'exploitation car, le temps que le jugement soit annoncé, le secteur avait évolué et cette division était devenue non rentable. Pullman était donc absolument ravi de s'en débarrasser. Sullivan, voir plus haut la note 38 p. 580-82.

<sup>81</sup> Ces questions sont abordées par Willard Tom et Gregory Wells dans « Raising Rivals' Costs: The Problem of Remedies », 12 George Mason Law Review 389, 393-94 (2003).

générales pour la définition pratique du montant des amendes dans les affaires de concurrence<sup>82</sup>. »  
L'encadré 1 détaille ainsi la théorie des amendes optimales.

### Encadré 1. Optimisation

#### *Préjudice ou avantages ?*

Dans la théorie de la dissuasion optimale, une question de seuil se pose, à savoir si la sanction pécuniaire doit être fondée sur les gains réalisés par une entreprise dominante en conséquence de son comportement abusif ou sur le préjudice net causé aux tiers. (Voir *Wouter Wils*, « *Optimal Antitrust Fines: Theory and Practice* », 29 *World Competition Review* (2006) (*à paraître*) (qui soutient la méthode des gains illégitimes) et William Landes, « *Optimal sanctions for Antitrust Violations* », 50 *Université de Chicago, Law Review* 652 (1983) (qui soutient la méthode du préjudice net).) La différence essentielle entre les deux méthodes est que les sanctions fondées sur les gains découragent toutes les infractions, tandis que les sanctions fondées sur le préjudice net ne font que détourner des infractions inefficaces. Selon Wils, la méthode à privilégier dépend de ce que l'on considère comme l'objectif principal du droit de la concurrence. Si l'objectif consiste à optimiser le bien-être économique total, c'est la méthode du préjudice net qui est préférée. S'il s'agit d'empêcher les transferts de richesse des consommateurs aux producteurs détenant la puissance sur le marché, c'est alors la méthode des gains illégitimes qui est favorisée.

Quelle que soit la méthode appliquée, il est peu probable que l'optimisation soit possible en pratique car les variables impliquées sont trop difficiles à observer ou à quantifier. Cela peut s'avérer particulièrement problématique dans les cas d'abus de position dominante car il peut être extrêmement ardu d'identifier le seuil à partir duquel le comportement unilatéral est nuisible ou favorable à la concurrence. Tenter de quantifier les forces en jeu contribue nettement à la complexité. Par exemple, dans les cas de pratiques tarifaires manifestement destinées à évincer des concurrents, les prix baissent dans un premier temps et il n'y a donc pas d'effet préjudiciable à court terme. En fait, on observe un avantage à court terme pour les consommateurs. Au moins, la méthode du préjudice net prévoit de comparer cet avantage au préjudice survenant une fois que l'épisode d'éviction est arrivé à terme et que la phase de récupération des pertes débute. En revanche, la campagne d'éviction peut encore être active lorsqu'une autorité de tutelle parvient à y mettre fin. Cela fut par exemple le cas d'*Aberdeen Journals*. (Affaire n°CA98/14/2002, *Predation by Aberdeen Journals Limited* (16 septembre 2002) (décision du *Director General of Fair Trading*)). En conséquence, le préjudice potentiel causé aux consommateurs ne sera pas survenu au moment où la sanction doit être choisie. Comment alors quantifier le préjudice ? Autre possibilité compliquant les choses, il peut y avoir une série de comportements anticoncurrentiels à analyser plutôt qu'un type unique.

#### *S'adapter aux risques de détection*

La pénalité attendue dépend dans une certaine mesure de l'estimation préalable par le contrevenant du risque de détection et de condamnation de ses activités illicites. Certaines infractions au droit de la concurrence sont plus faciles à dissimuler que d'autres, et certaines sont plus faciles à prouver que d'autres. Hormis le choix déterminant si le montant de la sanction pécuniaire doit être fondé sur le préjudice ou les gains, il est judicieux d'adapter le montant choisi en tenant compte du fait que la probabilité de détection et de condamnation du comportement est toujours inférieure à 100 %. Sinon, les entreprises dominantes peuvent en déduire que la valeur attendue correspondant à l'abus de leur position dominante est positive car elles savent qu'elles ne seront pas prises et condamnées à chaque fois. Ainsi, en théorie, l'ajustement consiste simplement à multiplier le montant de base par l'inverse de la probabilité. Par exemple, si les chances d'aboutissement de poursuites à l'encontre du contrevenant sont de 10 %, un économiste dirait que la sanction de base devrait être multipliée par 10 ( $1 \div 0,1 = 10$ ). Si la probabilité est de 50 %, le montant doit être multiplié par 2 ( $1 \div 0,5 = 2$ ).

Étant donné que dans la plupart des cas, le comportement potentiellement abusif d'entreprises dominantes – y compris les pratiques de vente liée, d'exclusivité et de remises de fidélité – est effectué ouvertement et donc relativement facile à détecter, on pourrait affirmer que le coefficient de multiplication dans les cas d'abus doit être relativement faible. Ainsi, le coefficient pour les pratiques plus difficiles à détecter comme les ententes serait supérieur. Les cas d'abus de position dominante ne s'assimilent toutefois pas systématiquement aux affaires d'entente en termes de difficulté ou de facilité à prouver leur existence devant un tribunal. Dans tous les cas, ces calculs font

<sup>82</sup>

Wils, voir plus haut la note 11.

simplement partie des méthodes théoriques visant à une sanction optimale, ce qui suppose la disponibilité des données adéquates. En réalité, « il serait difficile, sinon impossible, de définir des multiples [] fondés sur la probabilité que différentes infractions au droit de la concurrence seront détectées et condamnées avec succès ». (Edward Cavanagh, « Antitrust Remedies Revisited », 84 Oregon Law Review 147, 171 (2005).)

#### 4.4.2 Amendes

En contraignant les contrevenants à reverser tout ou partie des bénéfices tirés de leurs infractions, les amendes visent la dissuasion et la restitution. Elles peuvent également être envisagées à des fins de dédommagement, mais étant donné que les recettes des amendes sont généralement déposées dans un fonds public plutôt que reversées aux victimes, ce objectif est au mieux atteint indirectement.

Comme tous les mesures correctrices et sanctions, les amendes ont des points forts et des points faibles. Il peut y avoir des situations dans lesquelles la seule mesure correctrice ou la seule sanction exploitable et efficace est une amende. C'est l'un des avantages du recours à ce type de sanction : il est toujours possible de l'infliger. Il peut ne pas être facile de déterminer le montant optimal, mais au moins leur application est simple. Aucune surveillance constante n'est requise du tribunal ou de l'autorité, et il n'y a aucune raison de s'interroger si la structure du contrevenant se prête à une amende. Du point de vue d'un tribunal ou d'une autorité, toutes proportions gardées, les amendes sont une solution facile. En outre, les injonctions de paiement des amendes sont tellement simples qu'une fois mises en place, il est très difficile, sinon impossible, pour les entreprises d'y échapper obtenir gain de cause en appel.

Les amendes ne sont toutefois pas des sanctions parfaites. D'abord, la difficulté à déterminer le montant théoriquement parfait d'une amende pour optimiser son effet dissuasif dans le cas d'abus de position dominante peut être une véritable gageure. Ensuite, il peut exister certains cas dans lesquels la société contrevenante est tellement grande et bien financée, ou au sein de laquelle la nature des activités rend un comportement anticoncurrentiel susceptible d'être tellement rentable, que toute amende d'apparence raisonnable s'apparenterait à un coup de règle sur les doigts. À l'inverse, en cas d'amendes très lourdes, le contrevenant peut ne pas être en mesure de payer, ce qui finit par nuire aux salariés et consommateurs<sup>83</sup>. Autre inconvénient possible, selon le point de vue d'où l'on se place, les amendes ne mettent pas directement fin à la puissance sur le marché du contrevenant.

Les autorités de tutelle américaines n'infligent pas d'amendes pour les infractions civiles au droit de la concurrence, y compris en cas de comportement unilatéral illicite. Le ministère américain de la Justice peut demander des dommages intérêts triples en cas d'infractions au droit de la concurrence, mais uniquement lorsque le gouvernement a subi un préjudice<sup>84</sup>. Pour sa part, la FTC est en mesure de demander la restitution des bénéfices tirés d'un comportement contraire à la loi sur la FTC<sup>85</sup>. Mais d'après sa ligne de conduite, le comportement anticoncurrentiel d'une seule entreprise n'est quasiment jamais jugé répréhensible par les autorités car il implique trop de jugement et de suivi au cas par cas pour déterminer si le comportement était de toute façon illicite. Naturellement, cela ne signifie pas que l'on considère qu'un tel comportement ne se prête pas à des *mesures correctrices* imposées par les autorités, car il est manifestement condamnable. En outre, une condamnation à des dommages intérêts triples civils peut faire suite à toutes mesures correctrices imposées par une autorité.

<sup>83</sup> Wils, voir plus haut la note 11.

<sup>84</sup> 15 U.S.C. s. 15a (2000). Techniquement, la loi Sherman autorise les amendes pour les infractions à l'article 2, mais la ligne de conduite du ministère de la Justice consiste à ne pas y recourir.

<sup>85</sup> FTC contre Mylan Labs, Inc., 62 F.Supp. 2d 25 (D.D.C. 1999).

Par contre, en Europe, des amendes sont imposées dans les cas d'abus de position dominante soulevés par les autorités de tutelle. Compte tenu des considérations énumérées ci-dessus, nous avons là une occasion de nous fonder sur des exemples concrets pour évaluer une méthode judicieuse de détermination des amendes. Étant donné que des ouvrages entiers ont été écrits sur le sujet<sup>86</sup>, une réponse complète irait donc bien au-delà de la portée de la présente Note. Toutefois, une optimisation réelle est manifestement irréaliste et il serait en réalité dommageable de tenter d'y parvenir, car toute méthode reposant sur l'estimation des effets de bien-être est vouée à donner lieu à des erreurs, des jugements subjectifs et des résultats incohérents. Une approche meilleure consisterait probablement à reléguer au second plan l'objectif d'optimisation parfaite et à viser une méthode plus simple et objective qui donne des résultats cohérents et qui soit compréhensible pour le public. Par exemple, une méthode par laquelle on fixe les amendes en fonction d'un pourcentage donné de chiffre d'affaires sur le marché concerné peut présenter de nombreux avantages, même si l'optimisation théorique n'en fait pas partie. Est-ce le type de système en place en Europe ? La réponse semble être « pas vraiment ».

Alors qu'en Europe, les règles de calcul des amendes punissant les infractions au droit de la concurrence varient d'une juridiction à l'autre, elles ont tendance à limiter les amendes à un plafond de 10 % du total des recettes mondiales (« chiffre d'affaires ») du contrevenant au cours de l'année précédente<sup>87</sup>. Rien ne démontre clairement si ce plafond contribue à atteindre les objectifs de proportionnalité et de dissuasion. Si par exemple, 50 % du chiffre d'affaires total d'une entreprise est réalisé au moyen d'un abus de position dominante, on peut imaginer que l'équipe dirigeante en déduit logiquement que dans l'hypothèse la plus pessimiste, payer 10 % du chiffre d'affaires sous forme d'amendes reste un investissement rentable. En outre, il est difficile d'identifier le rôle du principe de proportionnalité lorsque l'on compare ce scénario à un autre, dans lequel seulement 10 % du chiffre d'affaires du contrevenant est réalisé au moyen d'un abus de position dominante et que *tous* ces gains illégitimes sont susceptibles d'être absorbés par une amende. Même si un système d'amendes non plafonnées risque lui aussi de présenter un problème de proportionnalité et aller jusqu'à provoquer des faillites non souhaitables, le plafond de 10 % ne semble pas arbitraire<sup>88</sup>.

En ce qui concerne le calcul du montant réel d'une amende, le manque de précision des règles a également suscité la critique. Conformément au principe de proportionnalité, elles tentent de créer un système dans le cadre duquel les infractions graves sont condamnées par des amendes plus lourdes, et les infractions moins sérieuses sont passibles d'amendes plus légères. Le problème, c'est qu'il n'existe pas de barème clair pour classer un cas donné d'abus de position dominante. Parmi les facteurs généralement pris en compte figurent :

- le type et l'ampleur du comportement illicite ;
- la taille du marché concerné ;

<sup>86</sup> Ex: : Wouter Wils, *The Optimal Enforcement of EC Antitrust Law* 41 (Springer : 2002).

<sup>87</sup> Voir par exemple Règlement n°1/2003 du Conseil (CE), Article 23 ; loi espagnole de protection de la concurrence 1989, Article 10.1. Voir également l'Office of Fair Trading (Royaume-Uni), « OFT's Guidance as to the Appropriate Amount of a Penalty », OFT 243 articles 2.3, 2.7-2.8 (décembre 2004) (qui fonde le calcul des amendes sur le chiffre d'affaires correspondant, et non le chiffre d'affaires total mondial, et qui fixe le montant de départ de l'amende à 10 % de ce chiffre) ; Autorité néerlandaise de la concurrence, « Guidelines for the Setting of Fines » para. 15 (décembre 2001) (qui fonde le calcul des amendes sur le chiffre d'affaires correspondant, et non le chiffre d'affaires total mondial, et qui fixe le montant de départ de l'amende à 10 % du chiffre d'affaires annuel total).

<sup>88</sup> Wils critique le seuil de 10 % pour d'autres raisons. Voir Wils, plus haut la note 85 p. 41 (qui affirme que le seuil devra être supprimé si la CE est autorisée à relever les amendes jusqu'au niveau nécessaire pour opérer une dissuasion efficace).

- la part de marché du contrevenant ;
- l'impact de l'infraction sur les concurrents et consommateurs réels et potentiels ;
- la durée du comportement ;
- le niveau de récidive du contrevenant ;
- l'existence de doutes raisonnables par le contrevenant sur le caractère illicite de son comportement ;
- le niveau de coopération du contrevenant avec l'autorité de tutelle.<sup>89</sup>

Il est judicieux de tenir compte de tous ces facteurs, pourvu qu'il existe également des recommandations sur leur mise en œuvre objective. C'est là la partie la plus difficile, et où les chercheurs ont identifié une défaillance dans le système. S'exprimant par exemple sur les règles espagnoles, Marcos a constaté que

[c]ertains de ces facteurs ne sont pas facilement applicables ; le premier (« *type de restriction fonction de la concurrence* ») n'amène en effet aucune conclusion. De fait, la [loi de protection de la concurrence] (LPC) n'établit pas si certaines restrictions sont plus rigoureuses que d'autres. De toute évidence, certaines actions ou pratiques sont plus préjudiciables à la concurrence que d'autres, mais la LPC ne comporte pas de barème des infractions. Les éléments susmentionnés sont renforcés par l'insuffisance des décisions du [tribunal de protection de la concurrence] (TPC), qui n'ont pas apporté la précision et la clarté complémentaires requises pour les critères évoqués ci-dessus. Cet aspect pose des problèmes car les principes du droit pénal en matière de peine exigent [précision et clarté, et ces] principes s'appliquent aux pouvoirs et décisions de condamnation du TPC qui inflige des amendes administratives. On a même soutenu que cela pourrait constituer une base viable pour envisager la nature inconstitutionnelle de l'article 10 de la LPC<sup>90</sup>.

En conséquence de l'absence de lignes directrices appropriées, Marcos estime que la tâche du TPC est plus difficile et que la plupart de ses décisions ne détaillent pas suffisamment la méthode de calcul des amendes. En conséquence, on constate une incertitude quant au montant de l'amende qu'une entreprise est susceptible de se voir infliger<sup>91</sup>.

De même, Geradin et Henry estiment que les décisions de la CE en matière de condamnation à des amendes sont vagues malgré les lignes directrices pour le calcul des amendes élaborées en 1998 par la Commission. En conséquence, la situation présente « laisse trop de place aux conjectures sur la méthode de

<sup>89</sup> Deux bonnes raisons incitent à réduire une amende lorsque les contrevenants coopèrent. D'abord, la coopération réduit le coût de l'enquête et du procès. Ensuite, si l'infraction était encore en cours lorsque l'enquête a débuté, la coopération du contrevenant permettra de mettre fin plus rapidement au comportement illicite. Wils, voir plus haut la note 11.

<sup>90</sup> Francisco Marcos, « The Enforcement of Spanish Antitrust Law: A Critical Assessment of the Fines Setting Policy and of the Legal Framework for Private Enforcement Actions », document présenté lors de l'atelier Workshop on Remedies and Sanctions in Competition Policy, Université d'Amsterdam, pp. 7-8, 17 février 2005 (citations omises), accessible à l'adresse [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=695542](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=695542) .

<sup>91</sup> Idem, p.8.

fixation des amendes finales par la Commission<sup>92,93</sup>. » Les auteurs reconnaissent qu'une certaine souplesse doit être accordée à la Commission à l'heure de fixer des amendes, car il n'est pas facile de classer précisément chaque cas et de déterminer dans quelle mesure les circonstances aggravantes ou atténuantes s'appliquent. Ils ajoutent néanmoins que les décisions doivent être cohérentes et présenter une validité juridique. Toutefois, après avoir analysé toutes les décisions de la Commission et tous les jugements du Tribunal de première instance portant sur des amendes qui ont été rendus depuis la publication des lignes directrices en 1998, les auteurs ont découvert que des scénarios factuels identiques sont parfois traités différemment, tandis que des scénarios différents sont parfois traités de façon identique<sup>94,95</sup>.

#### 4.4.3 *Dommages intérêts civils*

Un système en place pour les actions civiles présente des avantages considérables. Premièrement, elles permettent d'assurer le dédommagement des victimes du comportement abusif d'entreprises dominantes. Deuxièmement, les poursuites civiles dans le cadre du droit de la concurrence peuvent être un outil formidable pour dissuader un tel comportement. Troisièmement, le fait d'autoriser les actions civiles permet de soulager la mission des autorités publiques de la concurrence, qui ne disposent pas toujours des financements requis pour traiter tous les cas dignes d'intérêt. Compte tenu de ces avantages, Böge et Ost ont écrit que « les poursuites civiles dans les affaires de concurrence jouent incontestablement un rôle important et précieux<sup>96</sup> ».

Bien que l'idée d'autoriser les actions civiles pour les infractions au droit de la concurrence remonte à près de 400 ans<sup>97</sup>, elle n'a pas encore véritablement décollé en dehors d'un nombre réduit de juridictions. Cela commence toutefois à changer, car de nouvelles mesures ont été prises ces dernières années pour encourager les actions civiles dans d'autres juridictions. La CE a par exemple récemment publié un Livre blanc demandant des commentaires sur un certain nombre de réformes possibles en vue de stimuler les actions civiles relevant du droit de la concurrence devant les tribunaux nationaux des États membres<sup>98</sup>. En

<sup>92</sup> Damien Geradin et David Henry, « The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts' Judgments », document présenté lors de l'atelier Workshop on Remedies and Sanctions in Competition Policy, Université d'Amsterdam, p. 2, 17-28 février 2005.

<sup>93</sup> Commission européenne, « Lignes directrices pour le calcul des amendes infligées en application de l'article 15 paragraphe 2 du règlement n°17 et de l'article 65 paragraphe 5 du traité CECA », JO C 9, 14 janvier 1998, accessible à l'adresse [http://ec.europa.eu/comm/competition/antitrust/legislation/98c9\\_fr.html](http://ec.europa.eu/comm/competition/antitrust/legislation/98c9_fr.html)

<sup>94</sup> Geradin et Henry, voir plus haut la note 91 p. 3, 11.

<sup>95</sup> Il a été signalé que la Commission et les autorités nationales de la concurrence envisagent actuellement d'adopter de nouvelles lignes directrices pour le calcul des amendes. John Kallaugher et Andreas Weitbrecht, « Developments Under Articles 81 and 82 EC – The Year 2005 in Review », [2006] European Competition Law Review 144 et n°38.

<sup>96</sup> Ulf Böge et Konrad Ost, « Up and Running, or Is It? Private Enforcement – the Situation in Germany and Policy Perspectives », [2006] European Competition Law Review 197, 197.

<sup>97</sup> Le Statute of Monopolies édicté en 1623 en Angleterre (21 Jac. 1, c.3) a introduit ce concept. Kenneth Elzinga et William Breit, *The Antitrust Penalties: A Study in Law and Economics* (New Haven: Yale University Press, 1976).

<sup>98</sup> Livre vert de la Commission européenne, « Actions en dommages et intérêts pour infraction aux règles communautaires sur les ententes et les abus de position dominante », 19 décembre 2005, SEC(2005) 1732, disponible à l'adresse [http://ec.europa.eu/comm/competition/antitrust/others/actions\\_for\\_damages/gp\\_fr.pdf](http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/gp_fr.pdf). Voir également Neelie Kroes, discours devant le Harvard Club of New York, « Enhancing Actions for Damages for Breach of Competition Rules in Europe », (22 septembre 2005).

outre, le gouvernement français a récemment publié trois décrets facilitant les actions civiles en définissant des mesures permettant d'accéder aux informations de manière à protéger les secrets commerciaux, en améliorant la diffusion des informations émises par le Conseil de la concurrence, le ministère de l'Économie et les parties concernées, et en désignant les 16 tribunaux compétents pour l'audition des affaires relevant du droit de la concurrence.

Par ailleurs, de nombreux spécialistes de la concurrence estiment que l'autorisation des actions civiles pose des problèmes, notamment lorsque les dommages intérêts sont automatiquement doublés ou triplés<sup>99</sup>. Selon eux, de tels systèmes aboutissent à une application excessive des lois, ce qui engendre une inefficience et un découragement non souhaitable du comportement concurrentiel légitime ou une dégradation du contexte concurrentiel. Les effets négatifs sont amplifiés lorsque le système juridique autorise de nombreux plaignants à engager des poursuites à l'encontre d'une entreprise devant plusieurs tribunaux pour la même infraction. Ces aspects et d'autres sujets liés aux actions civiles ont fait l'objet de toute une série de tables rondes organisées par le Groupe de travail n°3 du Comité de la concurrence<sup>100</sup>.

La possibilité d'engager des actions civiles complémentaires doit être prise en compte par les autorités dans les juridictions où ces actions sont autorisées puisqu'elles peuvent manifestement avoir un impact substantiel sur les mesures correctrices imposées au contrevenant. Les risques d'actions complémentaires sont particulièrement significatifs aux États-Unis, où les dommages intérêts relevant du droit de la concurrence son triplés et où les actions civiles sont relativement courantes.

#### 4.4.4 *Restitution*

Ces dernières années, la Federal Trade Commission (FTC) aux États-Unis est parvenue à obtenir des sanctions pécuniaires visant spécifiquement à contraindre les entreprises abusant de leur position dominante à renoncer aux profits réalisés du fait de leur comportement abusif. Cette approche originale constituait une réponse, du moins partielle, aux obstacles de procédure aux actions civiles qui avaient progressivement vu le jour aux États-Unis, tels que l'interdiction des recours d'acheteurs indirects devant les tribunaux fédéraux. Alors que les sommes collectées auprès d'un contrevenant par le biais d'une action en restitution peuvent être distribuées aux victimes de l'abus, l'objectif théorique de la restitution est d'assurer que le contrevenant renonce aux profits illicites, plutôt que toutes les victimes soient pleinement dédommagées pour le préjudice subi. En conséquence, le montant de la restitution est calculé en déterminant le montant de profit réalisé par le contrevenant du fait de son comportement illicite, plutôt que le montant perdu par les victimes. La restitution est abordée plus en détail ci-après dans le contexte de l'affaire *Mylan*<sup>101</sup>.

<sup>99</sup> Ex., Ulf Böge et Konrad Ost, « Up and Running, or Is It? Private Enforcement – the Situation in Germany and Policy Perspectives », [2006] *European Competition Law Review* 197, 201-202..

<sup>100</sup> Pour en savoir plus sur les dommages-intérêts civils triples relevant du droit de la concurrence, voir Edward Cavanagh, « Detrebling Antitrust Damages: An Idea Whose Time Has Come? », 61 *Tulane Law Review* 777 (1987) (qui préconise le détriplement, avançant les arguments sur le risque de dissuasion excessive, d'injustice, de distorsions sur les marchés et de poursuites injustifiées pour abolir ou du moins limiter le caractère applicable des dommages-intérêts triples); Frank Easterbrook, « Detrebling Antitrust Damages », 28 *Journal of Law and Economics* 445 (1985) (qui affirme que l'existence d'un coefficient de multiplication doit dépendre de (a) la mesure dans laquelle l'infraction peut être dissimulée et (b) si le plaignant est un concurrent du contrevenant); Steven Salop et Lawrence White, « Treble Damages Reform: Implications of the Georgetown Project », 55 *Antitrust Law Journal* 73 (1986) (qui examine les implications des dommages-intérêts triples en termes de politique, à partir d'une base de données comportant des informations sur plus de 2000 affaires relevant du droit de la concurrence).

<sup>101</sup> Voir la section 5.2.

## 5. Mesures correctrices et sanctions dans les cas d'abus de position dominante

Même si certaines affaires plus anciennes sont particulièrement intéressantes à étudier dans le contexte des mesures correctrices et sanctions puisque les conséquences des mesures prises ont eu le temps de se concrétiser, certaines affaires récentes présentent aussi déjà un intérêt.

### 5.1 *Bird's-Eye Wall's*

En 2000, la Commission de la concurrence britannique a réalisé une enquête sur le marché de l'achat d'impulsion des crèmes glacées sous emballage et publié un rapport concluant que Bird's-Eye Wall's (« BEW »), dont la part de marché atteignait environ 65 %, était engagée dans diverses pratiques qui évinçaient les concurrents du marché et protégeaient sa position dominante<sup>102</sup>. Le rapport affirmait entre autres que les pratiques de BEW en matière d'exclusivité des armoires congélateurs et d'exclusivité de distribution restreignaient la concurrence et l'exploitation au détriment de l'intérêt du public. De façon spécifique, il a été jugé que les pratiques de BEW consistant à prêter gratuitement des distributeurs de crème glacée aux petits détaillants (tant qu'ils ne les utilisaient que pour stocker les produits BEW) se traduisaient par une augmentation des coûts de changement de fournisseur, et constituaient donc des barrières à l'entrée. En outre, selon le rapport, les pratiques de BEW consistant à exploiter son propre système de distribution exclusive anéantissaient la viabilité à long terme des grossistes indépendants, causant ainsi du tort à ses concurrents qui travaillaient avec ces grossistes<sup>103</sup>. Le rapport de la Commission recommandait un certain nombre de mesures correctrices au ministère du Commerce et de l'Industrie du Royaume-Uni, qui les a mises en œuvre.

Les mesures correctrices comprenaient deux types de mesures comportementales. D'abord, BEW s'est vue interdire l'exploitation de son propre système de distribution de crèmes glacées sous emballage sur le marché de l'achat d'impulsion. La société a donc dû s'en remettre aux grossistes multimarques pour distribuer ses produits. Ensuite, elle a été autorisée à continuer de prêter gratuitement ses distributeurs de crème glacée aux détaillants, mais la part de l'espace d'exposition qu'elle exige des distributeurs pour le stockage de ses produits ne peut plus dépasser 50 %. En outre, BEW n'a pas été admise à exiger que l'espace de stockage des armoires congélateurs soit dédié exclusivement aux produits BEW. Parallèlement, les concurrents de BEW ont obtenu le droit de prêter gratuitement des distributeurs de crème glacée et de demander une exclusivité<sup>104</sup>.

À première vue, ces mesures correctrices semblaient quelque peu risquées. La première imposait l'intervention d'un intermédiaire dans la chaîne de production de BEW, ce qui risquait d'augmenter les coûts de cette dernière, de dégrader son service et d'affecter sa compétitivité. La deuxième contraignait BEW à cesser de prêter gratuitement des distributeurs aux détaillants ou à subventionner ses concurrents en payant pour leur espace de congélation. On pourrait s'attendre à ce que BEW choisisse la première option, mais dans ce cas, ses concurrents pouvaient profiter de leur capacité à prêter gratuitement des distributeurs exclusifs et donc grignoter rapidement la part de marché de BEW. Cela semblait pourtant être l'objectif des mesures correctrices, à savoir aider les autres fabricants pour leur permettre de devenir des concurrents viables et performants.

<sup>102</sup> Commission de la concurrence, « The Supply of Impulse Ice Cream: A Report on the Supply in the UK of Ice Cream Purchased for Immediate Consumption », (janvier 2000), disponible en anglais à l'adresse [www.competition-commission.org.uk/rep\\_pub/reports/2000/436ice.htm](http://www.competition-commission.org.uk/rep_pub/reports/2000/436ice.htm)

<sup>103</sup> Idem

<sup>104</sup> Derek Ridyard, « With the Benefit of Hindsight – the 2000 UK Impulse Ice Cream Investigation », [2005] European Competition Law Review 533, 534.

Cinq ans plus tard, Derek Ridyard a analysé le marché britannique des crèmes glacées vendues sous emballage pour connaître l'impact des mesures correctrices<sup>105</sup>. Selon lui, si les distributeurs exclusifs et les pratiques de distribution de BEW avaient été responsables de la fermeture du marché, la part de marché de cette dernière aurait baissé au profit de celle des autres fabricants. Ce que Ridyard a découvert illustre la difficulté à prévoir des effets correctifs. En 2003, c'est-à-dire la dernière année pour laquelle il a pu obtenir des données, la part de marché de BEW avait à peine changé, tandis que celle de ses principaux concurrents avait stagné, voire baissé. Entre-temps, BEW avait dans un premier temps réduit puis éliminé complètement son programme de prêt gratuit de distributeurs. Fait plus important, et probablement surprenant, le volume total du marché britannique des crèmes glacées sous emballage sur le marché de l'achat d'impulsion a chuté de plus de 20 % de 1999 à 2003<sup>106</sup>. Comme Ridyard l'observe, les mesures correctrices n'étaient pas les seuls facteurs susceptibles d'influencer les ventes globales du marché. Une chute de 20 % reste néanmoins substantielle, et elle soulève la possibilité que non seulement les mesures correctrices ne sont pas parvenues à accroître la concurrence, mais qu'elles ont également réduit les investissements et de la production<sup>107</sup>.

Cette affaire permet également de mettre en évidence certaines différences entre les mesures correctrices d'ordre comportemental et structurel. D'abord, alors que les mesures de correction de comportement appliquées semblaient relativement fortes elles ne sont pas parvenues à affecter les positions relatives des principaux acteurs. S'il s'agit d'une affaire pour laquelle il paraissait important de limiter la part de marché de BEW et de stimuler celle de ses concurrents, la leçon à tirer de cette expérience est que même de puissantes mesures de correction de comportement ne parviennent pas toujours à leurs fins. Cet argument semble peser en faveur de la cession d'actifs, qui aurait certainement anéanti directement la puissance sur le marché de BEW et favorisé davantage un équilibre des pouvoirs dans le secteur. Pourtant, cette affaire permet également d'illustrer pourquoi les cessions d'actifs sont jugées risquées dans le cas d'abus de position dominante. Si une erreur est commise sur le problème concurrentiel réellement posé par le comportement d'un contrevenant, une cession d'actifs provoquera des changements indéniables sur le marché qui seront probablement dommageables et irréversibles. En revanche, une mesure de correction de comportement peut ne pas engendrer beaucoup de changements, et si elle le fait, les modifications non souhaitées peuvent être annulées avec le retrait de la mesure.

## 5.2 *Mylan*

Cette affaire illustre le fonctionnement de la restitution. Dans l'affaire *Mylan*,<sup>108</sup> la FTC américaine avait engagé des poursuites à l'encontre du deuxième fabricant américain de médicaments génériques pour infraction à l'article 5 de la loi sur la FTC, qui interdit les pratiques concurrentielles déloyales<sup>109</sup>. Mylan était le premier fabricant et vendeur de deux calmants très demandés. Il avait signé des contrats d'approvisionnement exclusif à long terme avec les seuls fournisseurs d'un produit chimique nécessaire à la fabrication de ces médicaments. Après avoir évincé les concurrents du marché, Mylan a relevé ses prix. Le prix d'un médicament est alors passé de 13.60 à 378.40 USD par 1 000 unités, tandis que l'autre a grimpé de 22.72 à 740.00 USD par 1 000 unités<sup>110</sup>. Robert Pitofsky, le Président de la FTC à l'époque, avait

<sup>105</sup> Idem, p.533. Ridyard déclare être intervenu en tant qu'expert économique du contrevenant dans le cadre de l'enquête de la Commission de la concurrence.

<sup>106</sup> Idem, p. 536-37. Le chiffre du volume du marché est corrigé pour tenir compte de l'impact de la météo estivale favorable et défavorable sur les ventes de crèmes glacées.

<sup>107</sup> Idem, p.537.

<sup>108</sup> FTC contre Mylan Labs, Inc., 62 F. Supp.2d 25 (D.D.C. 1999).

<sup>109</sup> 15 U.S.C. s. 45 (2000).

<sup>110</sup> Mylan, 62 F. Supp. p. 34.

qualifié le nombre de plaintes reçues par la Commission de « quasiment inédit<sup>111</sup> ». La FTC a estimé que Mylan avait engrangé environ 120 millions USD de bénéfices supplémentaires (avant prise en compte des intérêts) en conséquence de son monopole sur le marché.

Comme Pitofsky l'a expliqué par la suite, une décision mettant uniquement fin aux contrats exclusifs de Mylan aurait permis à la société de conserver ses profits illicites, sous réserve seulement de recours privés en dommages intérêts. La plupart des personnes qui payaient des prix gonflés pour les médicaments fabriqués par Mylan les avaient achetés en pharmacie plutôt que directement auprès de Mylan. En conséquence, il leur était interdit de demander des dommages intérêts en vertu du droit fédéral américain de la concurrence. La FTC a donc décidé de tester sa théorie selon laquelle elle était habilitée à exiger restitution en vertu de la loi sur la FTC<sup>112</sup>. L'opinion de la Commission a été validée par le tribunal et une résolution a suivi, aux termes de laquelle Mylan est convenu de restituer 147 millions USD déposés dans un fonds spécial, dans lequel on a pu puiser pour rembourser les prix abusifs aux victimes de Mylan<sup>113</sup>. Mylan a également accepté la décision lui interdisant d'adopter un tel comportement à l'avenir.

Le jugement *Mylan* a fait l'objet de quelques critiques, notamment de l'American Bar Association Section of Antitrust Law. L'ABA craignait en effet que, d'une façon générale, lorsque la FTC sollicite une restitution, les victimes puissent recevoir plusieurs réparations pour le même comportement car les parties lésées peuvent également engager des recours privés en dommages intérêts triples<sup>114</sup>. Pour Pitofsky, ce problème peut être évité : tous les recours privés qui ne sont pas interdites par le droit fédéral peuvent en effet être joints devant le tribunal ayant ordonné la restitution, qui peut ensuite gérer les recours de façon à s'assurer qu'aucune partie ne reçoive deux fois des dommages intérêts. C'est ainsi que l'affaire FTC et un certain nombre d'actions complémentaires ont été traitées<sup>115</sup>. La jonction semble être une solution judicieuse pour les situations dans lesquelles plusieurs réparations sont possibles pour la même infraction. En conséquence, compte tenu des difficultés rencontrées par certaines parties civiles pour obtenir réparation pécuniaire dans certaines affaires, il ne semble pas déraisonnable que la FTC demande réparation en leur nom.

Cela ne signifie toutefois pas que la FTC devrait ou va demander naturellement restitution. En fait, la Commission a déclaré qu'elle demanderait rarement restitution et uniquement dans les affaires impliquant une infraction manifeste au droit de la concurrence pour lesquelles les profits illicites peuvent être calculés de façon raisonnablement précise<sup>116</sup>. Bien que la dissuasion soit l'un des objectifs visés par la FTC à l'heure de demander restitution<sup>117</sup>, il reste à voir l'ampleur de l'effet procuré par l'ajout d'une telle option. En soi, la restitution ne suffit probablement pas pour atteindre le niveau théoriquement idéal de dissuasion car la probabilité de détection et de condamnation est inférieure à 100 % (bien que les cas d'abus de position

<sup>111</sup> Pitofsky, voir plus haut la note 5 p. 174.

<sup>112</sup> Idem, p.175.

<sup>113</sup> In re Lorazepam et Clorazepate Antitrust Litigation, 205 F.R.D. 369 (D.D.C. 2002).

<sup>114</sup> Lettre de Roxane Busey, Présidente de l'American Bar Association Section of Antitrust Law, à Donald Clark de la FTC (11 mars 2002), accessible en anglais à l'adresse [www.abanet.org/antitrust/mesurescorrectrices/request.pdf](http://www.abanet.org/antitrust/mesurescorrectrices/request.pdf); voir également David Balto, « Returning to the Elman Vision of the Federal Trade Commission: Reassessing the Approach to FTC Remedies », 72 Antitrust Law Journal 1113, 1120-24 (2005) (selon lequel en sollicitant des mesures correctrices de restitution, l'action de la FTC fait double emploi avec le rôle des autorités civiles et des autorités nationales de la concurrence).

<sup>115</sup> Pitofsky, voir plus haut la note 5 p. 175-76.

<sup>116</sup> US Federal Trade Commission, « Policy Statement on Monetary Equitable Remedies in Competition Cases », (25 juillet 2003), disponible en anglais à l'adresse [www.ftc.gov/os/2003/07/disgorgementfrn.htm](http://www.ftc.gov/os/2003/07/disgorgementfrn.htm).

<sup>117</sup> Idem

dominante portent généralement sur un comportement non dissimulé). Le concept de restitution ne prévoit toutefois pas de coefficient de multiplication pour tenir compte de cet écart de probabilité. Cela peut ne pas poser de problème s'il y a aussi des recours privés en dommages intérêts triples pour la même infraction, mais ce n'est pas toujours le cas. En outre, rien ne prouve que les dommages intérêts triples ont un effet dissuasif approprié<sup>118</sup>. Mais comme on l'a vu, la dissuasion optimale n'est de toute façon pas un objectif pratique, et la FTC dispose au moins désormais d'un moyen d'obtenir une *certaine* somme dans les affaires où la réparation pécuniaire semble pertinente. Il doit s'agir davantage de dissuader que de contraindre simplement une entreprise dominante à mettre fin à son comportement illégitime.

### 5.3 *Les affaires Microsoft*

Malgré l'attention extraordinaire dont les problèmes anticoncurrentiels mondiaux de Microsoft font l'objet, il s'agit d'une entreprise tellement singulière qui intervient dans un contexte de marché tellement caractéristique qu'une étude détaillée de ces affaires a peu de chances de fournir beaucoup d'indications applicables à grande échelle sur les mesures correctrices. En outre, plusieurs affaires, dont celle engagée par la Commission européenne, n'ont pas encore reçu de jugement final. Il serait donc prématuré d'en débattre ici de façon pertinente. Pourtant, les affaires Microsoft sont manifestement incontournables et même à ce stade intermédiaire, cette table ronde donne l'occasion de tirer au moins quelques leçons généralement pertinentes et d'autres éléments de nature à alimenter les discussions sur les affaires qui opposent le groupe aux États-Unis et à la Commission européenne.

#### 5.3.1 *L'action engagée par les États-Unis*

Dans l'affaire opposant le ministère américain de la Justice à Microsoft, le tribunal de première instance avait estimé que Microsoft avait illégalement entretenu un monopole dans les systèmes d'exploitation de PC compatibles Intel, qu'il avait tenté de monopoliser le marché des navigateurs Internet et qu'il pratiquait la vente liée de son navigateur et de son système d'exploitation<sup>119</sup>. Le gouvernement exigeait un ensemble de mesures correctrices d'ordre structurel et comportemental, y compris une condamnation consistant à scinder Microsoft en une société de systèmes d'exploitation et une société d'applications. Cette demande a été reçue sans grandes modifications. Une cour d'appel a ensuite modifié le jugement de responsabilité, confirmant le chef d'un maintien de monopole, renvoyant les allégations de vente liée en vue d'un réexamen conforme à une norme plus rigoureuse, et annulant les allégations de tentative de monopolisation.

La cour d'appel a également annulé le jugement correctif et ordonné le réexamen des mesures correctrices car, entre autres raisons, le tribunal de première instance n'avait pas justifié ses mesures correctrices de façon appropriée. Même si la cour d'appel n'avait pas exclu la cession d'actifs, elle a estimé qu'il devait y avoir un « lien de causalité entre le comportement d'exclusion de Microsoft et sa position sur le marché [des systèmes d'exploitation pour PC] » pour qu'une cession d'actifs puisse être recevable<sup>120</sup>. En d'autres termes, le comportement déclaré illicite doit également être considéré comme avoir effectivement contribué au maintien du monopole de Microsoft. Le fait qu'il soit simplement susceptible d'y avoir

<sup>118</sup> Un débat est en cours sur l'adéquation des dommages-intérêts triples. Voir Robert Lande, « Are Antitrust 'Treble' Damages Really Single Damages? », 54 Ohio State Law Journal 115 (1993) (qui affirme qu'en moyenne, plusieurs facteurs limitent la valeur réelle des « dommages-intérêts triples » dans les affaires américaines relevant du droit de la concurrence à des montants inférieurs à des dommages-intérêts compensatoires, ce qui se traduit systématiquement par une dissuasion insuffisante).

<sup>119</sup> États-Unis contre Microsoft Corp., 97 F. Supp. 2d 59 (D.D.C. 2000), partiellement confirmé, partiellement annulé, 253 F.3d 34 (D.C. Cir. 2001), demande de révision par voie de certiorari rejetée, 534 U.S. 952 (2001).

<sup>120</sup> Microsoft, 253 F.3d p.80.

contribué aurait été insuffisant. Le tribunal a ajouté que « [l]a cession d'actifs est une mesure correctrice qu'il faut imposer avec grande prudence, en partie parce que son efficacité à long terme est rarement absolue<sup>121</sup> ».

Par la suite, le ministère de la Justice a décidé d'abandonner son chef d'accusation de vente liée et sa demande de mesures structurelles. Une résolution consistant uniquement en des mesures correctrices d'ordre purement comportemental a alors été adoptée<sup>122</sup>. Les mesures correctrices ont essentiellement visé à empêcher Microsoft de recourir aux types de stratégies qu'il utilisait pour désamorcer les menaces concurrentielles de Netscape et Java. Il a été exigé que Microsoft octroie ses licences pour le système d'exploitation Windows de façon non discriminatoire et transparente, qu'il dévoile les spécifications d'interfaçage et les protocoles de communications utilisés par certains logiciels Microsoft pour inter opérer avec Windows. En outre, il fut interdit à Microsoft de s'engager dans des contrats limitant la capacité des équipementiers informatiques à utiliser certains logiciels concurrents, et de lancer des représailles à l'encontre des sociétés qui avaient installé des logiciels concurrents.

Une fois que les modalités de la résolution ont été rendues publiques, un certain nombre de commentateurs se sont exprimés sur la manière dont les mesures correctrices choisies affecteraient le monopole de Microsoft et si elles encourageraient la concurrence et l'innovation. Ensemble, leurs écrits forment une espèce de conte de type Boucles d'or : certains affirment que les mesures correctrices sont trop légers, d'autres qu'elles sont adéquates, et d'autres encore estiment qu'elles n'auraient de toute façon jamais dû être imposées mais qu'elles n'auront probablement pas de conséquences néfastes<sup>123</sup>. Bien qu'il soit probablement trop tôt pour juger de l'efficacité réelle de ces mesures, on peut d'ores et déjà se prononcer sur leur administration.

Quiconque doute que les mesures de correction de comportement dans les cas de comportement unilatéral puissent nécessiter un suivi considérable par les tribunaux et les autorités de tutelle jugeront utile de consulter la liste des dépôts de plainte liés à la résolution concernant Microsoft<sup>124</sup>. En outre, le contenu de certaines plaintes donne une idée des types de problèmes susceptibles de résulter de l'exécution d'une résolution de cette complexité. Par exemple, en janvier 2004, un rapport conjoint a montré que le gouvernement craignait que le programme d'octroi de licences des protocoles de communication imposé par la résolution n'ait pas atteint ses objectifs correcteurs et ait peu de chances « de susciter l'émergence sur le marché de concurrents importants au système d'exploitation Windows.<sup>125</sup> » En conséquence, le gouvernement a recommandé la modification du programme<sup>126</sup>. Deux ans plus tard, le gouvernement a

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<sup>121</sup> Idem, p.84.

<sup>122</sup> États-Unis contre Microsoft Corp., 231 F. Supp. 2d 144 (D.D.C. 2002).

<sup>123</sup> Voir Timothy Bresnahan, « A Remedy that Falls Short of Restoring Competition », 16 Antitrust 67 (automne 2001) (qui affirme que les mesures correctrices de la résolution sont trop complaisants) ; Einer Elhauge, « Soft on Microsoft » The Weekly Standard pp. 17-18 (25 mars 2002) (idem) ; Charles James, « The Real Microsoft Case and Settlement », 16 Antitrust 58 (automne 2001) (qui estime que les mesures correctrices sont appropriées) ; David Evans, Albert Nichols et Richard Schmalensee, « United States v. Microsoft: Did Consumers Win? », 1 Journal of Competition Law and Economics 497 (2005) (qui juge que Microsoft n'aurait de toute façon jamais dû être jugé responsable, mais que les mesures correctrices ne sont pas contestables).

<sup>124</sup> Voir [http://www.usdoj.gov/atr/cases/ms\\_index.htm](http://www.usdoj.gov/atr/cases/ms_index.htm).

<sup>125</sup> États-Unis contre Microsoft, C.A. n° 98-1232 (CKK), Joint Status Report on Microsoft's Compliance with the Final Judgments, pp. 3-5 (16 janvier 2004), disponible en anglais à l'adresse [www.usdoj.gov/atr/cases/f202100/202129.htm](http://www.usdoj.gov/atr/cases/f202100/202129.htm).

<sup>126</sup> Idem, p. 8-9.

déclaré au tribunal que sur plus de 1 000 questions de documentation technique soumises à Microsoft, plus de 700 n'avaient toujours pas été traitées par le groupe<sup>127</sup>.

Au moins trois leçons semblent pouvoir être tirées avec certitude de l'expérience jusqu'à présent au sujet des mesures correctrices élaborés dans cette affaire : a) l'administration des mesures correctrices comportementaux peut être difficile et onéreuse ; b) les mesures correctrices peuvent être soumis à des problèmes inattendus susceptibles de compromettre leur objectif ; et c) l'exécution de mesures correctrices comportementaux sur les marchés en évolution rapide des technologies de pointe n'est pas une mission simple.

D'autres leçons peuvent être tirées concernant l'arrêt rendu par la cour d'appel. D'abord, l'avertissement de la cour d'appel concernant les mesures correctrices de cession d'actifs (à savoir qu'il faut les imposer avec grande prudence car leur efficacité à long terme est rarement absolue) est quelque peu trompeur. En réalité, l'efficacité à long terme de la plupart des mesures correctrices, y compris celles qui ont fini par être exécutés dans le cas de Microsoft, est rarement *absolue*. D'après ce principe, les autorités devraient observer une « grande prudence » dans quasiment tous les cas où elles envisagent d'intervenir pour enrayer un comportement anticoncurrentiel, et peu de mesures seraient jamais adoptées. Inévitablement, l'application du droit dans le domaine de l'abus de position dominante serait altérée.

En outre, la présence obligatoire d'un lien de causalité exigée par le tribunal (qui implique de démontrer que l'infraction identifiée a engendré le préjudice traité par la mesure correctrice) peut être trop stricte. Elle se traduit par ce que Salop a qualifié de « dissuasion inverse » car elle encourage les entreprises dominantes à anéantir rapidement et souvent les concurrents potentiels, c'est-à-dire avant qu'il ne puisse être démontré avec certitude que ces entreprises seraient devenues des concurrents importants, ce qui aurait justifié une mesure correctrice plus stricte si l'on suit le principe du tribunal. En outre, étant donné que les hommes d'affaires intervenant dans le secteur sont généralement meilleurs juges que les autorités ou les tribunaux concernant la menace concurrentielle posée par les jeunes entreprises, la décision du tribunal pourrait se traduire par un effet de dissuasion considérablement réduit dans les affaires de monopole<sup>128</sup>.

### 5.3.2 L'action engagée par l'UE

Au contraire, la décision de la Commission européenne ne reflète pas autant le souci de limiter les mesures correctives pour ne traiter que le préjudice prouvé. La décision, qui est actuellement examinée en appel devant le Tribunal de première instance, estime que Microsoft a abusé de sa position dominante en refusant de fournir des informations qui faciliterait l'interopérabilité entre les serveurs de groupe de travail concurrents et son système d'exploitation client Windows, et en procédant à la vente liée de son lecteur Windows Media avec le système d'exploitation client Windows<sup>129</sup>.

Pour traiter ces infractions, la Commission imposa un ensemble de mesures pécuniaires, comportementales et structurelles. D'abord, elle a infligé à Microsoft une amende record de plus de 497 millions EUR. En outre, elle a ordonné à Microsoft de mettre fin à ses pratiques illicites, de s'abstenir de récidiver, d'accorder des licences pour les protocoles au moyen desquels les systèmes d'exploitation de

<sup>127</sup> États-Unis contre Microsoft, C.A. n° 98-1232 (CKK), Joint Status Report on Microsoft's Compliance with the Final Judgments, p. 8 (8 février 2006), disponible en anglais à l'adresse [www.usdoj.gov/atr/cases/f214500/214518.htm](http://www.usdoj.gov/atr/cases/f214500/214518.htm).

<sup>128</sup> American Bar Association Section of Antitrust Law, Remedies Forum Roundtable II 5 (2 avril 2003), disponible en anglais sur [www.abanet.org/antitrust/remedies/](http://www.abanet.org/antitrust/remedies/).

<sup>129</sup> Microsoft Decision, affaire COMP/C-3/37.792, art. 2(a), p. 300.

Microsoft communiquent entre eux, et de proposer une version du système d'exploitation client de Windows dépourvu du lecteur Windows Media. Il est intéressant de noter que la décision de découplage a été spécifiquement rejetée par le ministère américain de la Justice dans l'affaire qu'il a traitée<sup>130</sup>. Il est trop tôt pour dire quelle catégorie de mesures correctrices s'avérera la plus efficace pour promouvoir la concurrence, mais les résolutions différentes devraient permettre aux autorités de tutelle de tirer des leçons précieuses<sup>131</sup>.

## 6. Conclusion

Cette analyse décrit les objectifs que les tribunaux et autorités tentent d'atteindre dans les cas d'abus de position dominante et les différentes mesures correctrices et sanctions auxquelles ils ont recours à cette fin. Elle fait la synthèse des points forts et des points faibles des mesures dont disposent les autorités, et évoque certaines difficultés théoriques tout en mettant en évidence des enjeux d'ordre pratique. Globalement, l'impression donnée par l'analyse des publications de chercheurs est que la définition et l'exécution de mesures correctrices et sanctions dans les cas d'abus de position dominante sont un défi monumental – qui est loin d'être maîtrisé.

L'un des meilleurs moyens d'améliorer l'état des connaissances sur les mesures correctrices et sanctions et d'optimiser leur définition et leur exécution est d'étudier les expériences et les mesures qui ont été imposées par le passé, et notamment d'examiner leurs effets sur le bien-être des consommateurs. Dans l'idéal, les autorités de tutelle devraient procéder régulièrement à de telles évaluations. Même si certaines autorités ont fait des efforts à cette fin concernant les mesures correctrices de fusion, il est possible et souhaitable d'en faire plus concernant les cas d'abus de position dominante<sup>132</sup>.

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<sup>130</sup> Charles James, « The Real Microsoft Case and Settlement », 16 *Antitrust* 58, 64 (automne 2001).

<sup>131</sup> Pour consulter un pronostic anticipé du remède de découplage de la CE, voir Ian Ayres et Barry Nalebuff, « Going Soft on Microsoft? The EU's Antitrust Case and Remedy », 2 *The Economist's Voice* 1 (2005) (qui affirme qu'il aurait mieux valu conjuguer le découplage à l'obligation de vendre la version du système d'exploitation équipée du lecteur Windows Media avec trois autres lecteurs média).

<sup>132</sup> Voir Balto, plus haut la note 113 p. 1117 (qui appelle la FTC américaine à utiliser ses pouvoirs pour procéder à des études post-jugement sur l'efficacité des mesures correctrices).

## CANADA

### 1. Introduction

In discussing Canadian remedies and sanctions in abuse of dominance cases, it is important to first highlight the historical background of the abuse provisions in Canada, which have led to the civil regime currently in place.

In 1986, the former criminal monopoly provision of the *Combines Investigation Act*<sup>1</sup> was replaced by section 79 of the *Competition Act* (“Act”)<sup>2</sup>, which applies to broad categories of conduct that can potentially fall within the scope of “abuse of a dominant position”. The former criminal provision was viewed as ineffective as the Crown continued to fail to prove public detriment in monopoly cases according to the criminal law standard of proof. Conduct under the new civil provision is reviewable by the Competition Tribunal (“Tribunal”) and subject to the civil balance of probabilities standard of proof.

Remedial powers were evidently directly impacted by these legislative changes. Under the old criminal regime, such activities could give rise to a criminal conviction and related penal consequences such as fines and imprisonment and/or exposure to private damage actions derived, whereas abusive type behaviour under the current legislation can result in an order prohibiting the continuation of anti-competitive acts, or the divestitures of assets or shares, as may be reasonably necessary to overcome the effects of the practice on the marketplace.<sup>3</sup>

From its inception it was clear that the intent of section 79 was not to punish firms, but rather to ensure a level playing field. As stated by Micheal Flavell and Christopher Kent “the purpose of s.79 is not to punish firms merely for having market power. Rather, its purpose is to ensure that dominant firms compete on merit and do not slant the playing field in their favour through their dominance.”<sup>4</sup>

### 2. Outline of Submission

The purpose of this submission is to offer the Competition Bureau’s (“Bureau”) perspective on remedies in abuse cases, a discussion of the Bureau’s policy objectives in achieving compliance with the Act, the remedial powers available to the Tribunal in abuse cases, a look at the options available and exercised by the Commissioner of Competition (“Commissioner”) in seeking to correct abusive behaviour, as well as case examples throughout to illustrate the approach and effect of past remedies.

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<sup>1</sup> *Combines Investigation Act*, R.S.C. 1927, c.26.

<sup>2</sup> *Competition Act*, R.S.C. 1985, c.19 (2nd Supp.), s.19.

<sup>3</sup> See F. Rioux, *Analysis of the Competition Tribunal Decisions Under Secs. 78-79 of the Competition Act*, McMaster Gervais (1999), at pgs 2-3.

<sup>4</sup> C.J.M. Flavell & C.J. Kent, *The Canadian Competition Law Handbook*, Carswell (1997), at p. 78.

### 3. Sections 78 & 79 of the Act - Abuse of a Dominant Position

Sections 78 and 79 deal with situations where a dominant firm in a market, or a dominant group of firms, engages in conduct that is intended to eliminate or discipline a competitor or to deter future entry by new competitors, with the result that competition is prevented or lessened.

Subsection 79(1) sets out three essential elements, which must all be found to exist by the Tribunal for it to grant an order. The Tribunal must find that:

- a. one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
- b. that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
- c. the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.<sup>5</sup>

Section 78 of the Act outlines a non exhaustive list of 11 examples of potentially anticompetitive acts. In a number of cases, the Bureau has alleged, and the Tribunal has accepted, that practices not included in section 78 constituted anti-competitive acts that can be addressed under section 79<sup>6</sup> (See Appendix 1 which outlines section 78).

### 4. Bureau Policy Objectives in Achieving Compliance

Generally, in seeking compliance with the Act and the other statutes which fall under the Commissioner's mandate, the Bureau has adopted a multifaceted approach to the administration and enforcement of its legislation.

The Bureau's *Conformity Continuum Information Bulletin*<sup>7</sup> ("Conformity Continuum") explains this approach. It sets out the Bureau's plan to achieving increased and ongoing conformity. An approach which is guided by five governing principles: transparency, fairness, timeliness, predictability and confidentiality. The Bureau places emphasis on education, negotiation and voluntary compliance to limit the need for contested proceedings.

The Conformity Continuum is premised upon the belief that businesses will be more likely to comply with legislation if they are provided with the required knowledge and tools. That being said, the Bureau will not hesitate to take the necessary steps needed to address matters of non-conformity.<sup>8</sup>

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<sup>5</sup> Supra, note 2, subsection 79(1). See also Competition Bureau, *Enforcement Guidelines on Abuse of Dominance Provisions* (Section 78 and 79 of the *Competition Act*), 2001. Available at <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1251&lg=e>.

<sup>6</sup> *Enforcement Guidelines on Abuse of Dominance Provisions*, supra, note 5. See page 3.

<sup>7</sup> Competition Bureau, *Conformity Continuum Information Bulletin*, (2000). Available at: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1750&lg=e>.

<sup>8</sup> Ibid.

More specifically, as outlined in the Bureau's *Enforcement Guidelines on the Abuse of Dominance Provisions* ("Abuse Guidelines"), the Bureau's enforcement policy with regards to abuse cases is to vigorously pursue cases that meet the elements of section 79.<sup>9</sup> As such, the Bureau will investigate matters in order to determine if there's a breach of subsection 79(1), all the while applying its multifaceted approach to achieving compliance.

## 5. Remedial Powers of the Tribunal<sup>10</sup>

The Bureau's role in abuse of dominance cases is to carry out inquiries under the Act having regard to the public interest in competition. In this regard, the Commissioner does not have the authority to directly compel change in business behaviour. In order to achieve this, she must apply to the Tribunal and assume the role of litigant.<sup>11</sup>

### 5.1 Prohibitions (behavioural remedies)

As stated above, all of the elements of subsection 79(1) must be met in order for a remedy to be ordered by the Tribunal. Should the Commissioner be successful in satisfying all of the elements, subsection 79(1) prescribes that "the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice".<sup>12</sup>

### 5.2 Order for Action, Including Divestiture of Assets or Shares (behavioural/structural remedies)

Subsection 79(2) provides for an additional or alternative order to be granted by the Tribunal:

*Where, on an application under subsection (1), the Tribunal finds that a practice of Anticompetitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.*<sup>13</sup>

This section gives the Tribunal the authority to order positive corrective action to overcome the effects of the anti-competitive acts, including ordering the divestitures of assets or shares.

<sup>9</sup> *Enforcement Guidelines on Abuse of Dominance Provisions*, supra, note 5. See Executive Summary.

<sup>10</sup> Since administrative monetary penalties are not broadly available as a remedial option to the Tribunal they are not discussed in this submission. It should be noted however that the Act does provide an industry specific provision enabling the Tribunal to order an administrative monetary penalty up to \$15 million against a domestic carrier for abusing a dominant position. Supra, note 2, subsection 79(3.1).

<sup>11</sup> Supra, note 9.

<sup>12</sup> Supra, note 2, subsection 79(1).

<sup>13</sup> Supra, note 2, subsection 79(2).

*The distinction between an order prohibiting a person from engaging in an anti-competitive act, and an order mandating positive acts, is not always clear. For example, in Tele-Direct<sup>14</sup>, the anti-competitive act was discriminating against consultants and customers who use consultants. The Tribunal prohibited Tele-Direct from rejecting orders submitted through consultants. This, of course, amounts to a requirement that Tele-Direct accept such orders.<sup>15</sup>*

Subsection (3) adds a limitation to orders made pursuant to subsection (2) in that the order should interfere with the rights of the person or persons affected by the order in the least restrictive manner possible. In essence, it should interfere “only to the extent necessary to achieve the purpose of the order”.<sup>16</sup> Such a restriction is intended to protect existing private contractual relationships between persons, and other proprietary property such as trade secrets, unless a breach of these contracts or secrets is absolutely necessary to restore competition.<sup>17</sup>

Commentary on this section included the following: “This limitation was probably inserted to indicate that orders under subsection 79(2) are not to be punitive in nature but are to be directed at restoring competition.”<sup>18</sup> This is also the opinion of the Bureau. As stated in the Bureau’s Abuse Guidelines, “the intent of this subsection is to have an order that is aimed at restoring competition, and not one that goes beyond achieving this objective. In other words, the order should be remedial and not punitive.”<sup>19</sup>

In *Laidlaw*, the Tribunal affirmed this principle when it “agree(d) with counsel for Laidlaw’s argument that it is not part of the Tribunal’s function to impose penalties or punitive measures. What is necessary to restore competition is a judgment which must be made by reference to the evidence which has been put before the Tribunal as to how the markets in question operate and have operated and the effects the anti-competitive acts are having thereon.”<sup>20</sup>

In analysing subsections (2) and (3), it is evident that Parliament viewed prohibitive remedies as a less intrusive means of addressing abusive practices. Remedies as described in subsection (2), and limited in subsection (3), are intended for cases where a prohibitive remedy would not suffice.

<sup>14</sup> *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) 1 (available on the Tribunal Website at [www.ct-tc.gc.ca](http://www.ct-tc.gc.ca)). In this matter, the Director (now the Commissioner) alleged that Tele-Direct (Publications) Inc. (the Publisher of several yellow page directories) had abused its dominant position in the markets for advertising services and advertising space. The main issue was tying advertising services to advertising space. The Tribunal found that Tele-Direct’s refusal to deal with consultants and putting obstacles in the way of the successful entry of an independent publisher were anti-competitive acts. The Tribunal ordered Tele-Direct that customers using consultants must be treated no differently than customers that do not.

<sup>15</sup> M. Osborne, *Essentials of Reviewable Matters*, Ontario Bar Association (2005), at p. 24.

<sup>16</sup> *Supra*, note 2, subsection 79(3).

<sup>17</sup> *Enforcement Guidelines on Abuse of Dominance Provisions*, *supra*, note 5, p. 27.

<sup>18</sup> R.S.Nozick, *The 2006 Annotated Competition Act*, Carswell (2006), at p. 217.

<sup>19</sup> *Supra*, note 17.

<sup>20</sup> *Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (available on the Tribunal Website at: [www.ct-tc.gc.ca](http://www.ct-tc.gc.ca)).

Unlike merger cases where structural remedies are clearly preferred, given the limitation outlined in subsection (2), to date, no such remedy, or combination of a structural/behavioural remedy, has been imposed by the Tribunal, or requested by the Commissioner, in a section 79 matter.

The Bureau has recently noted in its *Draft Information Bulletin on Merger Remedies in Canada* that requiring certain actions of the newly merged entity, instead of, or in combination with a (full or partial) divestiture remedy, may have structural implications for the marketplace.<sup>21</sup> Examples of such changes that could have structural impacts include: licensing intellectual property; removing anti-competitive contract terms such as non-competition clauses and restrictive covenants; and, granting non-discriminatory access rights to networks.

A common remedy imposed in abuse of dominance cases often requires the dominant firm to alter its contracts in order to open the market to competition. For example, this was ordered in *NutraSweet*<sup>22</sup>, where the respondent was prohibited from enforcing contractual terms requiring or inducing exclusivity, and from entering into future contracts containing these provisions.

This was also achieved in *Nielsen*<sup>23</sup>, where the Tribunal ordered the respondent to amend its contracts substantially including, but not limited to, making provisions preventing or limiting the supply of data to any party null and void, and rendering unenforceable clauses promoting exclusivity of scanner data.

Although behavioural by definition, it is important to note that prohibitions ordered pursuant to subsection (1) can and do impact the structural make-up of the industry in question by making it open to competition, either by reducing barriers for new entrants, providing access to necessary infrastructure or key technologies, or otherwise facilitating entry or expansion. Consequently, such remedies, in abuse of dominance cases, seem to strike the right balance between overly intrusive orders and ensuring an appropriate solution to anti-competitive conduct.

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<sup>21</sup> Competition Bureau, *Draft Information Bulletin on Merger Remedies in Canada*, (2005). Available at: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1982&lg=e>.

<sup>22</sup> *Canada (Director of Investigation and Research) v. NutraSweet Co.*, (1990), 32 C.P.R. (3d)1 (available on the Tribunal Website at [www.ct-tc.gc.ca](http://www.ct-tc.gc.ca)). In this case, the Director alleged that The NutraSweet Company had abused its dominant position in the market for the high intensity sweetener aspartame. The acts found to be anti-competitive by the Tribunal were trademark display and cooperative marketing allowances (i.e. branding ingredient strategy); exclusive use and supply clauses; and meet-or-release and most favoured nation clauses. The Tribunal ordered *NutraSweet* not to enter into, or enforce, the following contractual provisions with Canadian customers: (i) exclusive use or supply clauses; (ii) allowances for displaying the trademark or logo; (iii) meet-or-releases clauses; and (iv) most favoured-nation clauses unless all of the competitors of the customer have similar price protection.

<sup>23</sup> *Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd.*, (1996), 64 C.P.R. (3d) 216 (available on the Tribunal Website at: [www.ct-tc.gc.ca](http://www.ct-tc.gc.ca)). The Director alleged that Nielsen had abused its dominant position in the provision of scanner data from supermarkets to manufacturers of the products sold. The concern was the long term (three year or more) exclusive contracts that Nielsen had with every major Canadian supermarket chain. The Tribunal prohibited Nielsen from enforcing its current exclusive contracts and from entering into any new ones. As well, all existing customer contracts were terminable by the customer upon eight months notice. Finally, Nielsen had to supply its competitor, IRI, with historical data upon request.

### 5.3 *Limitations, Exceptions and Clarifications under 79*

Although section 79 provides wide latitude to impose remedies in abuse of dominance cases, in addition to subsection (3) discussed above, section 79 also contains a number of other limitations, exceptions and clarifications with respect to orders of the Tribunal, and applications by the Commissioner.

Subsections 79(4) to 79(7) ensure a consideration of the following issues:

- (i) *superior competitive performance* - whether the lessening of competition is attributable to the superior competitive performance of the dominant firm or firms. It is important to note here that this consideration does not call upon the Tribunal to balance superior competitive performance against the effects of anti-competitive acts. Superior competitive performance is only a factor to be considered in determining the cause of the lessening of competition, and not as a justifiable goal for engaging in an anti-competitive act.<sup>24</sup>
- (ii) *exercise of intellectual property rights* - whether the respondent has exclusive rights provided by intellectual property law -- these do not in themselves constitute abusive conduct by a dominant firm. The legitimate use of such rights would evidently not be problematic, but conduct that goes beyond the mere exercise of these rights could result in a violation under section 79.<sup>25</sup>
- (iii) *time limitation* - that the practice has not ceased more than three years ago. This three year limitation prohibits the Commissioner from making an application to the tribunal after the time limitation has passed.<sup>26</sup>
- (iv) *avoidance of duplicative proceedings* - subsection 79(7) requires the Commissioner to choose between the conspiracy, the merger or the abuse of dominance provisions when electing to proceed. The subsection codifies for merger, conspiracy and abuse of dominance the principle in common law that no person is to be placed in jeopardy twice for the same or substantially the same cause.<sup>27</sup>

## 6. Options Available to the Commissioner

In addition to filing an application under s. 79 seeking a remedy directly from the Tribunal, the Commissioner also has other options at her disposal which enable her to arrive at an agreement with the firm or firms in question in order to deal with the abusive conduct.

### 6.1 *Consent Agreement*

In line with the Bureau's objectives as set out in its Conformity Continuum, the Commissioner can also choose to arrive at a consent agreement with the firm in question. Essentially, cases can be resolved on

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<sup>24</sup> Supra, note 2, subsection 79(4). See also, *Enforcement Guidelines on Abuse of Dominance Provisions*, supra, note 5, p. 27.

<sup>25</sup> Ibid, subsection 79(5). See also Competition Bureau, *Intellectual Property Enforcement Guidelines*, 2000. Available at: <http://www.competitionbureau.gc.ca/internet/index.cfm?item ID=1286&lg=e>.

<sup>26</sup> Supra, note 2, subsection 79(6). See also, *Enforcement Guidelines on Abuse of Dominance Provisions*, supra, note 5, p. 27.

<sup>27</sup> Ibid, subsection 79(7).

a consensual basis, where the firm or firms whose conduct is in question and the Bureau agree on a remedy to be submitted to the Tribunal. Pursuant to section 105 of the Act, a consent agreement can be registered with the Tribunal by the Commissioner and respondent firm without hearing the full evidence, as it would have in a contested proceeding.

Some limitations do exist however. The agreement arrived at shall be based on terms that could be the subject of an order of the Tribunal. As such, the Commissioner must respect the limitation found in section 79 in arriving at such an agreement. Upon registration, an agreement has the same force and effect as an order by the Tribunal.<sup>28</sup>

Since the enactment of section 79, three consent agreements have been registered with the Tribunal.<sup>29</sup>

In the *Interac* case, the parties had 100% of the Canadian market for the delivery of services associated with the electronic banking network, on which transactions are made through automated banking machines and debit cards. The Bureau alleged that they lessened competition substantially by prohibiting new members; demanding higher membership fees for competing financial service providers; charging service fees to entities that had no direct connection to the system but were obligated to go through another member and, by imposing limitations on price competition and services. The parties agreed to amend the by-laws of *Interac* in order to: remove restriction on membership by other financial institutions, allow indirect access by other commercial entities, modify the governance of *Interac* with respect to the composition of its board and modify pricing practices and procedures for approving new network services.<sup>30</sup>

In the *Canadian Yellow Pages Services* (“*CANYPS*”) matter, the parties had 90% of the national yellow pages advertising in Canada. The Bureau alleged that the arrangements among the members of *CANYPS* prevented competition between them and prevented the entry of independent sales agents into this market. The parties consented to a number of remedies including providing the Bureau with minutes of all *CANYPS* meetings for a set period of time.<sup>31</sup>

Lastly, on December 18, 2001, *Enbridge* and the Bureau filed a consent agreement with the Tribunal to encourage competition in the supply and service of natural gas hot water heaters in areas of Ontario including Toronto and Ottawa. This action followed complaints about the high cost consumers had to pay to exit the *Enbridge* hot water heater rental program. The Bureau concluded that the exit charges and conditions substantially lessened competition in the relevant market. The Tribunal issued the order which required, among other things, that the competitors no longer be prevented from disconnecting and returning *Enbridge*'s rental water heaters.<sup>32</sup>

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<sup>28</sup> Supra, note 2, section 105, subsections 1 to 4.

<sup>29</sup> It should be noted that the *Interact* and *CANYPS* cases were considered under an earlier process where the Tribunal was obliged to review and approve proposed consent agreements.

<sup>30</sup> *Canada (Director of Investigation and Research) v. Bank of Montreal et al.*, (1996), 68 C.P.R. (3d) (C.T.) (all documents, including amendments available on the Tribunal Website at: [www.ct-tc.gc.ca](http://www.ct-tc.gc.ca)).

<sup>31</sup> *Canada (Director of Investigation and Research) v. AGT Directory Ltd. et al.*, (1994), C.C.T.D. No 24 Trib Dec. No CT9402/19 (available on the Tribunal Website at: [www.ct-tc.gc.ca](http://www.ct-tc.gc.ca)).

<sup>32</sup> *Commissioner of Competition v. Enbridge Services Inc* - Statement of Grounds and Material Facts, Competition Tribunal File No. 2001-008 (available on the Tribunal Website at: [www.ct-tc.gc.ca](http://www.ct-tc.gc.ca)).

## 6.2 *Alternative Case Resolutions*

Alternative case resolutions (“ACR”) are another option used by the Commissioner in dealing with situations of abusive behaviour. ACRs can best be defined as situations where negotiated corrective measures have resolved the Commissioner’s concerns with regards to abusive anti-competitive behaviour. In these situations, the Bureau will typically accept an undertaking from the party in question as an alternative to pursuing the investigation. ACRs are often agreed upon in matters involving infrequent and inadvertent infringements by cooperative parties.<sup>33</sup>

For example, on October 1, 2003, the Bureau discontinued an investigation it had begun in April of 2002 under section 79 concerning commercial waste disposal contracting practices in the Winnipeg, Manitoba area. According to the complainants, competition in these markets was being restricted by long-term contracts and right-of-first-refusal clauses in them. Following discussions with Bureau officials, the companies in question agreed that they would limit the initial and subsequent renewal terms for standard form contracts to three years and would not include right-of-first-refusal clauses.<sup>34</sup>

As well, in March of 2003, the Bureau concluded its investigation of IKO Industries Ltd., Canada’s largest manufacturer of asphalt roofing products. The Bureau had received complaints that IKO was abusing its dominant market position and impeding the entry and expansion of competitors through its policy of giving distributors loyalty rebates on sales of residential asphalt roofing shingles. The Bureau had outlined its concerns about the distributor loyalty program, observing that it likely prevented or substantially lessened competition in the supply of low-end asphalt roofing shingles in Canada. In response to the Bureau’s concerns, IKO modified its rebate program by giving customers a choice between loyalty and volume-based rebates. In addition, the level of rebate varied in the modified loyalty program with the volume of percentage of shingles purchased from IKO. These modifications diminished the incentive to exclusivity inherent in loyalty rebates.<sup>35</sup>

ACRs and consent agreements demonstrate the Commissioner’s willingness to resort to an adversarial approach only when all other avenues to correct anti-competitive behaviour have failed or the activities constitute a flagrant disregard for the law.

## 7. **Penalties for Breach**

If an order of the Tribunal is breached by the respondent, section 66 of the Act sets out applicable penalties stating that:

Every person who contravenes an order (...) is guilty of an offence and liable

- (a) *on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both; or*
- (b) *on summary conviction, to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding one year or both.*<sup>36</sup>

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<sup>33</sup> Supra, note 7.

<sup>34</sup> See: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=381&lg=e>.

<sup>35</sup> See: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=353&lg=e>.

<sup>36</sup> Supra, note 2, section 66.

As well, section 36 outlines a civil right of action for the recovery of damages resulting from a failure to comply with an order of the Tribunal or another court under the Act.

(1) *Any person who has suffered loss or damages as a result of (...)*

(b) *the failure of any person to comply with an order of the Tribunal or another court under this Act, may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.*<sup>37</sup>

Breach of an undertaking provided pursuant to an ACR may result in the reopening of the investigation and, ultimately, a more stringent enforcement response.

## **8. Monitoring**

Since all orders and ACRs are made public, marketplace participants are always well aware of what the parties have been ordered to, or have agreed to, do as part of a remedial package. As such, should a firm not implement the order or ACR in question, such participants typically inform the Commissioner of a breach.

As well, the threat of section 66 coupled with a potential damages claim under subsection 36(1) also acts as a deterrent for those contemplating a breach.

## **9. Conclusion**

44. In summation, the Act imposes clear limits on the options available both to the Commissioner and the Tribunal in that it makes prohibitive remedies the first option to be considered in all cases. In their approach to the application of section 79, the objectives of both the Bureau and the Tribunal have, in accordance with the law, not been punitive in nature. Rather, their objective has been to address anti-competitive conduct and restore competition in the market in question. In this regard, both the Bureau and Tribunal have adopted a balanced approach: the Bureau has a multifaceted approach with its Conformity Continuum, while the Tribunal has limited its intervention, thus far, to prohibitive remedies.

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<sup>37</sup> Supra, note 2, subsection 36(1).

## APPENDIX 1

78. (1) For the purposes of section 79, "anti-competitive act", without restricting the generality of the term, includes any of the following acts:

- (a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;
- (b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
- (c) freight equalisation on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
- (d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;
- (e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;
- (f) buying up of products to prevent the erosion of existing price levels;
- (g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;
- (h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market;
- (i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor;
- (j) acts or conduct of a person operating a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, that are specified under paragraph (2)(a); and
- (k) the denial by a person operating a domestic service, as defined in subsection 55(1) of the *Canada Transportation Act*, of access on reasonable commercial terms to facilities or services that are essential to the operation in a market of an air service, as defined in that subsection, or refusal by such a person to supply such facilities or services on such terms.

## CZECH REPUBLIC

### 1. Introduction

This paper describes the practice and instruments used by the Office for the Protection of Competition of the Czech Republic (hereinafter referred to as “the Office”) in cases where the need for restoration of effective competition arises as a result of an abuse of dominance by market players.

More than half of the abuse of dominance cases investigated by the Office since the beginning of its activity in 1991 concerned the **network industries**, especially the sectors of energy supply and telecommunications. The regular scenario in these cases presented a dominant owning the infrastructure facility and at the same time operating on the related markets. The abuses were typically committed in the form of **exclusionary practices**. One third of the Office’s actions in abuse of dominance cases concerned actions of undertakings on **local markets** where immediate negative impacts on final consumers resulted from **lack of alternative suppliers**. **This applied** especially in the area of energy supply, where the Office took measures against the local monopoly suppliers of electricity, gas and heat, which, for example, conditioned conclusion of contracts by reimbursing the debt of the preceding consumer or refused to conclude contracts for electricity supply.

Beside the abovementioned type of abuses, the Office dealt with cases varying from **tied sales** in the sector of non-alcoholic beverages production, through a refusal to supply in the petrochemical industry and application of different prices for the same services to a very rare case of abusing dominance in the form of the dominant’s **quiet life**<sup>1</sup> (in the area of cars’ spare part production).

The remedial measures applied by the Office for the sake of eliminating the impacts of anticompetitive actions may have had both behavioural and structural character. As the behavioural remedies were sufficient in all cases, no structural remedy has been applied until these days. The breaches in question concerned especially abuse of dominance by incumbents in energy and telecommunication sectors; the remedies were imposed especially in form of contract modification, ensuring access to infrastructure and restoration of supplies. In the predominant part of cases, a fine and a remedy were imposed simultaneously.

The Czech competition legislation allows sanctioning anticompetitive behaviour by a fine up to 10 million CZK (approximately 500,000 USD) or up to 10% of undertaking’s net annual turnover achieved during the last accounting period. The **basic amount of fine** is calculated on the basis of two main factors: gravity and duration of infringement. The basic amount of fine is **modified** according to further circumstances of infringement. **Aggravating factors** are especially the importance of the affected market, the estimated amount of profit resulting from the infringement, general estimation of number of affected consumers and subjective relation of the undertaking to the infringement. As **mitigating circumstances**

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<sup>1</sup> "Quiet life“ may be characterised as non-performance of all the effort, which may be reasonably demanded, by the dominant undertaking for minimising the negative impacts of its decision on its competitors or consumers. See e.g. the decision of the European Court of Justice in case C 179/90 Port of Genoa v. Gabrielli.

are considered e.g. cooperation of the undertaking with the Office, immediate termination of the anticompetitive conduct and refraining from other forms of abuse of dominance.

At the dawn of its functioning, the Office was imposing fines at the very lower level of the extent allowed by the Competition Act, mainly for the sake of cautious establishment of settled practice. The increase in the level of fines was only slow and gradual with respect to preserving legal certainty of the companies, which did not allow a major leap towards the maximum sanctions. The amounts of fine in that period varied from 0.01 to 0.8 percent from the undertakings' turnover. Even in the latter years the fines imposed did not exceed 5 percent limit. As it turned out especially in cases of abuses by incumbents, such fines did not perform their deterrent role satisfactorily<sup>2</sup>.

### *1.1 Case Study- Abuse of Dominance by the Telecommunication Incumbent*

The following example illustrates the “classical” approach of the Office to sanctioning of dominance abuses, including imposition of a fine and remedial measures.

In 2005, the Chairman of the Office imposed a fine on the incumbent in the telecommunication sector, company ČESKÝ TELECOM. Since 2002, ČESKÝ TELECOM had offered price plans intended for households and small entrepreneurs, which contained call credits or free minutes as part of a monthly flat rate. By bundling services together, ČESKÝ TELECOM prevented the development of competition on the relevant market, progress of existing alternative operators. As a consequence it limited the possibilities of consumers to obtain better services for competitive prices. The breach of competition rules concerned a larger number of price plans. The abuse of the dominant position by the ČESKÝ TELECOM consisted in bundling services together, i.e. the monthly flat rate offered on markets where it had a substantially dominant position and the services offered on markets where competitive environment was continually developing. ČESKÝ TELECOM thus ensured a fixed minimal part of income from the call charges and access to the Internet for itself in advance, regardless of the fact whether the customers consuming the price plans in question really used its services. An important fact is that the customers, by purchasing a price plan containing a call credit or free minutes, obtained certain calls “for free”, whereas these price plans were more advantageous for them. In case a customer telephoned less than the call credit or free minutes allowed, he or she had to pay the full monthly flat rate nonetheless, and the amount of payment did not reflect the fact that the call credit (free minutes) had not been fully used. The structure of the price plans in question did not enable division of the payment into the call charge and the lease of the telephone line. For this reason, the customers were less willing to call through networks other operators, as they did not want to lose something they obtained “for free” as part of the monthly flat rate. By this conduct, the competition in the telecommunication services was restricted.

The abovementioned behaviour of ČESKÝ TELECOM was assessed by the Office as an abuse of dominance in the form of **exclusionary practices**. The Office also concluded that this case comprised a breach of the Article 82 of the EC Treaty, as the alternative operators performed their activities also in other EU Member States and the trade between the Member States was appreciably affected.

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<sup>2</sup> In the period of 1994 to 2000, 21 abuse of dominance cases were dealt with by the Office. In 3 percent of them a fine was imposed in the amount of the material profit of the undertaking in breach of competition law. In almost 25 percent of cases the fine was based on the net turnover of the undertakings. In approximately 75 percent of cases the fine was imposed below the lower limit allowed by the Act (up to 10 million CZK – app. 500,000 USD)

## 1.2 *Setting the Fine*

The Office imposed on ČESKÝ TELECOM a fine amounting to CZK 205 million (app. 10 million USD). In setting the fine, the Office took account especially of the gravity of the infringement, which constituted a significant barrier to the development of other competitors' business in the **liberalised sector**. The fact was also considered that the Office repeatedly informed the incumbent about the anticompetitive aspects of the price plans. Nevertheless, the company continued to introduce new such plans even in the course of the administrative proceeding.

The party to the proceeding breached the Act **intentionally**, in the form of a non-direct intention, both to the detriment of its competitors and customers. A very significant aspect for the stipulation of the fine was the fact that the breach had been committed by an **entity already repeatedly sanctioned** for similar anticompetitive behaviour in the past. The fine in this case was set in amount aimed at performing both the repressive and preventive role and not being fatal for the party to the proceeding.

## 1.3 *Remedial measures*

Along with the fine, the party to the proceeding was imposed a behavioural remedial measure consisting in the duty to modify the price plans so that they would not have provided the call credit/free minutes as a part of the regular monthly lump sum for using the phone station. Another remedial measure took the form of a duty to cease provision of price plans, in the framework of which the party to the proceeding offered usually the first thirty minutes of operation in certain period for free and to cease application of favourable price for using the main phone station in case of price plans combined with the Internet Express Service. The party to the proceeding complied with all the remedial measures imposed. It also filed an action against the decision of the Office with the Regional Court in Brno.

Similar steps as in the abovementioned case were applied by the Office also in other cases. So it was in case of applying unreasonable conditions against contractual partners in selling the lottery tickets by company SAZKA or in the case of abuse of dominance by the incumbent telecommunication operator discriminating the alternative operators in providing services of intermediating the Internet services and transfer of data using the broadband ADSL technologies.

## 2. **Development of practice**

**The amendment to the Competition Act**, which came into force on 2 June 2004, following the adoption of the Council Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, introduced a new instrument enabling the Office to perform efficient solution of anticompetitive situations in an early stage of a case. The amendment established a possibility for the Office to issue a **decision on imposition of commitments proposed by the parties to the proceeding**. Such decision, conditioned by sufficiency of the commitments for elimination of the anticompetitive situation, enables ceasing the administrative proceeding without the need to issue a decision stating that a prohibited agreement had been concluded or that an abuse of dominant position had been committed. The Office adopted this instrument from the modernised EC competition law, as it held the opinion that such measure might enable faster remedy of a wrongful situation on the market and thus contribute to consumers' welfare.

In order to put this idea in practice, the Office initiates dialogue with the companies on the verge of breaching the competition law, using regularly the "statement of objections", and explains the advantages offered to the companies by the instrument of "commitments", newly introduced to the Czech competition law. As it was already indicated, fines and remedies are still available in cases, where the preventive

approach is impossible and/or where the dialogue between the Office and companies in breach of competition law on the possibility of remedies failed.

### **2.1      *Legal Aspects of Commitments***

The Office may impose on the **parties to the proceeding a duty to perform measures which they had jointly proposed**, if they are sufficient for the protection of competition and if they enable elimination of the wrongful situation. When the Office finds the proposed measure insufficient, it communicates the reasons for this finding to the parties to the proceeding and continues the proceeding. If the measures are found sufficient, the Office imposes, by its decision, a duty to perform them on the parties to the proceeding and ceases the proceeding. The remedial measures may be proposed to the Office within the 15 days following the day, when the Office delivered to the parties the objections against their behaviour; any latter proposals shall be considered only in cases worthy of special consideration.

It is presumed that companies should be interested in ensuring that the commitments are submitted and the proceeding is ceased as soon as possible, as the possible declaration of an anticompetitive action by the Office's decision **could be used against it in civil dispute on damages**. An important aspect of the commitments' application, is the fact that the situation of the entities affected by the anticompetitive behaviour is substantially complicated, as the decision of the Office on ceasing the proceeding does not declare the illegality of the behaviour in question. The affected third parties therefore cannot rely on solution of the preliminary question by the Office, whether an administrative tort was committed and by whom. Should the private claims for damages be applied in such a situation, the affected entities would have to prove by their own means that a breach of competition law was committed.

The companies are obliged by their commitments proposal vis-à-vis the Office and also vis-à-vis each other, or third persons. They may not proceed further in a way that is subject to the objections of the Office.

After ceasing the procedure the Office may reinitiate the proceeding and issue a decision on abuse of dominant position, if:

- the conditions decisive for issuing of the decision have substantially changed;
- the undertakings in question acted in breach of the imposed measures, or
- the decision was issued on the basis of incorrect or incomplete documents and information submitted by the undertakings.

Imposition of the measures proposed by the parties to the proceeding and ceasing the procedure may be used only in case, where the abuse of dominance did not result in substantial breach of competition. The legal regulation is generally conceived in favour of the undertakings, but also imposes considerable responsibility upon them.

### **2.2      *Case study – Abuse of Dominance by company Forests of the Czech Republic***

In 2005, an administrative proceeding was initiated in case of a possible breach of the Competition Act and the Article 82 of the EC Treaty by the state-owned company Lesy České republiky, s.p. (the Forests of the Czech Republic, hereinafter referred to as "the LCR"). The LCR terminated the contractual relationships with their suppliers concerning the forestry works by declaring the Contract on Performance of Growing Activities and on Sale and Purchase of Timber invalid and required a change of the

commercial relations into a system based on individual orders. New contractual partners would have been selected on the basis of tenders.

During the proceeding the Office established that the LCR had a dominant position on the market of growing activities, exploitation activities in the forest and on the market of raw timber. Furthermore, it was found that the activity of LCR resulted in significant uncertainty of their business partners on the basis of the LCR requirement to change the commercial relations into a system based on individual orders. This uncertainty was strengthened by a requirement of conclusion of new contracts in short terms not allowing the contractual partners to duly assess the proposed changes that were about to occur because of the unilateral action of the LCR and to adapt to the new situation.

By this behaviour, the LCR caused factual detriment to its contractual partners consisting in a temporary interruption of the forestry activities as well as non-material detriment, established by the uncertainty about further possibilities of cooperation with LCR, all to the prejudice of the investments already implemented by the affected companies.

### **2.3      *The commitments***

The party to the proceeding proposed to the Office adoption of measures and commitments, performance of which should have remedied the wrongful situation. The Office assessed the proposed commitments and concluded that performance of these commitments would eliminate further possible negative impacts of the LCR's activity on its contractual partners. The proposed measures were found sufficient for the protection of competition and elimination of the wrongful situation.

The Office accepted the measures proposed by the party to the proceeding. The LCR were imposed, by means of the Office's decision, a duty to continue the former contractual relationship. Furthermore, the LCR had to comply with the duty to perform the selection of all the contractual partners for the complex supply of growing and exploiting activity exclusively on the basis of transparent and non-discriminating tenders, the principles of which had been negotiated with the Office. Last, but not least, the LCR was also imposed a duty to present the content of the abovementioned measures on its Web pages within 10 days following the date of the legal force of the decision.

In line with the Act, the Office ceased the administrative proceeding. Such decision was allowed by the fact that the behaviour in question had not resulted in a substantial distortion of competition. The LCR complied with the abovementioned remedial measures.

Imposition of the measures proposed by the party to the proceeding enabled fast rectification of the wrongful situation. The possible damages to other competitors were therefore minimised. The decision of the Office came into legal force in a substantially shorter period than in a "classical" sanction proceeding concluded by fine, which almost always faces an appeal by the party to the proceeding. In case of an appeal, the decision of the Office remains without legal force and the party to the proceeding is not obliged to perform the imposed remedial measures.

### **3.          Relationship between remedies and commitments**

Both instruments used by the Office aim at elimination of negative consequences of prohibited behaviour. However, conditions for their use are different and using them pursues different objectives; **their sense therefore cannot be interchanged.**

As regards the preconditions for imposition of both instruments, commitments are proposed by the parties to the proceeding and the Office "only" accepts or rejects them. Use of remedies, however, falls

exclusively within the scope of the Office's discretion, which must not exceed the limits of the basic principles of administrative discretion, especially the principle of legality and proportionality.

The main difference between both instruments consists in the objective pursued by them. **The commitments** proposed by the parties to the proceeding must be of such character and intensity that their very performance may justify ceasing the administrative proceeding aimed at imposition of a fine for a behaviour considered and administrative tort, without the need to issue a decision that such a tort had been actually committed. Commitments are used in an extraordinary situation when, from the competition protection point of view, there is an objective possibility of immediate and complete solution of a wrongful situation established by anticompetitive behaviour. At the same time the interest in such a solution must prevail over the interest in punishing the undertaking in breach of competition law and the interest in the legal certainty of third persons.

The Office concludes on the basis of the abovementioned facts **that use of commitments must be subject to stricter conditions than imposition of remedies**, especially as regards accuracy, sufficiency and also the capability of achieving the preset goal in a short term.

**The remedial measures** are on the contrary a supplementary instrument that may be applied by the Office when it reaches the properly established conclusion that neither the very declaration of anticompetitive behaviour with its prohibition for the future, nor possible imposition of a fine are not sufficient for accomplishing the goal of the Competition Act. From the legal point of view, remedies imposed by the Office consist in imposition of duties specifying the duty to restore the situation existing before the breach of the Act, resulting from the parallel verdict on prohibition of certain behaviour and from the general duty to refrain from illegal action.

In case the Office does not find the proposed commitments sufficient it is still not prevented from imposing remedies similar to the proposed commitments as regards their form and content, along with declaration of anticompetitive character of the behaviour in question, prohibition of such conduct for the future and possible imposition of a fine. Such procedure is, as a matter of course, subject to meeting the legal preconditions and sufficient reasoning by the Office in its administrative decision.

#### **4. Conclusion**

Recently, there has been a major shift in the attitude of the Office towards dealing with anticompetitive practices. After years of the "classical" approach based on sanctioning of the undertakings convicted from the infringement of competition law only after it had been committed and going through the complete administrative proceeding, the Office now aims at eliminating the very roots of situations possibly resulting in distortion of competition. The position of the Office is that the "Competition Policeman", personified by competition authorities, should move from the shadows, where he has been waiting to catch "a thief" in the act, to a full daylight, thus preventing breaches of the law by his very presence and enforcement of rules in situation preceding serious administrative torts.

In line with this view, all the recent activities of the Czech Competition Office have been devoted to giving a clear positive signal to all qualified companies willing to cease their anticompetitive behaviour under favourable conditions. At the same time, the course to a significant increase in fines for undisputable infringements has been set. In other words, factual and focused prevention followed, when necessary, by efficient, timely and sensible competition enforcement outline the new policy of the Office. Such approach shall be based on balanced and reasonable use of the three powerful tools in the Office's hands, discussed in this paper - commitments, remedies, and sanctions.

## FRANCE

Le Président du Comité de la concurrence de l'OCDE a invité les délégations à adresser des soumissions en vue de répondre à 7 séries de questions qui tiennent aux objectifs poursuivis en matière de sanctions et remèdes dans le contexte des abus de position dominante, la recherche de l'outil le plus adapté en matière de remèdes, les conditions de suivi des remèdes imposés, les conditions d'établissement des sanctions, l'application de remèdes dans les secteurs de haute technologie et d'industries de réseau, la prise en compte des actions privées et l'expérience dans l'application de remèdes structurels et comportementaux.

### **1. Les objectifs poursuivis et l'adaptation des instruments à ses objectifs**

#### ***1.1 Un rôle dissuasif***

En matière d'abus de position dominante, comme en matière d'ententes, les interventions du Conseil de la concurrence ont pour objectif de dissuader les entreprises d'adopter des comportements qui ont pour objet ou pourraient avoir pour effet de fausser, restreindre ou empêcher le jeu de la concurrence. Les sanctions pécuniaires constituent alors l'instrument le plus adapté. Il faut que, compte tenu de la menace de sanction qui pèse sur tout comportement illicite, les entreprises en position dominante considèrent qu'elles n'ont pas intérêt à mettre en œuvre de tels comportements. C'est le cas si la sanction encourue est supérieure aux gains attendus de la pratique abusive.

Le caractère dissuasif des sanctions pécuniaires dépend donc de leur montant. Une plus grande efficacité de l'intervention du Conseil a été recherchée au cours des dernières années par le moyen d'un relatif alourdissement des sanctions infligées. La loi NRE du 15 mai 2001 a notamment rehaussé et élargi le plafond légal des sanctions, porté de 5% du montant du chiffre d'affaires hors taxes réalisé en France au cours du dernier exercice clos à 10 % du montant du chiffre d'affaires mondial hors taxes le plus élevé réalisé au cours d'un des exercices clos depuis l'exercice précédant celui au cours duquel les pratiques ont été mises en œuvre,

Le caractère dissuasif de la sanction dépend également de la probabilité de détecter les pratiques et donc de l'efficacité des mécanismes de contrôle et de surveillance mis en place par les pouvoirs publics. Schématiquement, si une entreprise retire un bénéfice de 100 euros de la pratique anticoncurrentielle et si la probabilité de se faire prendre est de 10 %, alors la sanction dissuasive s'élève à  $100/10\% = 1000$  €. Cette question, essentielle en ce qui concerne les ententes, d'autant plus dommageables qu'elles sont secrètes, se présente toutefois d'une façon différente s'agissant des abus de position dominante dans la mesure où la détection des pratiques est alors largement assurée par les concurrents victimes des pratiques d'exclusion.

#### ***1.2 Un rôle correctif***

Les interventions contentieuses du Conseil ont également pour objectif de rétablir des conditions de fonctionnement concurrentiel du marché. C'est la finalité du pouvoir d'injonction qui a été conféré au Conseil dès sa création en 1986. Des injonctions peuvent être prononcées par le Conseil en complément d'une sanction pécuniaire ou de façon isolée, à l'issue d'une procédure au fond, ou à titre conservatoire, dans le cadre d'une procédure d'urgence, prévue à l'article L. 464-1 du code de commerce. L'efficacité de

cet instrument est néanmoins étroitement lié à celui des sanctions pécuniaires qui peuvent être prononcées en cas de non respect de ces injonctions (article L. 464-3) et, depuis l'ordonnance du 4 novembre 2004, par la possibilité de prononcer des astreintes (article L. 464-2).

Cet aspect correctif de l'intervention du Conseil a été plus récemment renforcé avec la possibilité donnée au Conseil de recueillir les engagements des entreprises, que ce soit dans le cadre de la procédure de non contestation des griefs mise en place par la loi NRE de 2001, ou dans le cadre de la procédure d'engagements instaurée par l'ordonnance du 4 novembre 2004. Leur efficacité est également liée à celle des sanctions pécuniaires qui incitent les entreprises à offrir leur coopération au Conseil et qui peuvent être infligées aux entreprises qui ne respecteraient pas les engagements pris.

Ces instruments permettant de corriger les comportements sont spécifiquement adaptés aux comportements unilatéraux tels les abus de position dominante et non aux ententes, dont les plus dommageables sont de toutes façons conçues pour rester secrètes. S'agissant des engagements résultant de procédures négociées avec les entreprises, ils constituent des mesures mieux adaptées aux réalités de la vie économique que ne le seraient des mesures imposées par l'autorité de concurrence. En effet, la participation volontaire des entreprises à la définition des mesures correctrices permet de pallier les asymétries d'information entre les autorités de contrôle et les entreprises. Les engagements négociés sont de plus *a priori* mieux acceptés par les entreprises..

Le code de commerce prévoit également la possibilité de remédier à un abus de position dominante par une intervention sur la structure de l'entreprise en position dominante. L'article 430-9 dispose en effet que « *le Conseil de la concurrence peut, en cas d'exploitation abusive d'une position dominante ou d'un état de dépendance économique, demander au ministre chargé de l'économie d'enjoindre, (...) à l'entreprise ou à un groupe d'entreprises en cause de modifier, de compléter, ou de résilier dans un délai déterminé les accords ou actes par lequel s'est réalisée la concentration de la puissance économique qui a permis les abus* ». Cette disposition n'a cependant été utilisée par le Conseil qu'une seule fois depuis sa création, dans une décision 02-D-44 du 11 juillet 2002), relative à des pratiques mises en œuvre dans le secteur de la distribution d'eau et les mesures demandées n'ont à ce jour pas été prises.

## **1.2 Les sanctions pécuniaires**

Aux termes de l'article L. 464-2 du Code de commerce, le Conseil de la concurrence peut prononcer des injonctions et infliger des sanctions aux auteurs des pratiques incriminées, celles-ci étant proportionnées à la gravité des faits reprochés, à l'importance du dommage causé à l'économie, à la situation de l'entreprise sanctionnée ou du groupe auquel l'entreprise appartient et à l'éventuelle réitération des pratiques. Ces sanctions sont déterminées individuellement pour chaque entreprise sanctionnée et motivées.

Depuis la loi NRE le montant maximum de la sanction est 10 % du montant du chiffre d'affaires mondial hors taxes le plus élevé réalisé au cours d'un des exercices clos depuis l'exercice précédant, celui au cours duquel les pratiques ont été mises en œuvre. Si les comptes de l'entreprise concernée ont été consolidés ou combinés en vertu des textes applicables à sa forme sociale, le chiffre d'affaires pris en compte est celui figurant dans les comptes consolidés ou combinés de l'entreprise consolidante.

Les affaires d'abus de position dominante ne représentent que 20% des décisions de sanctions du Conseil depuis 1987 et le total des sanctions infligées à ce titre depuis la création du Conseil ne représente que 5% du montant total des sanctions infligées depuis cette date, soit près de 2 milliards d'euros. Toutefois, si les cas d'abus de position dominante sont moins nombreux, les entreprises concernées sont de taille plus importante et la sanction moyenne par entreprise est en conséquence plus élevée.

Le secteur principalement concerné par les sanctions pécuniaires infligées par le Conseil dans des affaires d'abus de position dominante est depuis quelques années le secteur des télécommunications, l'application du droit de la concurrence ayant joué, aux côtés de la régulation sectorielle, un rôle important dans l'ouverture de ce secteur à la concurrence.

Le Conseil a ainsi condamné France Télécom, dans une décision 05-D-59 du 3 novembre 2005, à une amende de 80 millions d'euros pour une pratique de refus d'accès à l'infrastructure essentielle que constitue la boucle locale et, en l'absence de dégroupage effectif jusqu'en 2002 de cette boucle locale, une partie du réseau de l'opérateur historique. Alors que l'accès à cette infrastructure était nécessaire aux opérateurs concurrents de France Télécom désireux d'offrir aux fournisseurs d'accès à Internet des prestations de transport du trafic haut débit échangé avec leurs abonnés, France Télécom leur a dans un premier temps refusé cet accès, puis le leur a proposé à un tarif excessif, générant un effet de ciseau tarifaire avec ses propres tarifs aux fournisseurs d'accès à Internet.

Le montant de la sanction a été justifié par le Conseil par la gravité de la pratique, liée notamment à la position stratégique conférée à France Télécom par la détention du réseau historique, qui lui donne la capacité de contrôler la structure et le niveau des coûts de ses concurrents et donc une responsabilité particulière sur les marchés concernés, dans le contexte général de l'ouverture du secteur des télécommunications à la concurrence et dans le cadre particulier du développement de nouvelles technologies et de nouveaux services, comme l'Internet et l'ADSL. L'importance du dommage causé à l'économie par cette pratique a été apprécié en tenant compte des effets et de la durée de la pratique, qui avait permis à France Télécom de se maintenir en situation de quasi-monopole sur le marché de gros du haut débit pendant près de trois ans, et empêcher le jeu de la concurrence dont auraient pu bénéficier les FAI sous forme d'innovations ou de baisses tarifaires.

Cette décision a fait l'objet d'un recours devant la cour d'appel de Paris.

Les autres secteurs concernés sont variés : alimentaire, construction, pompes funèbres, insémination, cinéma, télécommunication et édition.

**Tableau : sanctions pour abus de position dominante –  
répartition par secteur et montants en euros**

Secteur/année	2001	2002	2003	2004	2005
<b>Alimentaire</b>				5 000 000	2 500 000
<b>Télécoms</b>	6 097 960			20 600 000	81 000 000
<b>Edition</b>			600 000	60 000	620 000
<b>Insémination</b>				766 800	
<b>Construction</b>				700 000	
<b>Cinéma</b>				50 000	
<b>Services funèbres</b>			7 000	560 224	
<b>Chimie</b>			3 385 000		
<b>Santé</b>	304 898		7 000 000		
<b>Distribution d'eau</b>		0			500 000
<b>Publicité</b>		76 244			
<b>Assurance</b>	15 244				

### 3. Les injonctions au fond

L'injonction, qui consiste à ordonner le rétablissement d'une situation de concurrence, de faire cesser un trouble et d'éviter son renouvellement, joue un rôle essentiellement correctif.

S'agissant de corriger un abus de position dominante, les injonctions de faire ou de ne pas faire sont souvent complémentaires des sanctions pécuniaires. Les injonctions présentent l'intérêt d'agir directement sur les comportements, en indiquant précisément ce qu'il convient de faire pour faire cesser l'atteinte à la concurrence. Elles peuvent guider les entreprises quant aux mesures à adopter pour mettre fin aux infractions constatées.

L'efficacité des injonctions a été renforcée par l'ordonnance du 4 novembre 2004, le Conseil ayant désormais la possibilité, en vertu des dispositions du II de l'article L. 464-2 du Code de commerce, de prononcer des astreintes dans la limite de 5 % du chiffre d'affaires journalier moyen par jour de retard, pour contraindre les entreprises à exécuter une décision les ayant obligées à mettre fin aux pratiques anticoncurrentielles ou à exécuter une décision ayant imposé des conditions particulières ou à respecter les mesures prononcées à titre conservatoire en application de l'article L. 464-1.

Les injonctions constituent toutefois un instrument délicat à utiliser pour plusieurs raisons. D'une part, elles doivent être claires, précises et dépourvues d'ambiguïté. D'autre part, elles ne doivent pas excéder ce qui est strictement nécessaire pour faire cesser l'atteinte à la concurrence. La cour d'appel de Paris et la Cour de cassation veillent aussi au respect du principe de proportionnalité en ce qui concerne les injonctions prononcées par le Conseil.

Leur utilisation présente donc une difficulté, lorsque plusieurs solutions sont envisageables pour faire cesser le comportement anticoncurrentiel. Il ne relève pas du rôle du Conseil de se substituer au chef d'entreprise et de choisir entre plusieurs solutions qui, si elles se révèlent toutes adaptées pour résoudre le problème de concurrence, peuvent ne pas être équivalentes du point de vue des intérêts de l'entreprise. On verra ci-dessous que des engagements négociés et acceptés par les entreprises concernées présentent, de ce point de vue, un avantage par rapport aux injonctions prononcées unilatéralement par le Conseil.

Les injonctions apparaissent toutefois particulièrement nécessaires, lorsque l'atteinte à la concurrence résulte des stipulations d'un contrat toujours en vigueur à la date de la décision du Conseil. Le Conseil enjoint alors à l'intéressée de supprimer les clauses concernées. L'immixtion dans la stratégie de l'entreprise est alors limitée au strict nécessaire.

Par exemple, dans un arrêt du 15 juin 1999, la cour d'appel de Paris a « enjoint à la société Canal Plus de cesser de lier le préachat de droits exclusifs de diffusion télévisuelle par abonnement des films cinématographiques d'expression française récents à la condition que le producteur renonce à céder à tout autre opérateur les droits de diffusion télévisuelle de ces films pour la diffusion par un service de paiement à la séance, avant et pendant la période au cours de laquelle Canal Plus peut mettre en oeuvre l'exclusivité de la diffusion par abonnement ; Enjoint, par voie de conséquence, à la société Canal Plus de mettre son contrat type de préachat de droits exclusifs de diffusion télévisuelle par abonnement qu'elle propose aux producteurs de films en conformité avec l'injonction précédente, en modifiant notamment les articles 2, 6 et 7 de ce contrat type ».

De même, dans sa décision 04 D 49 relatif au secteur artificiel bovine, le Conseil a enjoint aux centres d'insémination artificielle de *supprimer les clauses de partage du marché* portant atteinte à la concurrence. En effet, le centre d'insémination subordonnait la délivrance de l'attestation nécessaire pour pratiquer une insémination, à la signature de conventions comportant des clauses anti- concurrentielles.

Les injonctions de faire ou ne pas faire ainsi que les sanctions pécuniaires peuvent être complétées par des injonctions de publication conformément à l'article L-464-2 CC. Elles sont donc subsidiaires aux sanctions ou engagements et ne peuvent suffire à elles-mêmes.

Le Conseil y recourt quand il considère qu'il y a nécessité d'informer tous les consommateurs en général ou un milieu professionnel bien spécifique, afin d'assurer les conditions de rétablissement du fonctionnement du marché par une bonne circulation de l'information.<sup>1</sup>

### **Typologie des injonctions imposée par le conseil de la concurrence depuis 1987**

#### ***- Injonctions d'abstention ou de ne pas faire relatives aux prix***

S'abstenir d'élaborer et de diffuser des prix  
 S'abstenir d'élaborer et de diffuser des barèmes de prix  
 S'abstenir de recommander ou imposer un prix conseillé  
 S'abstenir de recommander ou imposer un prix minimum  
 Cesser d'imposer un prix  
 Cesser de pratiquer une tarification globale  
 S'abstenir de toute intervention faisant obstacle à la fixation des prix par le marché et de toute concertation  
 Mettre fin à une discrimination dans les prix  
 Cesser de consentir des remises sur les prix

#### ***- Injonctions d'abstention non relatives aux prix***

S'abstenir de toute diffusion et de tout échange d'informations sur les marchés publics  
 Cesser les refus de vente  
 Mettre fin à une discrimination  
 Mettre fin à un boycott  
 Cesser toute pratique limitant le libre accès des tiers à un marché ou à des produits  
 Cesser de déterminer des quotas de vente  
 Cesser de faire application d'une convention d'exclusivité  
 Cesser de faire application d'une convention de non-concurrence  
 Cesser l'usage d'imposer un parrainage  
 Cesser de procéder à un partage de marché ou de clientèle  
 Cesser d'imposer une protection territoriale absolue  
 Cesser d'imposer l'adhésion à un contrat d'assurance  
 Cesser de déterminer des conditions de vente

#### ***- Injonctions de modification de dispositions contractuelles***

Supprimer ou réduire les clauses de non-concurrence  
 Supprimer les clauses de préférence  
 Supprimer les clauses de tacite reconduction  
 Supprimer les clauses d'exclusivité  
 Supprimer les clauses de remises quantitative

<sup>1</sup> Voir décision 03D35, 03D01, 01D41, 01D46..

Supprimer les clauses interdisant au revendeur de rétrocéder des produits à un autre revendeur agréé  
Supprimer les clauses permettant à un fabricant de supprimer les remises auxquelles ses revendeurs peuvent prétendre  
Supprimer une clause de résiliation liée à la politique de prix ou de marge du revendeur  
Supprimer les clauses anticoncurrentielles des Conditions générales de ventes  
Supprimer les clauses anticoncurrentielles des contrats de distribution  
Supprimer les clauses de protection territoriales absolues  
Supprimer les clauses de parrainage  
Suspendre l'application de certaines clauses  
Supprimer les clauses limitant l'autonomie des entreprises

**- Injonctions d'aménager des dispositions contractuelles**

Modifier les règlements intérieurs, les statuts, les cahiers des charges  
Modifier les contrats de distribution et de franchise  
Modifier les conditions générales de vente  
Modifier le texte d'une recommandation  
Modifier les conditions générales d'un contrat d'adhésion

**- Injonctions de modification des pratiques**

Orienter les tarifs vers les coûts  
Présenter une tarification dans des conditions objectives, transparentes et non discriminatoires  
Modifier les méthodes de calcul des prestations  
Mettre en place une tarification détaillée  
Dissocier deux types d'activité et les prix afférents  
Se plier à une obligation d'information  
Fournir une liste modifiée d'abonnés et proposer un service permettant la mise en conformité des fichiers  
Publier les catalogues de films disponibles à une fréquence correspondant au rythme de la programmation  
Respecter les engagements souscrits

**4. Le cas particulier des injonctions prononcées à titre conservatoire dans le cadre d'une procédure d'urgence (« mesures conservatoires »)**

Beaucoup des plaintes déposées devant le Conseil directement par des entreprises et dénonçant des pratiques mises en œuvre par un concurrent, dont elles soutiennent qu'elles constitueraient des abus de position dominante, sont assorties de demandes de mesures conservatoires, visant à faire cesser dans les plus brefs délais les pratiques d'exclusion dénoncées. Le Conseil ne peut prononcer d'injonctions dans le cadre d'une procédure d'urgence si l'entreprise plaignante ne demande pas expressément le bénéfice de l'article L.464-1 du code de commerce. En revanche, depuis la loi NRE de 2001, le Conseil peut accorder d'autres mesures que celles demandées par le plaignant s'il les estime nécessaires.

Les mesures conservatoires constituent un remède particulièrement adapté en cas de pratiques abusives mises en œuvre par une entreprise en position dominante dans la mesure où de telles pratiques sont souvent susceptibles, compte tenu de la puissance de marché de leur auteur, de porter une atteinte grave et immédiate à l'économie générale, à celle du secteur intéressé, à l'intérêt des consommateurs ou à l'entreprise plaignante, en réduisant sensiblement le degré de concurrence existant sur le marché ou en bloquant l'entrée sur ce marché. Il importe alors de faire cesser d'urgence ces pratiques avant qu'elles aient causé un dommage important à l'économie, l'action du Conseil s'inscrivant ainsi dans le temps économique réel.

La procédure de demande de mesures conservatoires a notamment été beaucoup utilisée dans le cadre de l'ouverture à la concurrence du secteur des télécommunications, secteur dans lequel la rapidité des évolutions concurrentielles et technologiques et les enjeux liés à l'importance des investissements consentis par les différents acteurs rendaient peu adaptée une procédure au fond nécessitant un temps d'enquête et d'instruction parfois long. Cette évolution a de plus été favorisée par l'assouplissement des conditions d'octroi des mesures conservatoires opéré par le Conseil et les cours supérieures à partir de 1998. Alors qu'auparavant seule la constatation de pratiques manifestement illicites pouvait justifier l'octroi de mesures conservatoires, des mesures ont ensuite été accordées au motif qu'il n'était pas exclu que la pratique soit abusive et qu'elle portait une atteinte grave et immédiate à l'économie générale, à celle du secteur intéressé, à l'intérêt des consommateurs ou à l'entreprise plaignante.

La Cour de cassation, dans un arrêt du 18 avril 2000 (France Télécom C/Numéricâble), a confirmé cet assouplissement. Elle a jugé que des mesures conservatoires pouvaient être accordées, même sans constatation préalable de pratiques manifestement illicites, dès lors que les faits dénoncés sont suffisamment caractérisés pour être tenus pour la cause directe et certaine de l'atteinte relevée. A partir de 2004, le Conseil a modifié la formulation jusque là utilisée en matière de mesures conservatoires en abandonnant sa motivation traditionnelle « *il n'est pas exclu que la pratique puisse constituer un abus* », jugée trop elliptique, pour adopter une motivation plus précise, celle de « *présomption raisonnable de pratique anticoncurrentielle* » qui a l'avantage de mieux refléter la nature des évaluations préliminaires des problèmes de concurrence qui étaient de fait requis pour l'octroi des mesures conservatoires. Cette adaptation de la motivation n'a toutefois pas changé la pratique décisionnelle qui reste alignée sur la jurisprudence « Numéricâble » de la Cour de cassation.

Les mesures conservatoires accordées par le Conseil ont ainsi joué un rôle important dans l'ouverture à la concurrence du secteur des télécommunication, par exemple en enjoignant à France Télécom de ne pas faire d'offres de téléphonie fixe couplant des prestations qu'il était encore le seul à pouvoir offrir, comme l'abonnement, et des prestations pour lesquels des offres concurrentes étaient disponibles, offres couplées que ses concurrents n'auraient pu répliquer (décision 00-MC-19, suspension de l'offre « Ma ligne France »).

Le développement des marchés émergents liés à la fourniture d'accès à Internet et notamment au haut débit s'est également appuyé sur plusieurs décisions de mesures conservatoires du Conseil. A deux reprises, le Conseil a ainsi suspendu des offres tarifaires de France Télécom sur le marché de détail, que ce soit l'offre tarifaire d'accès à Internet à destination des écoles et des établissements scolaires (décision n° 98-MC-03 du 19 mai 1998 relative à une demande de mesures conservatoires présentée par l'Association Française des Opérateurs privés de télécommunications) ou l'offre d'accès rapide à Internet par la technologie ADSL (décision n° 99-MC-06 du 23 juin 1999 relative à une demande de mesures conservatoires présentées par la société Grolier Interactive Europe/Online Groupe). Le Conseil a subordonné la commercialisation de ces offres à une condition de « *réplicabilité* », c'est-à-dire pour la première, à la possibilité pour les opérateurs concurrents de se connecter au réseau local de France Télécom pour construire une offre concurrente et, pour la seconde, à la possibilité effective pour les opérateurs concurrents de présenter leurs propres offres d'accès à Internet par la technologie ADSL. Le Conseil est également intervenu pour suspendre la commercialisation des packs ADSL de Wanadoo dans les agences commerciales de France Télécom, conditionnant celle-ci notamment à la possibilité pour les opérateurs alternatifs d'accéder aux mêmes informations que Wanadoo sur l'éligibilité des lignes téléphoniques à l'ADSL (décision n° 02-MC-03 du 27 février 2002 relative à la saisine et à la demande de mesures conservatoires présentée par la société T-Online France).

Plus récemment, il est intervenu dans les conditions du dégroupage (décision 04-MC-01 du 15 avril 2004 relative à la saisine et à la demande de mesures conservatoires présentées par les sociétés Free, Iliad, LDCOM et 9 Télécom) et a accordé des mesures conservatoires destinées à mettre fin à l'atteinte grave et

immédiate portée au marché de la téléphonie mobile des Caraïbes du fait de pratiques mises en œuvre par la filiale de France Télécom, Orange Caraïbes, dont il pouvait être raisonnablement présumé qu'elles étaient abusives (décision 04-MC-02).

L'autre secteur ayant fait l'objet de mesures d'urgence est celui de la distribution de la presse, fortement concentré (décisions 03-MC-04 et 06-MC-01).

Les critères d'octroi de mesures conservatoires restent toutefois relativement restrictifs, s'agissant de la constatation d'une atteinte grave et immédiate. Le Conseil considère ainsi qu'un simple manque à gagner de l'entreprise plaignante, à le supposer démontré, est insuffisant à lui seul pour justifier l'octroi de mesures conservatoires. De plus, comme cela a déjà été souligné ci-dessus s'agissant des injonctions au fond, elles doivent être claires, précises et dépourvues d'ambiguïté et rester proportionnelles à ce qui est strictement nécessaire pour faire cesser l'atteinte à la concurrence. De plus, la réactivité et les enjeux financiers des secteurs des technologies de l'information, dont on a souligné ci-dessus qu'elles rendaient car les mesures suggérées ne sont pas toujours réversibles et sont à leur tour susceptibles de causer une atteinte grave à l'économie. Comme l'a souligné dernièrement le Président du Conseil de la concurrence *« si le Conseil impose par exemple, à un fabricant de logiciels de communiquer ses codes sources à ses concurrents, il ne pourra plus revenir en arrière, même si la décision au fond lui donne raison »*<sup>2</sup>

## **5. Les sanctions pour non respect d'injonctions.**

La vérification du respect de l'injonction est systématiquement faite par les services de la DGCCRF. Elle peut déboucher sur une procédure de non respect d'injonction et sur une sanction, conformément aux dispositions de l'article L. 464-3 du Code de commerce, alors qu'en l'absence d'injonctions, la poursuite par le contrevenant du comportement infractionnel ne pourrait être sanctionnée que dans le cadre d'une nouvelle procédure au fond.

Le non respect d'une injonction prononcée par le Conseil est jugé, en soi, exceptionnellement grave, ainsi que l'a rappelé la cour d'appel de Paris dans un arrêt du 11 janvier 2005, statuant sur la décision 04-D-18 du 13 mai 2004 concernant l'exécution de la décision 00-MC-01 du 18 février 2000 relative à une demande de mesures conservatoires présentée par la société 9 Télécom Réseau. La cour a, dans cet arrêt, souligné l'exceptionnelle gravité du comportement de l'entreprise mise en cause en doublant la sanction qui avait été infligée par le Conseil de 20 à 40 millions d'euros. La cour avait également, dans un arrêt du 6 avril 2004, confirmé la sanction de 40 millions d'euros infligée par le Conseil à France Télécom, dans la décision 03-D-43 du 12 septembre 2003 relative au respect des injonctions prononcées par la cour d'appel de Paris dans son arrêt du 29 juin 1999. Cette sévérité est justifiée par le fait que le non respect des injonctions prononcées par le Conseil met en cause l'effectivité même du droit de la concurrence.

## **6. Les engagements : nouveaux instruments procéduraux pour une intervention plus réactive et plus efficace du Conseil de la concurrence**

Dans une décision du 30 novembre 2004<sup>3</sup> le Conseil a indiqué que « le prononcé de sanctions et l'acceptation d'engagements pris par les entreprises sont, pour le Conseil de la concurrence, deux outils qui, s'ils ne correspondent pas aux mêmes situations économiques et n'ont pas les mêmes effets, répondent au même objectif de rétablissement et de maintien pour l'avenir d'une situation normale de concurrence : dans un premier cas, des sanctions significatives dissuadent l'entreprise d'éventuellement réitérer et, dans le second, les engagements préfigurent une modification substantielle et crédible des comportements de l'entreprise et l'abandon de ses pratiques anticoncurrentielles »

<sup>2</sup> Bruno Lassere Conc Actualité expresse N 487 31 mars 05

<sup>3</sup> 04-D-65

L'ordonnance n° 2004-1173 du 4 novembre 2004 a conféré au Conseil de la concurrence le pouvoir d'accepter des engagements, aligné sur ceux de la Commission européenne et de la plupart des autorités de concurrence européennes, dans la perspective d'un fonctionnement équilibré du réseau constitué par ces autorités.

Cette procédure, indépendante de toute reconnaissance des griefs élargit véritablement les outils d'intervention du Conseil et notamment son pouvoir de régulation des marchés. Elle permet au Conseil de la concurrence d'« *accepter des engagements proposés par les entreprises ou organismes et de nature à mettre un terme aux pratiques anticoncurrentielles* » et de clore ainsi l'affaire sans ouvrir une phase contentieuse *stricto sensu*, en privilégiant l'efficacité et la rapidité de l'action. Les engagements sont toutefois rendus obligatoires par la décision du Conseil pour les entreprises qui les ont souscrits et des sanctions pécuniaires et des astreintes peuvent être prononcées s'ils ne sont pas respectés. La probabilité de respect semble toutefois plus forte lorsque ce sont les entreprises elles mêmes qui s'engagent.

Le Conseil de la concurrence a déjà appliqué cette procédure à six reprises, ce qui témoigne de son attractivité. Au terme d'une année de pratique, les six affaires tranchées par le Conseil permettent de dessiner un profil type des pratiques pouvant bénéficier de la procédure d'engagements : il s'agit principalement de pratiques unilatérales commises par un opérateur en position dominante, n'ayant pas cessé au jour de la prise des engagements et pour lesquelles les sanctions pécuniaires n'apparaissent pas être la voie la plus appropriée. Ces affaires ont notamment soulevé la question l'accès à des ressources rares détenues par un opérateur en position dominante et actif sur un marché aval.

Si, contrairement à la Commission européenne, le Conseil de la concurrence n'a pas la possibilité d'imposer des mesures correctives de nature structurelle, mais seulement comportementale quand il fait usage de son pouvoir d'injonction traditionnel, il peut, dans la procédure d'engagements, accepter des mesures proposées par les entreprises des deux natures. En pratique, les engagements rendus obligatoires par le Conseil de la concurrence ont été essentiellement comportementaux, même si certains d'entre eux pourraient être qualifiés de quasi-structurels. Il en a été notamment ainsi, quand les engagements ont porté sur la cession d'une licence d'exploitation d'un droit d'auteur<sup>4</sup> ou sur la modification substantielle des règles d'organisation ou de fonctionnement d'une entreprise<sup>5</sup>, telle l'intégration d'une entreprise dans une mesure nationale d'audience, la modification des statuts de la SACD permettant le fractionnement des apports de droits, ou encore sur la modification de la structure des barèmes de distribution de la presse en Nouvelle-Calédonie et en Polynésie.

De fait, bien qu'elle ait été pour le moment peu utilisée dans le secteur des communications électroniques, cette procédure pourrait constituer, comme les mesures conservatoires, un instrument correctif particulièrement adapté aux pratiques abusives dénoncées dans ce secteur, la vigilance de l'ensemble des acteurs conduisant la plupart du temps à porter les conflits devant les autorités de la concurrence avant même que les pratiques en cause ne reçoivent un début d'application. Elle constitue donc un ajout utile aux instruments dont bénéficie le Conseil à l'heure où les nouveaux bouleversements en cours (TV sur IP, renseignements téléphoniques, convergence media/communications électroniques, troisième génération mobile, TV sur mobile, TNT, consolidations dans le secteur des communications électroniques et des médias) et le basculement progressif vers le droit commun pourrait conduire à une recrudescence des contentieux.

<sup>4</sup> Voir la décision 05-D-25 du 31 mai 2005 relative à des pratiques mises en œuvre par la société Yvert & Tellier, précitée.

<sup>5</sup> Voir les décisions 05-D-12 du 17 mars 2005, EUROPQN, et 05-D-29 du 16 juin 2005 relative aux pratiques des « Haras Nationaux », précitées.

Les engagements pourraient ainsi, s'agissant des pratiques abusives dans les secteurs de haute technologie et les industries de réseau, s'insérer entre une procédure contentieuse que la complexité des problèmes posés et l'ampleur des enjeux financiers rend longue et « jusqu'au boutiste » (recours systématique en Cour d'appel et bien souvent ensuite devant la Cour de cassation), d'une part, et la résolution des conflits dans le cadre d'une négociation privée, d'autre part, la saisine du Conseil assortie d'une demande de mesures conservatoires n'étant alors qu'un moyen de pression et le succès de la négociation se traduisant par le désistement de la plaignante.

## GERMANY

### 1. Legal Instruments

The Bundeskartellamt has a variety of legal instruments and powers at its disposal to address abusive conduct. These powers have been strengthened and extended by the 7th amendment of the German Act against Restraints of Competition (ARC) which entered into force on 1 July 2005. The act provides the Bundeskartellamt and the competition authorities of the *Länder* with the following legal instruments:

#### 1.1 *Finding and termination of an infringement (§ 32 ARC)*

§ 32 ARC provides that the competition authority may impose all measures which are necessary to effectively bring the antitrust infringement to an end and which are proportionate to the infringement established. The Bundeskartellamt may therefore impose structural and behavioural remedies in abuse cases. To the extent that a legitimate interest exists the competition authority may also declare that an infringement has occurred after an infringement has been brought to an end. In cases of urgency the authority may order interim measures *ex officio* if there is a risk of serious and irreparable damage to competition (§32a ARC).

#### 1.2 *Commitment decision (§ 32b ARC)*

§ 32b establishes the instrument for making the commitments of the undertakings binding (as in Art. 9 of Regulation 1/2003). § 32b reads: Where, in the course of antitrust proceedings under § 32, undertakings offer to enter into commitments which are capable of dispelling the concerns communicated to them by the cartel authority upon preliminary assessment, the cartel authority may by way of a decision declare those commitments to be binding on the undertakings.

#### 1.3 *Settlements*

In practice many abuse of dominance cases are concluded with a settlement. The proceedings against the company concerned are discontinued and in return the company undertakes a written agreement to meet certain commitments. Where the company does not meet the commitments the Bundeskartellamt may resume the abuse proceedings and conclude them with a prohibition decision or decision subject to conditions. This procedure therefore resembles that of the formal decision under Section 32b. One example where proceedings were discontinued subject to conditions was the gas price abuse case (see below).

#### 1.4 *Skimming off the profit from the illegal conduct (§ 34 ARC)*

If an undertaking has intentionally or negligently violated an antitrust provision or a decision of the cartel authority and thereby gained an economic benefit, the competition authority may order – in an administrative proceeding – the skimming off of the economic benefit and require the undertaking to pay a corresponding amount of money. However, the undertaking shall not be obliged to transfer the additional revenue to the Cartel Authority if such additional proceeds have been skimmed off by payments for damages pursuant to civil actions or a fine.

### **1.5 Fines (§ 81 ARC)**

The Bundeskartellamt has the power to impose a fine on undertakings for breaching abuse provisions. The abuse of a dominant position is considered to be an administrative offence and may be punished, if committed intentionally or negligently, by a fine up to EUR 1 million or, if a fine is imposed on an undertaking or an association of undertakings, by a fine up to 10 percent of the total turnover of the undertaking in the preceding business year. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

In addition to the sanctions available to the German competition authorities, private enforcement also plays an important role:

### **1.6 Civil actions (§ 33 ARC)**

Third parties may initiate legal proceedings against abusive enterprises with the aim of obtaining injunctive relief or of recovering – if the abuse is conducted wilfully or negligently – actual, though not punitive, damages (§ 33 ARC). In Germany, many abusive practices are addressed by private law suits. Each year numerous private law suits against abusive practices are brought before the courts. Most of these claims aim at a court order to refrain from exclusionary conduct or at an obligation to deal on non-discriminatory and/or non-exclusionary terms and conditions.

### **1.7 Skimming off of benefits by associations and institutions (§ 34a ARC)**

In addition to the competition authorities, other associations and institutions are under certain conditions also entitled to claim the skimming-off of benefits through the courts. Whoever intentionally commits a competition law infringement and thereby gains an economic benefit at the expense of multiple purchasers or suppliers may be required by such associations to surrender the economic benefit to the federal budget, to the extent that the cartel authority does not order the skimming off of the economic benefit.

## **2. Objectives and general policy**

The primary objective of remedies in dominance cases is – in the view of the Bundeskartellamt – to restore the competitive conditions that would have existed but for the unlawful conduct. As the objective of the abuse provisions is the protection of competition (as a means of enhancing an efficient allocation of resources and of enhancing consumer welfare) the Bundeskartellamt aims to protect competition – not competitors - by imposing appropriate remedies in abuse cases. To create a market that is as competitive as possible is a wishful goal but the Bundeskartellamt restricts itself to protecting competition and not deciding which market structures or results are optimal.

Most of the abuse of dominance cases which the Bundeskartellamt handles are therefore about eliminating artificial barriers to entry – in other words they concern exclusionary conduct. There are several reasons for this focus. Firstly, this policy is based on the knowledge that in the medium and long term, open markets will lead to market entry and thus increased competition to the benefit of consumers. Secondly, exclusionary conduct is easier to identify and remedy than the indirect effects of these artificial entry barriers (such as e.g. higher prices, lower output, less innovation, etc.). Thirdly, reducing or eliminating artificial entry barriers created by the exclusionary conduct of dominant undertakings, is less intrusive as it does not require the competition authorities to mandate certain market outcomes. Also, it avoids the need for ongoing interventions as competition itself will in the medium and long term lead to efficient market outcomes. Nevertheless, in special cases the Bundeskartellamt also addresses non-exclusionary practices such as exploitative pricing.

In general, the primary objective of the Bundeskartellamt in abuse of dominance cases is to seek legal clarity and to bring the infringement to an end. Conversely, the deterrent effect of punishing violators through fines plays an important role but is not the key factor in abuse cases. Most of the abuse proceedings of the Bundeskartellamt conclude with a prohibition and remedies decision and not with a fine decision. Fine decisions are generally regarded to be more appropriate against hard-core cartels rather than in abuse cases. One reason for this approach is that abusive practices are easier to detect than hard-core cartels, so that the sanctions and remedies have to take into account that abusive practices go less frequently undetected if compared to cartels. Another reason is that in the area of abusive practices it is sometimes hard to distinguish between aggressive lawful behaviour and illegal anti-competitive behaviour, so that the sole purpose of a proceeding might be to “only” seek legal clarity.

Where a fine proceeding is not warranted, the Bundeskartellamt considers it important to skim off the economic benefit of a company gained by the abusive conduct. § 34 of the German Competition Law empowers the Bundeskartellamt to skim off any profit from a company’s unlawful conduct in an administrative proceeding (see above).

### **3. Choosing and monitoring remedies**

In general, the appropriate remedies are chosen according to the general objectives and the policy goals in the area of abusive practices as set out above. The key criterion in choosing an appropriate remedy is the principle of proportionality, which seeks to impose remedies which are proportionate to the infringement established. The Bundeskartellamt thus aims at remedies that are not overly intrusive, keep markets open, bring the infringement to an end and lead to optimal deterrence (neither over-deterrence nor under-deterrence).

The remedies are chosen and monitored by the Decision Divisions of the Bundeskartellamt which are responsible for all the proceedings in a certain sector. The case handlers who work several years in a Decision Division have a profound knowledge of the market, its structure and its players. They draft the remedies and are also best placed to monitor the implementation and effectiveness of the imposed remedies. They are supported by the General Policy Department which evaluates the remedies across the different branches.

Before imposing certain remedies on dominant companies the Bundeskartellamt generally asks the parties to the proceedings (who are mainly competitors, customers and other market players) if they consider the proposed remedies to be effective and sufficient. This is a kind of “market test” remedies have to undergo before being imposed by the Bundeskartellamt.

In general, in dominance cases behavioural remedies are more appropriate to impose than structural remedies, although remedies eliminating artificial entry barriers can be viewed as remedies which are behavioural in nature but structural in effect. One of the reasons why behavioural remedies are more appropriate in abuse proceedings is that abuse provisions aim at monitoring conduct whereas merger control aims at monitoring structures. Consequently, structural remedies should generally be imposed in merger control cases, whereas behavioural remedies are the more appropriate remedy in abuse cases.

### **4. Setting fines**

For the reasons indicated above the Bundeskartellamt conducts proceedings against the abuse of a dominant position almost entirely in the form of administrative proceedings which can be concluded with a prohibition decision or a commitment decision (if a violation can be proved). Abuse proceedings are rarely conducted in the form of administrative fine proceedings, which are concluded with a decision imposing a fine. Since many abuse proceedings raise new legal issues or concern marginal cases from an economic or

legal point of view, a prohibition or commitment decision is often more appropriate than a decision imposing a fine. Where a more severe sanction is required the Bundeskartellamt also imposes fines as a deterrent.

## 5. Selected recent cases

Below are five recent abuse of dominance cases reported. These cases illustrate both the enforcement focus of the Bundeskartellamt as well as the diversity in remedies chosen.

<i>Case</i>	<i>Type of abuse</i>	<i>Type of remedy</i>
<i>E.ON Ruhrgas, 2006</i>	<i>Exclusionary conduct</i>	<i>Cease and desist order</i>
<i>Deutsche Post, 2005</i>	<i>Exclusionary conduct</i>	<i>Cease and desist order</i>
<i>Soda Club, 2006</i>	<i>Exclusionary conduct</i>	<i>Cease and desist order</i>
<i>Gas prices, 2006</i>	<i>Excessive pricing</i>	<i>Settlement</i>
<i>Fuchs spices, 2006</i>	<i>Exclusionary conduct</i>	<i>Fine decision</i>

### 5.1 *E.ON Ruhrgas, 2006: Market foreclosure by long-term gas supply contracts*

In January 2006, the Bundeskartellamt prohibited E.ON Ruhrgas' long-term gas supply contracts with distributors. In this prohibition decision the Bundeskartellamt informed E.ON Ruhrgas AG that its gas supply contracts with distributors in their combination of long-term purchase obligations and high degree of requirement satisfaction violated European and German competition law. The Bundeskartellamt concluded that binding gas distributors by long-term supply contracts had a foreclosure and thus price-raising effect because it prevented the market entry of newcomers and deprived third providers of supply possibilities for years.

The Bundeskartellamt thus prohibited E.ON Ruhrgas' long-term contracts with distributors which cover more than 80 per cent of their actual gas requirements. These contracts are to be terminated at the latest by the end of the current gas year on 30 September 2006. As regards the conclusion of new contracts with regional and local gas companies, those contracts are to be prohibited which run for more than four years and which cover more than 50 per cent of actual gas requirements, or which run for more than two years and cover more than 80 per cent of requirements. In order to prevent circumvention, multiple supply contracts between the supplier and the customer are to be considered as one individual contract. Tacit extension clauses are also prohibited.

When a consensus was not reached at the end of September 2005 and the Bundeskartellamt threatened the company with prohibition proceedings, E.ON Ruhrgas offered a voluntary declaration of self-commitment. However, the offer not only included a later opening-up of contracts in 2008, it also left many aspects open or unregulated, such as contract stacking, which opened up circumvention possibilities. In the

Bundeskartellamt's view the offer did not go far enough to remedy the anti-competitiveness of the gas contracts. Rather, there was still the danger that the self-commitment offer would do nothing to change the

market-foreclosure effect of current contract practice. At the same time the proposals showed that E.ON Ruhrgas would not bring the anti-competitive practice to an end of its own accord.

E.ON Ruhrgas filed an appeal against the decision of the Bundeskartellamt.

## **5.2 *Deutsche Post, 2005: Hindering competitive entry of “mail consolidators”***

In February 2005, the Bundeskartellamt prohibited Deutsche Post AG from hindering or discriminating against rival small and medium-sized providers of postal services in their so-called “mail preparation services.” The mail preparation services concerned included in particular the collection and pre-sorting of letters and the feeding of mail items weighing under 100 grammes into Deutsche Post’s sorting centres.

Previously, Deutsche Post awarded discounts of 3 to 21 per cent for these services only to its own major customers and also PostCon Deutschland as a registered cooperative. However, with this practice of awarding discounts Deutsche Post was hindering the market entry of competitors (so-called “mail consolidators”) in the collection, pre-sorting and feeding-in of letters. Small customers generally do not reach the minimum volumes of letters required by Deutsche Post to qualify for such discounts, but they can reduce their postage costs through the activities of the mail consolidators.

In its examination of the case the Bundeskartellamt came to the conclusion that this practice of the Deutsche Post violated German and European competition law. As a dominant company it may not treat providers of mail services feeding in letters from only one large customer and so-called mail consolidators feeding in letters from various (smaller) customers differently without justification. It may also not discriminate between consolidators, i.e. grant benefits to a cooperative which it refuses another consolidator. Furthermore Deutsche Post may not hinder consolidators by refusing them access to the partial services of letter conveyance and delivery (without collection, presorting and feeding-in) without any objective justification. The sender’s address on the letters is of no significance whatsoever as regards the provision of conveyance and delivery services.

According to the Bundeskartellamt’s decision Deutsche Post AG has in future to grant discount for the feeding-in of pre-sorted bulk mailings into its mail sorting centres even where competitors collect and sort letters from different senders to ultimately hand these over to Deutsche Post AG bundled (“consolidated”).

## **5.3 *Soda-Club, 2006: Excluding competitors from refilling CO<sub>2</sub> cartridges***

In February 2006 the Bundeskartellamt prohibited Soda-Club GmbH from preventing competing suppliers from refilling CO<sub>2</sub> cartridges for water carbonating machines by claiming its ownership of the cartridges. The Bundeskartellamt considered the behaviour of Soda-Club to be an exclusionary abuse and a violation of the German and European provisions against an abuse of a dominant position. Soda-Club was dominant in the market for refilling CO<sub>2</sub> cartridges with a market share of more than 70%. Hindering competitors from refilling CO<sub>2</sub> cartridges represented an abuse of this dominant position. By this conduct Soda-Club prevented consumers from taking advantage of alternative refilling possibilities. On appeal for interim measures the Düsseldorf Higher Regional Court in April 2006 confirmed the Bundeskartellamt’s decision in all its material respects.

## **5.4 *Gas prices, 2006: Exploitative abuse in gas supply of end consumers***

At the end of January 2006, after strong price rises since the previous October, the Bundeskartellamt instituted abuse proceedings against seven national gas providers on suspicion of their charging end consumers abusively excessive prices.

A nationwide survey on gas prices conducted by the Bundeskartellamt and the competition authorities of the *Länder* at more than 700 gas providers had identified price differences of more than 40 per cent between the least and the most expensive providers. Private consumers had not only complained about the high prices but also about the fact that they were not free to switch gas providers.

The companies undertook in writing to offer private customers the possibility to switch providers from 1 April 2006. As a consequence, the Bundeskartellamt decided in February 2006 to discontinue the proceedings. The Bundeskartellamt considered this remedy to be superior to price abuse control. The freedom of choice of consumers is one of the principles of the free economic and social system and the remedies were expected to arrive at a more rapid and less intrusive solution. If consumers have an effective opportunity to switch providers this would stimulate competition in general.

The possibility to change provider runs under the rubric “provision”, a market-opening regulation which is already applied in the telecommunications sector and electricity market. This practically involves a “triangular relationship”. The private end consumer concludes a supply contract with the new supplier, who in turn buys the gas from an established local network operator on the basis of a “provision” contract.

#### **5.5 *Fuchs spices, 2006: Systematically driving competitors out of the market through exclusivity agreements***

In May 2006, the Bundeskartellamt imposed a fine of 250,000 € against TEUTO Gewürzvertrieb GmbH (TEUTO) for violating a prohibition decision of the Bundeskartellamt dating back to July 2002. TEUTO belongs to the Fuchs group. Fuchs is the clear market leader in Germany and Europe. The company sells dried spices and herbs in household packages under several brand names to food retailers in Germany via the distribution company TEUTO. With a market share of more than 70 per cent Fuchs has a dominant position on the German markets.

In 2002 the Bundeskartellamt prohibited the Fuchs group from unfairly impeding the business activities of Hartkorn, one of the few remaining small competitors. The impediment amounted to systematically forcing competitors out of the market by paying retailers high contributions to advertising costs, which induced them to agree to stock exclusively Fuchs products.

According to the Bundeskartellamt’s investigations at least five violations of the prohibition decision were committed by TEUTO sales representatives after the decision had been issued in July 2002. TEUTO’s sales representatives had no longer enforced exclusivity upon the retailers they supplied on a written basis but had either agreed this verbally or de facto enforced it by the manner in which the provisions of the supply agreements were formulated. As an incentive for granting exclusivity to the detriment of Hartkorn, the retailers received unrivalled contributions to advertising costs in the form of payments and/or services in kind (of economic value) such as in particular the free supply of basic fittings, i.e. shop shelves filled with spices.

## JAPAN

### 1. Introduction

Unilateral Conduct is regulated by two regulatory means, that is, through Private Monopolisation and Unfair Trade Practices under the Antimonopoly Act (AMA).

Regarding remedies and sanctions, the AMA provides (a) elimination measures, (b) surcharges, and (c) criminal sanctions for Private Monopolisation and elimination measures for Unfair Trade Practices.

The following describes the regulations on unilateral conduct under the AMA. After illustrating the remedies and sanctions for each regulation, we will focus on 3 case studies and will examine the remedies carried out by the Japan Fair Trade Commission (JFTC) in each case.

### 2. Regulations on unilateral conduct under the AMA

#### 2.1 *Private Monopolisation (Section 3 of the AMA)*

Private Monopolisation is prohibited as stated in Section 3 of the AMA. It is defined in Section 2 (5) as: “such business activities, by which any entrepreneur, individually or by combination or conspiracy with other entrepreneurs, or in any other manner, excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.”

“Exclusion” in this definition is interpreted as making it difficult for other firms to continue their business activities or preventing other firms from entering the market. “Control” in this definition is interpreted as depriving other firms of their freedom of decision-making concerning their business activities and forcing them to obey the controller’s desire.

Concerning “substantial restraint of competition”, the Tokyo High Court ruled that “substantially to restrain competition means to bring about a state in which competition itself has significantly decreased and a situation has been created in which a specific firm or a group of firms can control the market by determining price, quality, volume, and various other terms with some latitude of its or their own volition.”<sup>1</sup>

In other words, the AMA’s Private Monopolisation regulates not only conduct controlling and eliminating other firms by a firm that has a dominant position in a market but also obtaining a dominant position in a market by controlling and eliminating competitors from the market.

The provision in the AMA concerning Private Monopolisation does not refer to the position of a firm in a market. In determining whether a conduct falls under Private Monopolisation, there are no specific criteria on the market share of a company and the existence of market power should be decided comprehensively, taking various circumstances into account. It is natural to consider that a firm, which can control the market with some latitude of its own volition by excluding or controlling the business

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<sup>1</sup> Case against Toho Co.Ltd. and another company (Tokyo High Court Decision, December 7, 1953.)

activities of other firms, is usually required to have a certain dominant position in the market (Reference to after-mentioned “4. Case Studies” regarding concrete examples of the determination of a violator’s position in a market).

**2.2 *Unfair Trade Practices (Section 2 of General Designation of Unfair Trade Practices (Other Refusal to Deal), 11 (Dealing on Exclusive Terms), 13 (Dealing on Restrictive Terms), 14 (Abuse of Dominant Bargaining Position), 15 (Interference with a Competitors’ Transaction) etc.)***

Unfair Trade Practices are prohibited in Section 19 of the AMA. Unfair Trade Practices refer to conduct which tends to impede fair competition, and which are designated by the JFTC.

Regulations against the aforementioned Unfair Trade Practices target those typical behaviors which are used to create monopolies by controlling and eliminating competitors and are aimed at prohibiting monopolies at an incipient level. An illegal activity falls under the Unfair Trade Practices if such an illegal activity “tends to impede fair competition,” which fails to reach the criterion of “substantial restraint of competition,” which should be shown to prove Private Monopolisation. Therefore, a firm that is not subject to the regulations of Private Monopolisation because it does not have enough power to obtain a dominant position in a market may be subject to the regulations of Unfair Trade Practices if it engages in conduct that falls under the provisions of Unfair Trade Practices.

Concerning some of the illegal activities designated as Unfair Trade Practices, whether a firm is influential in a market or not is considered as one of the determining factors in recognising the existence of a violation. (Guidelines Concerning Distribution Systems and Business Practices<sup>2</sup>).

Conduct by an influential firm is considered to be illegal as a form of Unfair Trade Practices if 1) the firm engages in transactions with its trading partners on the condition that the trading partners shall not deal with the firm’s competitors, or if 2) it causes the trading partners to refuse to deal with competitors, and if such conduct may result in reducing the competitors’ business opportunities and making it difficult for them to easily find alternative trading partners (Section 11 (Dealing on Exclusive Terms), or 13 (Dealing on Restrictive Terms) of the General Designation).

This approach is based on the viewpoint that, in the case of a firm ranked low in the market share or newly entered on the market, the conduct usually would not result in reducing the competitor’s business opportunities or making it difficult for them to find alternative trading partners. Whether a firm is “influential in a market” is judged by, among others, the firm’s market share, that is, whether it holds no less than 10% of the market or its position is among the top three in the market (meaning a product market which consists of a group of products with the same or similar function and utility as the product covered by the conduct, and which competes with other firms based on geographical conditions, transactional relations, etc.).

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<sup>2</sup> The Guidelines were made public on July 11th, 1991. Available at <http://www2.jftc.go.jp/e-page/legislation/ama/distribution.pdf>

### 3. Remedies for Private Monopolisation and Unfair Trade Practices

#### 3.1 *Private Monopolisation*

##### 3.1.1 *Elimination Measures (Section 7 of the AMA)*

###### Contents for cease and desist order

Elimination measures are administrative remedies to eliminate an existing unlawful situation arising from illegal conduct and to restore the situation to its normal state. Elimination measures are stipulated in Section 7 of the AMA as orders “to cease and desist from such acts, to transfer a part of his business, or take any other measures necessary to eliminate such acts in violation (subsection 1).”

It is possible to order the firms concerned, when it is found particularly necessary, to take measures to publicise that the said conduct has been discontinued and to order any other measures necessary to ensure the elimination of the said conduct, even though the illegal activity has already ceased to exist. However, the foregoing shall not apply to cases in which three years have elapsed since the date of discontinuation of the said conduct.

The JFTC often orders forbearances in the future and usually orders to thoroughly make it known to other firms and trading partners that the conduct must never happen again or to promptly report to the JFTC any measures taken.

In the case of Private Monopolisation, orders to cease the conduct of exclusion and control and to remove all conditions resulting from Private Monopolisation will be enforced. However, strong market dominance is normally behind Private Monopolisation, and forms of exclusion and control conduct usually result from the abuse of dominant power. So it may be inappropriate to claim that any form of illegal activity has been eliminated when only the specific abuse has been eliminated but the strong market power survives. Therefore, the transfer of business can be ordered as a structural remedy in accordance with Section 7 of the AMA.

###### Procedures in cease and desist order

With the amendment of the AMA in 2005, it is now made possible for the JFTC to order elimination measures, such as suspension of the conduct, when the JFTC finds, in the process of investigating the case that the illegal activities did exist<sup>3</sup>. On the other hand, to ensure due process, when the JFTC orders an elimination measure, the JFTC gives the recipient of the order a chance to state their views and to submit evidence.

###### Penalties for violating cease and desist order

When a cease and desist order is not obeyed, penalties are stipulated in Sections 90 and 95 of the AMA, but these penalties have not yet been imposed up until now.

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<sup>3</sup> Before amendment of the AMA in 2005, the JFTC recommended to the violator to take appropriate measures after the JFTC had finished investigating the case. If the violator decided to appeal the case, the case would move on to hearing procedures. In other words, even after the recommendation was issued and it was found that the firm continued to carry out the unlawful conduct, there were few measures to handle the ongoing unlawful conduct until the decision was issued in hearing procedures.

### 3.1.2 *Surcharges (Section 7-2 of the AMA)*

With the amendment of the AMA in 2005, surcharges are imposed on Private Monopolisation which arises from the control of other firms' business activities. This was because Private Monopolisation where a powerful firm dominates the business activities of other firms in a certain market and when the powerful firm controls the price and supplies of the total market by ordering price, the amount of supplies, and to whom the provisions should be sent, is economically not different from a price cartel and so it was deemed necessary to order payment of surcharges.

#### Contents for surcharges

Section 7-2, Subsection 2 stipulates that surcharges are imposed on Private Monopolisation (limited to that arising from the control of other entrepreneurs' business activities) (a) when it concerns the prices of goods and services, and (b) when it substantially restrains the supply volume, market share and transaction counterparties and thereby affects their prices.

#### Surcharge rate

Generally, the surcharge amount will be the following percentage multiplied by the sales of the related products and such during the implementation period of illegal activities (in case such a period exceeds three years, the period shall be for three years retroactively from the date on which entrepreneurs ceased to engage in the business activities as implementation of such conduct):

- Manufacturers                      10%
- Retailers                                3%
- Wholesalers                          2%

In a case in which the violator receives a surcharge order within ten years from the first day the JFTC began its investigation into the illegal activity, normally a fifty percent increase will be added to the total amount (Section 7-2, Subsection 6).

Furthermore, in a case in which a criminal fine is imposed for the same case in which there was also a surcharge order imposed, half of the fine will be subtracted from the surcharge amount (Section 7-2 Subsection 14, Subsection 15, and Section 51).

### 3.1.3 *Criminal sanction*

Section 89 of the AMA stipulates that a sentence of up to three years in prison or a fine of up to 5,000,000 yen will be imposed. Furthermore, Section 95 of the AMA stipulates a double punishment when the representative of a company or a substitute of the company or person, its employees or other employees commits a form of illegal activities concerning the company, operation or assets, and the natural-person violator and the company will then both be subject to criminal sanctions. The JFTC shall file an accusation with the Public Prosecutor General when it is convinced of a form of unlawful activity after an investigation conducted according to the procedures of compulsory investigation of criminal cases and when it considers that a crime violated the provision of the AMA (Section 74). In accordance with the accusation by the JFTC, the Prosecutor's Office is in charge of the criminal investigation of the case.

Criminal sanctions have not been imposed on any Private Monopolisation cases up until now.

### **3.2 Elimination measures for Unfair Trade Practices (Section 20 of the AMA)**

Elimination measures for Unfair Trade Practices are stipulated in Section 20 of the AMA as orders “to cease and desist from such acts, to delete the clauses concerned from the contract, and to take any other measures necessary to eliminate the said acts (Subsection 1).” As with Private Monopolisation, it is possible to order the firms concerned, when it is found particularly necessary, to take measures to publicise that the said conduct has been discontinued and to order any other measures necessary to ensure the elimination of the said illegal activity, even though it has already ceased to exist.

The JFTC often orders forbearance in the future and usually orders companies to thoroughly inform other firms and trading partners that it must never happen again or to promptly report to the JFTC any measures taken.

Procedures in the cease and desist orders and sanctions for violating the cease and desist orders are basically the same as those for Private Monopolisation (reference to (1) (i) b and c).

## **4. Case studies**

### **4.1 Case against Toyo Seikan Kaisha, Ltd. (Recommendation decision issued on September 18, 1972)**

#### **4.1.1 Overview of this case**

Positioning of Toyo Seikan Kaisha, Ltd.(Toyo Seikan) in the market of food packaging cans

At the time of the case, there were 13 food packaging can manufacturing companies in Japan that covered almost all supplies, of which Toyo Seikan accounted for approximately 56% of the total supplies. Furthermore, including the supplies of Honshu Seikan, Shikoku Seikan, Hokkai Seikan and Mikuni Kinzoku which Toyo Seikan controlled through stock holdings and dispatched directors, Toyo Seikan held approximately 74% of the market.

Illegal activity carried out by Toyo Seikan

Control over competitors

Toyo Seikan held approximately 29% of shares issued by Hokkai Seikan. Under the basic agreement that they would merge in the future, Toyo Seikan restricted the sales areas and the shape of cans being manufactured by Hokkai Seikan to avoid all sales activities, which may cause overlapping investment and competitive relationships between the two companies. In addition, Toyo Seikan owned the majority of shares issued by Honshu Seikan and Shikoku Seikan, appointed its own directors and employees to positions equivalent to management positions in each company, and had the directors and employees participate in management. Toyo Seikan also controlled sales activities of Honshu Seikan and Shikoku Seikan to suit its own purposes. Also, not only did they assign 50% of the shares issued by Mikuni Kinzoku, but also Mikuni Kinzoku agreed to obtain approval from Toyo Seikan when other shareholders disposed of Mikuni Kinzoku stocks.

Eliminating business activities of potential competitors

The canning manufacturers depended heavily on Toyo Seikan by buying or borrowing canning manufacturing machinery from Toyo Seikan, and accepted technical services, rebates, sales mediations and financial support. When one company decided to manufacture its own food cans for their own use to reduce the cost of manufacturing cans, Toyo Seikan attempted to prevent the canning manufacturers from

producing their own food cans by no longer supplying food packaging cans which the canning manufacturer was unable to make.

The following elimination measures were imposed on Toyo Seikan for violation of Section 3 (Private Monopolisation) of the AMA as the company was found to restrict competition in Japan's food packaging can transactions by controlling the business activities of Honshu Seikan, Shikoku Seikan, Hokkai Seikan and Mikuni Kinzoku as well as by preventing canning manufacturers from manufacturing their own cans.

#### *4.1.2 Elimination Measures ordered in this case*

Elimination of illegal activity and other necessary measures

Removing control over Hokkai Seikan

- i. Forbidding Toyo Seikan from interfering in any of Hokkai Seikan's business activities under the basic agreement that Toyo Seikan and Hokkai Seikan will merge in the future.
- ii. Withdrawing all conditions regarding restrictions imposed upon the setting up of the Iwatsuki Factory of Hokkai Seikan such as those on facilities, the shape of cans or customers, as well as all conditions regarding personnel matters.
- iii. Disposing of Hokkai Seikan shares over 1,200,000.

Removing the exclusion of potential competitors

Toyo Seikan cannot prevent other canning manufacturers from manufacturing cans for their own use by stopping the supplies of cans to those manufactures.

Report

A report, based on the measures for a ii) and iii) mentioned above, is submitted to the JFTC for approval.

#### *4.1.3 Features of this case*

Regarding this case, the JFTC focused on the dominant operations of Toyo Seikan which, by holding stocks and sending executives to Hokkai Seikan, a competitor in its own right, under a basic understanding that the two companies would merge in the future, restricted the sales areas and shape of cans being manufactured to avoid competitive sales activities, and took structural measures such as disposing of stock. In addition, in this case Toyo Seikan excluded potential competition with the canning manufacturers by using its dominant position in the field of can manufacturing in the production of cans that other canning manufacturers were unable to make and in the tie-in of those cans with the cans which other canning manufacturers could make.

## **4.2 Case against Hokkaido Shimbun Press (Consent decision issued on February 28, 2000)**

### *4.2.1 Overview of this case*

The position of the Hokkaido Shimbun Press (Hokkaido Shimbun) in the newspaper market in the Hokkaido area

Hokkaido Shimbun published a general daily newspaper in Hokkaido. These newspapers accounted for a majority of the morning newspapers in Hokkaido as well as general daily newspaper publications in the Hakodate area.

#### Unlawful conduct by Hokkaido Shimbun

When Hakodate Shimbun entered the evening newspaper market in the Hakodate area, Hokkaido Shimbun obstructed the entry of Hakodate Shimbun and carried out the following actions to hinder their business:

##### a) Masthead

Hokkaido Shimbun applied for trademark registration to the Patent Agency regarding nine mastheads, such as “Hakodate Shimbun,” that would be used when publishing newspapers in the Hakodate area, although they had no specific plans to use those mastheads.

##### b) News agency

The main newspaper publishers in Hokkaido received articles through Jiji Press and Kyodo News Service. Based on a priority policy with precedent contractors stating that Jiji Press will not deliver articles against the will of the present contractors, Hokkaido Shimbun implicitly solicited Jiji Press not to deliver articles to Hakodate Shimbun so that Jiji Press and Hakodate Shimbun could not conclude a delivery agreement.

##### c) Collecting advertisements

To make it difficult for Hakodate Shimbun to acquire and assemble advertisements, Hokkaido Shimbun split the price of inserting basic advertisements in local newspapers in half for small- and medium-sized companies, who would be the advertising targets for Hakodate Shimbun.

##### d) Television commercials

Hokkaido Shimbun solicited Television Hokkaido Broadcasting not to respond to requests for broadcasting Hakodate Shimbun commercials so that Hakodate Shimbun could not broadcast any television commercials.

The JFTC recommended Hokkaido Shimbun to take the following elimination measures as they had violated Section 3 (Private Monopolisation) of the AMA by substantially restricting competition in general daily newspaper operations in the Hakodate area. Hokkaido Shimbun appealed for a hearing procedure against this recommendation but accepted the consent decision.

#### 4.2.2 *Elimination measures ordered in this case*

##### Notification

Hokkaido Shimbun will notify the following to Hakodate Shimbun and will make the contents thoroughly known to general consumers in the Hakodate area. The method of notification and how the information is to be publicised must be approved by the JFTC in advance.

- i. Hokkaido Shimbun carried out the following measures for the series of illegal activities that obstructed the entry and operations of Hakodate Shimbun:

- withdrew all trademark applications regarding the Hakodate area;
  - notified Jiji Press that Hokkaido Shimbun would not be involved in delivering general news including domestic and international sports news to Hakodate Shimbun;
  - revised its advertisement rates and handling fees for local newspapers to appropriate rates and fees;
  - notified Television Hokkaido Broadcasting that Hokkaido Shimbun would not be involved in broadcasting television commercials for Hakodate Shimbun.
- ii. Hokkaido Shimbun, from that point going forward will not eliminate business activities regarding the general daily newspaper of Hakodate Shimbun in the future by carrying out activities similar to those heretofore mentioned.

#### Future remedies

Hokkaido Shimbun will not eliminate business activities regarding the general daily newspaper of Hakodate Shimbun in the future by implementing actions similar to the heretofore actions.

#### Report

Hokkaido Shimbun must promptly report to the JFTC regarding the above measures.

#### 4.2.3 *Features of this case*

The JFTC found that Hokkaido Shimbun substantially restricted competition by the cumulative effect of the series of activities obstructing the entry and hindering the operations of Hakodate Shimbun, and recommended Hokkaido Shimbun to cease the illegal activities and to take necessary measures. These measures, taken when Hokkaido Shimbun decided to accept the consent decision, were deemed to be appropriate and the publicity stated in a i) was ordered in the consent decision.

#### 4.3 *Case against Intel Kabushiki Kaisha, Ltd. (Recommendation decision issued on April 13, 2005)*

##### 4.3.1 *Overview of the case*

Intel Kabushiki Kaisha, Ltd. (Intel) held approximately 90 % of the shares in the CPU market in Japan. Intel had made five major Japanese personal computer (PC) manufacturers refrain from adopting competitors' CPUs for all or most of the PCs manufactured and sold by them, or all of the PCs that belonged to specific groups of PCs, by making commitments to provide the Japanese PC manufacturers with rebates and/or certain funds in order to maximise their MSS (Market Segment Share)<sup>4</sup>, respectively, under the conditions listed below:

- a. to make 100% MSS and to refrain from adopting competitors' CPUs;
- b. to make 90% MSS, and to require that the share of competitors' CPUs in the volume of CPUs be incorporated into the PCs manufactured and sold by them within 10%; or

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<sup>4</sup> "MSS (Market Segment Share)" refers to the share of CPUs manufactured by Intel out of all the CPUs adopted in the PCs manufactured and sold by each domestic PC-maker.

- c. to refrain from adopting competitors' CPUs to be incorporated into groups of PCs with a comparatively large amount of production volume.

The JFTC found that by carrying out such activities, Intel had substantially restrained competition in the CPU market for the Japanese PC manufacturers. The JFTC ordered Intel to carry out the following elimination measures for violation of Section 3 (Private Monopolisation) of the AMA.

#### 4.3.2 *Elimination Measures ordered in this case*

##### a) Elimination of illegal activity

Intel, when selling Intel's CPUs to the Japanese PC manufacturers, shall terminate its illegal activities, that is, making commitments to provide the Japanese PC manufacturers with rebates and/or funds under the conditions as mentioned in (a) and (b) above, and making the Japanese PC manufacturers refrain from adopting competitors' CPUs to be incorporated into all or most of the PCs which were manufactured and sold by them with respect to the CPUs incorporated into the PCs manufactured and sold by the Japanese PC manufacturers.

##### b) Notification

Intel must notify the Japanese PC manufacturers and trade partners of Intel of the following points and must make the contents thoroughly known to its employees. The method of notification and how the information is to be publicised must be approved by the JFTC in advance:

- measures taken by Intel based on 'a' above;
- Intel, when providing rebates and/or funds to the Japanese PC manufacturers, must not to set the condition of no adoption of competitors' CPUs;
- Intel must terminate the activity of requiring the Japanese PC manufacturers not to adopt competitors' CPUs in more than one group of PCs, each of which has a comparatively large amount of production volume compared to other groups, by making a commitment to provide them with rebates and/or funds on the condition of switching from competitors' CPUs previously incorporated to Intel's CPUs in those groups of PCs, or keeping Intel's CPUs' adoption in all of the PCs in those groups of PCs.

##### c) Future remedies

Intel, from that point going forward, shall not exclude competitors' business activities for the sales of CPUs by employing activities determined to be illegal by the JFTC.

##### d) Other necessary measures

Intel shall take measures to carry out (i) training dealing with the compliance of the AMA for the executives of the sales department and for those staff members engaged in promoting and selling CPUs, and (ii) periodical audits by the legal department, thereby ensuring that the conduct mentioned above in 'c' shall not be repeated.

##### e) Report

Intel must promptly report to the JFTC regarding measures taken based on 'a', 'b' and 'd' mentioned above.

#### 4.3.3 *Features of this case*

Intel made strong use of discretion to determine transaction conditions such as prices for the Japanese PC manufactures based on the high market share, strong brand power and technical capability of U.S. Intel Corporation. In other words, Intel had a dominant position on the CPU market, given that it was important for the Japanese PC manufactures to incorporate Intel's CPUs into PCs. Intel excluded its competitors by imposing exclusive terms on the Japanese PC manufacturers, strengthened its dominant position and therefore substantially restricted the market. Based on that determination, the JFTC ordered that Intel carry out the elimination measures of these illegal activities.

### **5. Future Prospects**

The JFTC uses elimination measures as a remedy for cases regarding unilateral conduct and applies necessary measures to eliminate illegal activities including injunction of illegal actions. With the 2005 amendment, the measures have been reinforced and surcharges would be charged to Private Monopolisation which arises from the control of the business activities of other firms. Previously, Private Monopolisation and Unfair Trade Practices were subject to the same measures except that there are criminal sanctions regarding Private Monopolisation. Furthermore, as an illegal activity falls under the Unfair Trade Practices if such an illegal activity "tends to impede fair competition," which fails to reach the criterion of "substantial restraint of competition," which should be shown to prove Private Monopolisation, it is usually considered to be easier to prove Unfair Trade Practices in the case of illegal activities than in Private Monopolisation. It is considered that the application of surcharges to dominant-type Private Monopolisation will help deter such conduct in the future.

## KOREA

### 1. Introduction

The MRFTA<sup>1</sup> imposes an obligation on the KFTC<sup>2</sup> to make efforts to improve monopolistic/oligopolistic market structures and also endows the Commission with the authority to regulate abuse of market dominance which is one of the harmful effects of monopoly/oligopoly.

This report will discuss the KFTC's current regulations on abuse of market dominance by looking at their goals, remedies, processes in setting fines, ex post facto monitoring, etc and this will be followed by some of the Korean competition authority's competition law enforcement cases.

### 2. Remedies and Sanctions

#### 2.1 Policy goals

Corrective measures have the goals of 1) making offenders put an end to violations, 2) preventing a recurrence of similar violations, 3) restoring distorted competition in the market and 4) promoting fair and free competition.<sup>3</sup>

As one of the measures to restrain abuse of market dominance, surcharge has the characteristics of both 1) a sanction and 2) a tool to recover unjustified economic benefits. Just like other corrective measures, surcharges are used to put an end to violations, deter a recurrence of similar offences and restore distorted competition in the market.

#### 2.2 Choosing the right remedial tool

Where there exists any act abusing market dominance, the KFTC may order the market-dominating enterpriser involved to reduce prices, to discontinue the act that is a violation, to announce the fact of corrective order to the public, and to take other measures necessary for correction.<sup>4</sup> Moreover, the Commission can impose upon such an enterpriser surcharges not exceeding an amount equivalent to 3% of an enterprise's average turnover during the previous three business years.<sup>5</sup> And a person who has committed an abuse of market dominance shall be punished by imprisonment for not more than three years or a fine up to but not exceeding two hundred million won (approximately 200 thousand US dollars).<sup>6</sup>

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<sup>1</sup> Monopoly regulation and fair trade act

<sup>2</sup> Korea fair trade commission

<sup>3</sup> Guideline on Enforcement of corrective measures □.

<sup>4</sup> Article 5, MRFTA

<sup>5</sup> Article 6, MRFTA

<sup>6</sup> Article 66, MRFTA

If necessary for effective correction of violations, aside from cease & desist orders, specific performance orders forcing the offender to perform certain actions can be issued by the KFTC.<sup>7</sup>

Cease and desist orders include suspension of activity and injunction of activity. The suspension of activity order can be issued when either the violative act in question is still ongoing on the final deliberation day or the act's effects are still felt even on the final deliberation day. Meanwhile, the injunction order can be issued when it is afraid that, even though the violative act in question was already terminated on the deliberation day, identical or similar acts can occur in the near future.

Specific performance orders include forced use, initiation of transactions, re-initiation of transactions, correction or deletion of contracts' terms, unbundling, etc.

Forced use, initiation of transactions or re-initiation of transactions can be issued when either of the following two situations continues to the day of the final deliberation:

1. When market dominant enterprisers, to maintain or strengthen their dominance, unjustifiably deny or stop other businesses' use of or access to factors essential to production, distribution and sales of their goods and services.
2. When market dominant enterprisers, to maintain or strengthen their dominance, continue to unjustifiably hamper other businesses' purchase of raw materials necessary for producing their goods.

Correction or deletion of contracts' terms can be issued when abuse of market dominance is occurring based on unfair contract terms and when the order is needed to correct the violative act. Under the unbundling order, to effectively correct tie-in sales, enterprisers are forced to unbundle tied products from tying products.

In abuse of market dominance cases, in principle, price abuse and output control are subject to surcharges. Regarding obstruction of other enterprisers' business activities, in principle, surcharges are imposed where such obstruction is used as a tool either to abuse market dominance or to form, maintain and strengthen market dominance. For the rest of the cases, whether to impose surcharge or not is determined after considering circumstances, what motivated the violation, its impact, market conditions and so on.<sup>8</sup>

### **2.3 *Monitoring behavioural remedies***<sup>9</sup>

Usually, the KFTC monitors implementation of remedies. As for surcharge payment and public announcement of violations, it is relatively easy to confirm implementation of such measures and monitoring can be conducted effectively as well. However, this is hardly the case when it comes to cease & desist orders or orders forcing offenders to conduct specific acts. Therefore, only when the given corrective measure is so complicated and technical that it is necessary to let third parties with expertise in the area monitor implementation or when continuous on-site inspection is the only way to ensure effective implementation, can the KFTC designate third parties or KFTC officials as an organisation to confirm (or

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<sup>7</sup> Guideline on Enforcement of corrective measures □.1.~2.

<sup>8</sup> Notification on Surcharge Imposition □.2

<sup>9</sup> Guideline on Enforcement of corrective measures □.3.

monitor) the implementation. In this case, the Commission can order respondents to accept this organisation in their business premises for a certain period and to provide it with the access to data and materials necessary to monitor the implementation.

To monitor the implementation of corrective measures, the KFTC, aside from cease & desist orders and those forcing offenders to perform certain actions, can issue the following complementary orders to guarantee effective corrective measure implementation.

1. Order of Notification / Delivery of Copies of Notification

The KFTC can order offenders to give a notice within a given time frame to the parties who were affected or can be affected in the future by the violation that they received corrective measures from the Commission. Or, the KFTC can order these offenders to deliver copies of the KFTC's order to parties above.

2. Order of Report

The KFTC can order offenders to report to the Commission within a certain time from (1) results of implementation of corrective measures. Or, when (2) risks arise to the existence of respondents such as bankruptcy or changes in address that can affect implementation of corrective measures, the Commission can order the offenders to report such risks to it within a given time frame.

3. Order of Provision of Education Program

The KFTC can order offenders to provide education programs within a given time frame for a certain period of time to their senior executives and employees on laws & regulations related to their violations. These companies are also ordered to report the results of such education programs.

4. Order of Data Preservation

The KFTC can order offenders to preserve data related to implementing corrective measures for a given period. When there is a request from the Commission, they are obliged to allow the Commission to review & copy relevant materials.

## 2.4 *Setting fines*<sup>10</sup>

The base amount for setting a fine depends on substance and gravity of violations. After adjustments are made to the base amount considering the violation's duration, frequencies and size of unjustified economic profits, other factors are also looked at to see whether further reduction or aggravation is possible. These factors include offenders' intention/negligence, the violation's nature & context, offenders' financial situations, market situations and so on. In addition to this, whether offenders can actually afford to pay the fine is considered as well along with other market & economic situations and the violation's impact on the market.

In cartel cases, in principle, fines are set within a maximum 10 % of the relevant turnover. Though processes in calculating fines in cartel cases are the same as those in other cases, there are some differences in criteria to determine gravity of cases.

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<sup>10</sup> Notification on Surcharge Imposition □.

## **2.5 Remedies in high technology and network effects markets**

In cutting-edge technology industries that have network externality or that require huge R&D investment up front, when a business with monopoly power in a certain product market combines the product with tied products, this blocks latecomers' entry into the tied product markets in the long run.

In the abuse of market dominance case involving Microsoft in 2006, the KFTC ruled that tie-in sales of Windows Server Operating System and WMS<sup>11</sup> and that of PC Operating System and WMP<sup>12</sup> generated drastic tipping effects for WMS and WMP. Furthermore, tie-in sales of PC Operating System and MSN messenger also created tipping effects for MSN messenger.

As for the PC operating system and applications involved in the Microsoft case, there does exist network externality and huge up front investment in R&D is also required. Furthermore, the market is characterised by rapid technology innovation.

The KFTC reached a conclusion that the tie-in sales of Microsoft, the market dominant enterpriser, eliminated competition in the tied product markets. The Commission ruled that the enterpriser raised entry barrier and made it hard for latecomers to have effective competition in the market, thereby obstructing competitors' business activities.

Furthermore, as the tie-in sales denied consumers opportunity to purchase products with no attached tied products or to select competitor's tied products, the Commission ruled that this infringed upon consumers' right to choose products based on quality and performance and ultimately undermined consumer welfare.

The KFTC ordered the MS to unbundle Windows Media Service from Windows Sever Operating System for tying of Windows Media Service. For tying of Windows Media Player and Instant Messenger, Microsoft is required to offer two versions of Windows PC Operating System; one version to be stripped of Windows Media Player and Instant Messenger and the other version to contain competing media players and instant messengers, which will be determined by the KFTC after consulting the Advisory Board.

Furthermore, specifics were included in the decision to provide the respondent with greater predictability and clarity, to effectively monitor its implementation of the corrective measure and to prevent the enterpriser from evading its duty to implement the order in a different way.

As the illegal activity occurred in the cutting-edge tech sector, many round about ways are technically possible with which the enterpriser can have the similar effects to those of the violation committed in the past, while evading the duty to implement the corrective measure. Therefore, the KFTC had to ban such technically feasible, predictable round about ways. For example, they include installing WMP's codes or download links during service pack downloads or updates and providing indications or advertisements that encourage or are likely to encourage installation or use of Window Media Players.

## **2.6 Taking private actions into account**

Since the revision to the MRFTA in Apr 2005, victims of MRFTA violations have been entitled to the right to file a lawsuit against offending companies for damage compensation. According to the revision, the burden of proof for intention/negligence on the side of victims was reversed. Now, offending

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<sup>11</sup> Windows media service

<sup>12</sup> Windows media player

companies have the burden. Especially, the revised Act gives the Court the ex-officio authority to presume the amount of damages in cases where it is hard to quantify actual damage from violations.<sup>13</sup>

### **3. Experience**

Since 1983, in 17 abuse of market dominance cases, the KFTC imposed surcharges in 5 cases and warnings & corrective measures in 9 cases and filed complaints to the Public Prosecutor's Office about 3 cases. As for cases on price abuse or obstruction of competitors' business activities, the KFTC issued mostly cease & desist orders.

#### **3.1 *The following is the recent case on Microsoft's tie-in sales***

On Wednesday, December 7, 2005, the KFTC has reached upon a decision to order Microsoft Corporation and Microsoft Korea, inter alia, to unbundle the tied product, including Windows Media Player, and to impose surcharge of approximately 33 billion won (approximately 31 million US dollars) for violation of the MRFTA, including abuse of market dominant position.

#### **3.2 *The KFTC found the following practices by the Microsoft to be violation of the MRFTA***

First, tying Windows Media service to the Windows Server Operating System, where Microsoft has market dominance.

Second, tying Windows Media Player to the Windows PC Operating System, where Microsoft has monopoly power.

Third, tying instant messaging programme to the Windows PC Operating system, where Microsoft has monopoly power.

The KFTC found such tying practices liable because they constitute abuse of market dominant position and unfair trade practices unfair the MRFTA. The KFTC found that the tying practices by the Microsoft proved to have eliminated competition and exacerbate monopolisation of tied product market including messenger. Such practices raised entry barrier of the tying product market, namely the PC Server Operating System and PC Operating System, which led to restriction of market competition and obstruction of consumer welfare.

#### **3.3 *The ground of the KFTC's decision that found Microsoft's tying in violation is as follows***

First, by tying Windows Media Service to the Windows Server Operating System, a product which Microsoft has 78% market share, Microsoft was able to leverage its dominant power of the PC server operating system market to the streaming media server market, as a result monopolising it.

Dominant streaming media server market that had been almost fully preoccupied by RealNetworks and domestic venture companies, tipped over to Microsoft that had more than 90% market share.

Second, by tying Windows Media Player and Microsoft's messenger to the Windows PC Operating System, a product in which the Microsoft had 99% market share, Microsoft was able to shift its monopoly to the streaming media player and instant messenger market. As a result, Microsoft restricted competition in the tied product market, which previously had been held by Microsoft's competitions.

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<sup>13</sup> Article 56, MRFTA

In December 2000, right after Microsoft's tying of the Windows Media Player, Microsoft and RealNetworks had 39% and 37% of streaming media player market in Korea, respectively. Recently, however, the market share of the Microsoft has increased to over 60%, whereas that of the RealNetworks has shrunk to 5%.

In the instant messenger market, local instant messaging service companies, which had occupied the market, began to lose market share right after Microsoft tied messaging programme to Windows PC Operating System. As a consequence, in April 2004, Microsoft was able to take 65.2% of the instant messenger market, leaving Daum Messenger had 65.5% of market share, but Microsoft's messenger still retained 50.9% of the market, with the market share of other messaging services continuing to fall.

Third, those tying practices by Microsoft led to increased supply of Windows Media Service, Windows Media Player and other applications that complimented Windows Media Technology. This, in turn, led to raising entry barrier for the PC Server Operating System and PC Operating System market, resulting in enforcing monopoly power of the Microsoft in each operating system market.

For the reasons given above, the KFTC found the three respective tying practices by Microsoft to be liable, as violating Article 3-2 of the MRFTA, which prohibited market-dominant firm from engaging in "act unreasonable interfering with the business activities of other businesses" and "act unfair excluding competitions or substantially harm consumer benefit".

### **3.4 For the above violations by the Microsoft, the KFTC decided to impose following remedies**

For tying of Windows Media Service, Microsoft was obliged to unbundle Windows Media Service from Windows Server Operating System, within 180 day after the decision.

For tying of Windows Media Player and instant messenger, following remedies have been imposed.

First, Microsoft is required to offer two version of windows PC Operating System, within 180 days after the decision. One version will be stripped of Windows Media Player and instant messenger. Another version will be newly installed with "Media Player Centre" and "Messenger" that will contain links to web pages that allow consumers to download competing media players and instant messengers, so that competing softwares can be equally installed into Window PC Operating System.

Second, for Windows PC Operating Systems already sold and currently in use by consumers at the time of decision, Microsoft is required to provide users with "Media Player Centre" through CDs or internet updates.

In this case, the specifics such as competitive products to be included in the "Media Player Centre" will be determined by the KFTC after consulting with the Advisory Board.

The remedy will remain effective for 10 years and after 5 years, Microsoft will have an opportunity each year to request KFTC to review the remedy, accounting for changing market environment.

### **3.5 Imposing surcharge**

In addition to the above mentioned remedies, a total of 27.92 billion won (approximately 27 million US dollars) of surcharge has been imposed on Microsoft Corporation and Microsoft Korea Ltd., 22.92 billion won (approximately 22 million US dollars) on the former and 5 billion won (approximately 5 million US dollars) on the latter. Surcharge corresponding to 2005 revenue will be imposed later, as the revenue of 2005 was not available as of the date of the decision.

Once Microsoft reports revenue data for 2005, the KFTC will determine and impose surcharge corresponding to year 2005. It is estimated that the total surcharge including the amount for 2005 will be approximately 33 billion won (approximately 33 million US dollars).

### ***3.6 As the Microsoft case was a very complicated one with huge ripple effects on the market, how the case was handled itself had significance in several respects***

First of all, this case succeeded in drawing a conclusion through extensive, in-depth fact-findings, economic analysis and a heated legal debate. Microsoft submitted reports on economic analysis and market analysis generated by lawyers from the largest law firms in Korea and the U.S., renowned Korean & American economists and computer experts.

To refute Microsoft's reports and prove illegality of the company's tie-in sales, examiners and complainants reviewed economic & technology analysis reports and studies provided by Korea's most prominent jurists, economists and computer experts that prove anti-competitiveness of the company's act.

Secondly, during the deliberations on the case, Microsoft, complainants and all other stakeholders were given the chance to state their opinions. In this way, this case enjoyed the maximum procedural fairness. From 13th Jul 2005 to 26th Oct 2005, the full committee was held on seven occasions for a total of 40 hours to give the company sufficient time to defend its position and also to hear from examiners, witnesses and expert witnesses. After the deliberations, commissioners on the full committee had discussions on six occasions to reach a final agreement.

Thirdly, competition in the domestic IT industry was thoroughly, objectively analysed on multiple fronts through opinions from various market participants. Opinions were collected from contents providers, PC manufacturers, software developers & experts, media service providers, messenger service providers, SI (System Integration) companies and so on. Their opinions were utilised to make a judgment on illegality of the company's practice and to determine what corrective measures should be imposed.

### ***3.7 The remedies imposed are expected to bring positive effects in many ways***

First, this decision will allow both digital media software and instant messaging businesses to compete on the merits, i.e. by improved technology service, on the level playing field with Microsoft, and provide consumer with wider array of choice, so both businesses and consumers as to enjoy the fruits of competition.

Second, this decision will restore competition in the previously distorted markets, including respective markets for PC operating system, streaming media server, streaming media player, and instant messenger.

## **4. Conclusion**

The KFTC has not had much achievement regarding abuse of market dominance cases so far. This is mostly because the Commission's human resources were concentrated on cases triggered by complaints by outsiders. However, since the Commission's organisational restructuring in Dec 2005, law enforcement in abuse of market dominance cases has been strengthened and relevant systems in this area are going to have improvement to be in line with global standards.



## NORWAY

The Norwegian Competition Authority (NCA) has yet to impose behavioural or structural remedies in abuse of dominance cases under the present Competition Act which entered into force 1 May 2004. The NCA has adopted one decision against abuse of a dominant position where a fine was imposed. Currently, the NCA is working on several cases concerning possible abuses of dominance. These cases are not concluded, but to date the discussion of remedies has focused on fines rather than structural or behavioural measures.

In consequence, this submission will primarily focus on the Norwegian legal framework for imposing remedies and fines.

The Norwegian Competition Act allows for behavioural and structural remedies, interim measures, fines or periodic penalty payments. The prohibition rules under Norwegian competition law are harmonised with EC/EEA law. Considerations of EC/EEA law are consequently normally made also when considering remedies and fines. The Norwegian Competition Act does, however, not explicitly mention the possibility of accepting commitments. Norway has implemented substantive provisions from EC competition law, but has a different set of procedural rules.

### **1. Policy goal**

According to the Norwegian Competition Act, the NCA can order an undertaking abusing a dominant position to bring the infringement to an end. The order may include any measure necessary to bring the infringement to an end. However, the law provides that structural measures may only be ordered if there are no equally effective behavioural measures, or if a behavioural measure will be of greater burden to the undertaking.

In deciding which remedial tool to choose the main object is to restore the level of competition that would have existed but for the unlawful conduct. The remedy chosen must not go beyond what is necessary to achieve this goal, taking into consideration the nature and effect of the violation in question.

As regards fines, the main object is to deter future anticompetitive conduct, both on the part of the violator as well as with the aim of general deterrence. The imposition of fines does also contain an element of relinquishment of gain. Nevertheless, relinquishment of gain is only taken into account to the extent that it is possible to estimate the profit obtained by the illegal behaviour. Accordingly, considerations related to relinquishment of gain are only one of several elements in determining the amount of the fine.

### **2. Choosing the right remedial tool**

A decision by the NCA may comprise both an order to terminate the infringement, other remedies and a fine. In determining the nature and extent of the sanctions, the NCA's primary concern is to choose the measures that are best suited to advance efficient enforcement of competition law. The NCA has an obligation not to induce obligations on private parties that are unnecessary restrictive. In general terms, the choice of a remedial tool is made on the background of standards of proportionality. Furthermore, principles of parity before the law will influence on the choice of remedy.

In some cases efficient enforcement of competition law is best achieved by an order to terminate the infringement in question. However, in many cases it is necessary to combine the order of termination with behavioural and/or structural remedies and/or fines. In conclusion, the choice of remedy depends upon the nature and effect of the infringement.

Accordingly, an order to end the behaviour causing the infringement in combination with behavioural remedies may be appropriate instead of a fine where the gravity of the infringement is minor. The same approach may apply where there is reasonable doubt to whether the conduct in question constitutes an abuse of dominance, or where the state of law is inconclusive.

Structural remedies are likely to be used more frequently in abuse cases than in cartel cases. Structural remedies are particularly suitable where there is a high risk that the violation of competition law may persist as a consequence of the structure of the undertaking. One example is where a dominant firm is active on two relating markets and it cross-subsidises between the markets in combination with predatory pricing. In these cases behavioural remedies might not suffice to prevent further infringement, or they may be difficult or impossible to design and monitor. Structural remedies such as requirements to establish different legal entities may be the appropriate measure in these cases.

### **3. Monitoring behavioural remedies**

As mentioned above, the NCA does not have any experience with remedies in an abuse of dominance cases.

However, as a general observation behavioural remedies seem to qualify for more extensive monitoring than structural measures. Structural remedies are consequently considered more effective and less costly than behavioural remedies.

The Norwegian Competition Act does not provide for monitoring mechanisms with regards to behavioural remedies. Monitoring of behavioural remedies must be carried out by the NCA, and might be very time-consuming. One possible solution would be to adopt a similar scheme as under the merger provisions where there are clauses allowing for the appointment of a trustee to ensure the implementation of decisions by the NCA.

### **4. Setting fines**

The NCA may impose fines subject to having proved according to a preponderance of evidence rule that an undertaking intentionally or negligently abuses its dominant position.

When the NCA decides on the amount of a fine it is governed by standards of proportionality and principles of parity before the law. These principles apply irrespective of whether the NCA considers an abuse of a dominant position case or a cartel case.

In determining the amount of the fine particular attention should be paid to the turnover of the undertaking as well as to the gravity and duration of the infringement. Leniency does not apply to abuse of dominance cases. Detailed rules on the setting of fines are outlined by regulation given with legal basis in the Competition Act.

As part of determining the fine the NCA will consider, inter alia, the nature of the infringement, the impact on the relevant market, the size of the relevant market, the profit obtained by the undertaking concerned from the illegal behaviour and the size of the corporation the undertaking forms part of. Abusive behaviour by a dominant firm will generally be regarded as a serious or very serious infringement.

The discussion paper from OECD raises the question of whether the first offenders under a new law should be given a small fine. The Norwegian Competition Act entered into force 1 May 2004, and the preparatory works presupposed that this would impact on the level of fines for a while. However, the prohibition against abuse of a dominant position under the Act is based on Art 82 EC. The mere fact that a question arises first time under the Norwegian Act is hence not automatically sufficient grounds for a low fine. There might, however, exist other circumstances which may impact on the level of the fine. For instance, complex sectoral regulation hampering compliance with competition law might be a circumstance that should lead to a lower fine.

## **5. Remedies in high technology and network effects markets**

Under current Norwegian competition law the same law on remedies applies to technology cases as to any other type of case. So far, the NCA does not have any decisional practice that might shed light on the problem of high technology and network effects markets.

## **6. The possibility of private actions**

Norwegian civil procedure contains a possibility for private actions following violations of competition law. It is not necessary for the NCA to adopt a decision prior to private actions, but a demission from the NCA might encourage private parties to forward compensation claims.

According to the Norwegian Competition Act, the possibility of private actions is not taken into account when deciding what type of remedy or fine, or the level of the fine, to impose.

## **7. Experience**

As mentioned above, the NCA has yet to impose behavioural or structural remedies in abuse of dominance cases under the present Competition Act. The NCA has adopted one decision against abuse of a dominant position where a fine was imposed. In this case no remedy was imposed because the behaviour in question had already ceased to exist.



## SPAIN

### 1. Spanish legal framework

In Spain, remedies and fines in abuse of dominance cases are imposed according to the terms of the sanctioning procedure established in the Competition Act 16/1989 of July 17 (CA) to punish prohibited practices.

This sanctioning procedure is applied to prohibited agreements (art. 1), abuses of dominant position (art. 6) and acts of unfair competition which seriously distort the competitive conditions of the market (art. 7)

It is a two-phase procedure in which the *Servicio de Defensa de la Competencia* (SDC) is entitled to clarify the facts and instruct the sanctioning proceedings and the *Tribunal de Defensa de la Competencia* (TDC), an independent administrative body, has resolution and sanctioning functions.

Consequently, when issuing its resolutions the TDC will decide the sanction to impose, be it the establishment of specific conditions or obligations (remedies) and or of economic sanctions (fines). Nevertheless, in its Report to the TDC, issued once the instruction proceedings have concluded, the SDC may propose the sanction and, in the case of fines, their amount.

TDC's decisions are subject to judicial review by the *Audiencia Nacional*, whose judgments may then be appealed before the *Tribunal Supremo*.

The **objectives** pursued by the authorities when imposing sanctions are to punish violators, denying them any profit coming from their illegal conduct, and to deter future anticompetitive conducts. Brief, sanctions aim at ending with the illegal activity and preventing new ones by means of punishing the violator. There are no criminal penalties such as imprisonment for individuals envisaged in the Spanish CA.

#### 1.1 Types of sanctions

The CA foresees three types of sanctions for breaching the prohibitions described in articles 1, 6 and 7:

- a. *Cease and desist orders (art. 9)*: The violators may be ordered to cease and desist from the forbidden practices and, where needed, to remove any anticompetitive effects of such practices.
- b. *Sanctioning fines (art. 10)*: The TDC may impose fines of up to 901.518 euros, amount which could be increased to up to 10% of the total turnover corresponding to the fiscal year immediately prior to the Resolution. The amount of the sanction will be determined according to the importance of the breach, for which purpose the criteria described in art. 10.2 are taken into consideration.
- c. *Coercive fines (art. 11)*: Independently of the sanctioning fines, the TDC may impose coercive fines of 60 to 3.000 euros per day with a view to obliging undertakings to comply with the

TDC's orders to cease the forbidden practices and remove their distorting effects in competition and to publish the TDC Resolutions in the Official State Gazette and in newspapers of large coverage.

The Spanish CA is currently under review and it is likely that these provisions will change for the sake of major clarification and predictability of the fines.

## **1.2 Types of Resolutions**

According to art. 46 of the CA, the TDC resolutions *may declare* (art. 46.1) either the existence of forbidden practices or agreements or that the existence of such forbidden practices or agreements has not been proved. Moreover, these declarations may be accompanied with other *measures* described in art. 46.2. Consequently, according to art. 46 distinctions should be made between the elements that constitute the judgement and the elements that generate the sanction for having committed prohibited conducts:

- The TDC decision will include a statement or declaration of the existence of the infringement, declaring as well whether that action is considered as a restrictive agreement or an abuse of dominance.
- Besides the abovementioned declaration, TDC decisions include *penalties* such as: an order to cease the forbidden practices, the imposition of specific conditions or obligations (remedies), an order to remove the effects caused by the prohibited conducts and the imposition of fines.

### **1.2.1 Penalties and sanctions**

The order to cease the forbidden practices

TDC decisions declaring the existence of an illegal conduct include a cease and desist order which can have immediate effect or be implemented after a transitory period. The experience advises the introduction of this adjustment mechanism principle because in many cases the sharp ending of an agreement or unilateral conduct can damage third parties which have not taken part in the infringement or the functioning of the market where the convicted undertaking has been operating.

The imposition of specific conditions or obligations

The TDC may impose remedies following any sanctioning proceeding, but in the Spanish experience this is more common in authorisation cases. At all events, according to the CA the TDC can request undertakings to cease any anti-competitive behaviour and can impose behavioural remedies but not structural remedies in abuse of dominance cases (unlike in merger control proceedings).

The current draft new competition act includes structural remedies in line with those in Regulation 1/2003.

The order to remove the effects caused by the prohibited conducts

In its resolution the TDC should define the specific public interest being affected by the conduct in order to identify the negative effects in the market caused by the economic agent and order it to remove them.

These TDC powers described above, are firmly backed in the CA through the coercive fines that the TDC may impose, independently of the sanctioning fine, in order to make the economic agents comply

with the TDC Resolutions to cease the forbidden practices and remove their distorting effects in the market. These periodic payments amount to between 60 and 3.000 euros.

Furthermore, all these types of penalties require additional surveillance and monitoring of the operator's future behaviour in the market.

#### Sanctioning fines

Given that the Spanish competition Law does not foresee imprisonment penalties on individuals for the breach of substantive rules, fines are the main means for deterrence which can be imposed in sanctioning procedures. Nevertheless, the imposition of a fine does not necessarily follow from the declaration of a legal breach. Often, when it is the first time that an infringement is declared, the economic operator is not sanctioned with a fine. This is a heritage of the Luxembourg Court and it is oriented to comply with the pedagogical role played by the TDC through its Resolutions.

The amount of the fine (art. 10) may go up to 901.518 euros, amount which may be increased to up to 10% of the total turnover of the undertaking in the previous fiscal year of the Resolution.

Moreover, art. 10.3 provides that, besides the sanction to be imposed on the companies, in the case of a legal entity its legal representatives or the members of its management bodies that have intervened in the prohibited agreement or decision may personally be fined up to 30.050 euros.

The **amount** of the sanction is to be determined according to the importance of the breach, for which purpose the following **criteria** described in article 10.2 are taken into consideration:

- a) *The type and scope of the restriction upon competition.* Abuses of dominance, specially in recently liberalise markets such as energy, telecommunications or postal services, and horizontal agreements fixing prices or sharing markets are *per se* considered as serious restrictions of competition. In principle the Spanish competition authorities tend to have a less stringent approached towards vertical restrictions as they usually have efficiency enhancing effects which limit harm on global welfare.
- b) *The dimension of the market affected.* This is not only a question of geographical extension but also of the extension of the conduct over the market.
- c) *The market share of the corresponding undertaking.*
- d) *The effects on the actual or potential competitors, the other parties in the economic process and the consumers and users.* The effects on consumers and users are specially taken into consideration having regard of their weaker position in the market.
- e) *The duration of the restriction upon competition.* The TDC should consider whether the conducts have persistent effects or have transitory and circumstantial effects.
- f) *The reiteration of the prohibited conduct.* Reiteration is considered an aggravating circumstance.

Notwithstanding these factors, the TDC still has a wide margin of discretion as the CA does not explicitly establish which conducts might be considered as severe restrictions of competition and which might not. It does not contain a graduation of conducts nor a graduation of sanctions. Nevertheless, past decisions and judicial review creates general principles which constraint that discretion.

Finally, art. 10.6 provides that if the TDC were to judge that there was a lack of good faith or intentional recklessness in the actions of any of the parties before the competitions bodies, it could impose a fine of up to 30.051 euros.

### 1.2.2 *Monitoring penalty declarations*

Article 31 of the CA includes, among the functions of the SDC, that of surveilling the execution and compliance with the Resolutions adopted in applying the CA and, as the case may be, declaring the prescription for the action to request compliance with the sanctions foreseen in article 12 of the CA<sup>1</sup>.

For this purpose the SDC conducts the necessary proceedings in order to clarify whether the parties have complied or not with the TDC Resolution. Once the proceedings have concluded the SDC submits a Report to the TDC, which, in case the lack of compliance with the Resolution has been proved, may decide to impose coercive sanctions.

## 2. **Spanish experience: case law**

### 2.1 *Imposition of specific conditions or obligation (remedies)*

Imposing remedies has not been a regular practice of the TDC in abuse of dominance cases. Nevertheless, some interesting cases could be commented.

1. **McLane/Tabacalera (Case 486/00)**. In its Resolution (24.4.2002), the TDC declared that Tabacalera was abusing its dominant position by refusing the supply of raw tobacco to MacLane. The TDC imposed Tabacalera, as penalty measures to cease the declared forbidden conduct and to supply MacLane in a non discriminatory way. Additionally, it imposed a **sanctioning fine** of three millions euros based on the grounds that the deliberate attitude leading to the unlawful behaviour of Tabacalera was unquestionable and that the effects on competition were pretty serious.

The TDC considered that Tabacalera's refusal to supply hampered the access to the market of wholesale tobacco distribution to a potential competitor. The access to the raw tobacco market of Tabacalera was essential because Tabacalera not only distributed its own raw tobacco but also that of its competitors on an exclusive basis, making it impossible to enter the wholesale distribution market without Tabacalera.

The *Tribunal Supremo* said that Tabacalera's legal monopoly in the production of raw tobacco led to a monopoly in the downstream market of distribution which was clearly against the legislator's aim to liberalise this latter market and that the TDC's imposition to Tabacalera to supply a potential competitor was justified since there were no other means of obtaining the product in the primary market and the non existence of competition in the downstream market could harm end users.

2. **Iasist/3M (Case 517/01)**. *Agrupadores* and *analizadores* are complementary products (software) that are jointly used and so, consumers (hospitals mainly), ask their suppliers for both products.

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<sup>1</sup> Article 12. Prescription of the offences and sanctions.

1. The following shall be subject to prescription:
  - a) Four years, for the offences foreseen in this Act. The period will commence to run from the day on which the breach was committed.
  - b) Four years, for the sanctions.
2. The prescription shall be interrupted by any action on the part of the TDC or the SDC, of which the interested parties are formally notified, towards investigating, instructing or pursuing the infringement.
3. The prescription shall also be any action on the part of the interested parties towards ensuring, complying with or implementing the sanctionary agreements.

3M and Iasist were the only competitors in the market of *analizadores* (Iasist with the software CLINOS and 3M with *Estación Clínica*).

In its Resolution (5.4.2002), the TDC declared that 3M España committed an abuse of its dominant position in the market of *agrupadores* by limiting the supply of the licences of its *Agrupador AP-GRD* (the most used in the sanitary sector) through Iasist to the final customers of the latter, by refusing to provide Iasist with the price list for the *Agrupador* before Iasist identified its potential final clients, and by imposing unfair prices. By those means, 3M España imposed limitations and disadvantages to its single competitor in the downstream market of *Analizadores*, without objective justification. Indeed, this conduct seriously hampers the sale of the Iasist product by hindering the possibility to jointly offer the *Agrupador AP* with the *Analizador CLINOS*.

As **penalty measures**, the TDC imposed to 3M the orders to cease the forbidden practices and to publish the resolution in the Official State Gazette and in two newspapers of national coverage. Additionally, it was imposed a **sanctioning fine** of 4.200 euros.

The SDC, on its Report to the TDC also proposed to establish a system for Iasist's access to the *Agrupador AP-GRD* which would allow Iasist to perform effectively in the market through the selling of its *Analizador CLINOS*. That system would include an obligation to 3M to provide Iasist with the price list of *Agrupador AP-GRD* and with information on any modification or specific offer that 3M would run in the market concerning this product. However, the TDC decided not to impose any system concerning the relations between the parties since it seemed to it an excessive intervention which could exceed its functions.

Nevertheless, it is relevant to highlight that once the TDC resolution was issue, 3M proceeded to provide Iasist with the price list previously the final potential client were identified and to supply directly its products and licences in order to avoid that Iasist' clients be forced to deal with 3M. In conclusion, 3M complied with the TDC resolution.

3. **Seguros Médicos Ciudad Real (Case 497/00)**. In its Resolution (25.6.2001), the TDC found that the sanitary insurance company SEGURO COLEGIAL MEDICO QUIRURGICO S.A. abused its dominant position by hindering the access of new comers to the market by means of demanding exclusivity to its doctors. The TDC imposed to SEGURO COLEGIAL, the **order** to cease the forbidden practice and eliminate the exclusivity requirements in two months (such exclusivity was included both in the Internal Regulation of the entity and in the labour contracts of the doctors).

Additionally, the company was imposed a **sanctioning fine** of 90.151 euros, the order to publish the resolution in the State Official Gazette and in a newspaper of large coverage and a **coercive fine** of 601 euros per day of delay in the fulfilment of the obligation to publish the Resolution.

SEGURO COLEGIAL had a dominant position in the private sanitary insurance market in the province of Ciudad Real, due to its high market share and the availability of a list of doctors and sanitary facilities which were not available to the competitors. In such conditions, SEGURO COLEGIAL, which required exclusivity from the doctors and refused access to the most important private clinic of Ciudad Real (it was its owner) to doctors working with other insurance companies, enjoyed an ability to behave to an appreciable extent independently of the competitors.

The TDC considered that where insurance companies in dominant positions require exclusivity from the doctors, they not only prevent such doctors from freely exercising their profession but they also restrict competition in the market by hindering the access of new competitors whose possibilities to create their own list of doctors become limited. As a consequence, they prevent

the free election of the clients, which may wish to switch to another insurance company without changing doctors.

SEGURO COLEGIAL complied with the order of eliminating the requirements of exclusivity to the doctors.

**Other cases** in which the TDC has imposed behavioural conditions in abuse of dominance are the following:

- In **Airport Telephones (Case 350/94)** the TDC imposed Telefónica an obligation to supply a new client, to whom Telefónica had refused or delayed interconnection with some telephone devices. The TDC concluded that Telefónica was hampering the access of a new competitor into the market.
- In **Astel/Telefónica (case 557/03 issued in April 2004)** the TDC considered that Telefónica was abusing its dominant position by linking the provision of certain services to clients that had not pre-assigned with Telefónica's competitors. The TDC imposed a fine of 57 million euros to Telefónica and obliged it to inform every client that pre-assignment with another operator would not have any negative consequences on the quality of the services provided by Telefónica.
- In **Mercasevilla/Pescados (Case 525/01, issued in July 2002)**, the TDC considered that Mercasevilla had abused its dominant position and, apart from the fine and the obligation of publishing the Resolution, it imposed Mercasevilla the obligation to inform directly of the content of the Resolution to all fish wholesalers in the region.

## 2.2 *Imposition of fines*

As said before, the **amount** of the fine is determined according to the importance of the breach, following the **criteria** described in article 10.2 of the CA.

### 2.2.1 *Tabacalera/McLane case*

- a) Concerning the **type and scope of the restriction upon competition**, the conduct of Tabacalera consisting on defending through illegal practices its monopoly position, previously granted by law and abolished afterwards, was considered a very serious restriction. This conduct, which fostered the lack of competition in the wholesale distribution market, was clearly against the legislator's aim to liberalise that market.
- b) Concerning the **dimension of the market affected**, it was considered of large scope because almost the whole of Spain was affected.
- c) As for the **market share of Tabacalera** in the relevant market, it was of 100% in the distribution market.
- d) With regard to the **effect of the restriction upon competition**, the TDC found that it was remarkable, as one can say from the market share that Tabacalera kept in the market.
- e) Concerning the **duration of the restriction upon competition**, it persisted when the Resolution was issued.

All these considerations show that the elements to take into account in order to determine the amount of the sanctions were at the most grade in this case and therefore, the TDC fixed the amount of the **sanctioning fine** in three million euros. Additionally, it imposed two **coercive fines** of 600 euros each per day of delay in the fulfilment of the obligations to supply McLane and to publish the Resolution.

### 2.2.2 *Iasist/3M case*

On the one hand, concerning the **type and scope of the restriction upon competition**, the abuse was considered especially serious because it almost eliminated the only competitor of 3M in the market. Iasist had lost a considerable number of clients so that at that moment only 10% of the hospitals which used the *agrupador* of 3M were also clients of Iasist. On the other hand, with regard to the **dimension of the market affected**, its small dimension (it did not exceeded 150.000 euros) was especially considered.

According to the above mentioned, the TDC decided to impose 3M a **sanctioning fine** of 4.200 euros.

### 2.2.3 *Seguros Médicos Ciudad Real case*

- a) concerning the **type of the breach**, the abuse of dominance is one of the infringements which produce the most harmful effects in competition;
- b) as for the **dimension of the market affected**, the market of private insurance of medical care in Ciudad Real reached almost 80% of insurance premium revenues;
- c) the **effect of restriction upon competition** caused by the exclusivity requirement was not uniform, being larger the in the capital than in the rest of the province;
- d) as for the **duration of the infringement**, it lasted six years.

According to the above-mentioned data, the TDC decided to impose a **sanctioning fine** of 90.151 euros. Additionally, it imposed a **coercive fine** of 601 euros per day.

## 3. **The TDC Sanctioning Policy**

The TDC sanctioning policy has been criticised on several grounds. On one hand, it has been said that fines are too low to prevent new prohibited conducts. In fact, the 10% of the undertaking's turnover has never been reached. On the other hand, many have complained that the non existence of guidelines on the TDC's policy of setting fines and the non graduation of infractions and sanctions lead to a lack of predictability. This has given rise to appeals before the *Audiencia Nacional* with the aim of obtaining a reduction of the fines.

Since neither the *Audiencia Nacional* nor the *Tribunal Supremo* have ever increased the amount of the fines imposed by the TDC there is always an incentive to appeal. Nevertheless, most of the times these Courts have confirmed the TDC Resolutions. In the cases where they have only partially upheld the TDC Resolutions, acknowledging the reasoning of the TDC regarding substantive issues, there has been a trend to decrease the amount of the fines imposed.

However, this is not exclusive to the Spanish TDC. Most appeals to the EU Commission Decisions seek a reduction of the fines imposed. And several judgments of the Court of First Instance have resulted in partial reductions of these fines.

From 1997 to 2004, both years included, the TDC issued 1039 Resolutions subject to appeal before the *Audiencia Nacional* or before the *Tribunal Supremo*. Of those 1039 Resolutions only 287 (27,6 %) were appealed. On the other hand, the average percentage of the TDC Resolutions that have been partially or totally annulled by the *Audiencia Nacional* is under 10%. In about 50% of these judgements the *Audiencia Nacional* backs the TDC's reasoning regarding the substantive issues but reduces or totally removes the fines on different grounds: lack of proportionality regarding the effects of the conduct, insufficient reasoning of the TDC or different treatment to similar situations. Around 30% of the Judgements annulling (or partially annulling) the TDC Resolutions referred to abuse of dominant cases.

Some examples of TDC Resolutions that have been overturned or annulled by the judicial courts are the following:

- On case 412/97 BRITISH TELECOM/TELEFONICA the TDC imposed a fine of 3,5 million euros to Telefónica. This decision was partially reversed by the *Audiencia Nacional* in 2002 for defects on the calculation of the fine.
- In 2000 Telefónica was sanctioned by the TDC (Case 456/99, March 2000, RETEVISION/TELEFONICA) with a fine of 8,5 million euros. In 2003, the *Audiencia Nacional* issued a judgment that reduced the fine to 901.528 Euros, because of lack of reasoning as to the amount of the fine.
- In 2004 the TDC imposed the highest fine ever imposed in an antitrust proceeding, 57 million euros, to Telefónica (Case 574/03, April, 2004, ASTEL/TELEFONICA). The judgement of the *Audiencia Nacional* is still pending.

The Spanish authorities wish to encourage the **private enforcement** of competition law and there will be several provisions in this sense under the future competition law. However, the administrative authorities should not take into account, when determining the amount of the sanctions, whether the conduct is being or will be subject to private actions. Since private actions can follow an administrative decision, in such cases the authority would have to determine the amount of the fine without knowledge of what will happen in the aftermath. Coordination with the judiciary is foreseen under the new competition law but the administrative authorities should determine the quantity of the fines regarding the new CA provisions, and where they exist, the Guidelines to clarify the criteria on fixing the fines issued by the competition authorities.

#### 4. Conclusions

The Spanish Competition Law is generally in line with Community rules with regards to sanctions. No criminal penalties are foreseen for abuses of a dominant position and fines are the core elements for achieving deterrence and proportionality. The main absolute limit of fines imposed on firms is set at 10% of the total volume of sales and criteria for determining the fine are based on the gravity of the infringement, the duration and effects, as well as the specific characteristics of the offender.

This system has enabled the imposing of increasing fines in the last years, particularly in the field of abuses of dominant positions in recently regulated sectors.

The Spanish sanctioning system also shares the main limitations usually assigned to the EU competition policy: too low fines with insufficient deterrent effect and lack of consistency in the application of objective criteria for fixing the fine.

Nevertheless, work to improve the coercive effect and effectiveness of competition policy is underway in three directions:

First, the Spanish competition Law is currently under a revision process which will lead to a new Competition Act in the next months. The current draft includes measures which enhance transparency and legal certainty with regards to fines in order to reinforce their deterrent effect. Nevertheless, competition authorities must still have a certain degree of flexibility.

Secondly, the draft also foresees a reinforcement of private application of the competition rules, thus opening the floor for claims for damages, increasing the role of the judiciary in this field and the deterrent effect of the Law.

Third, there is a trend in the TDC' fining policy towards the toughening of the fines even within the current limits and criteria established in the competition act.



## TURKEY

According to Article 9 of the Law on Protection of Competition No 4054 (Law No 4054); Turkish Competition Board (the Board) is empowered to notify the undertaking and associations of undertakings a decision including behaviour to be fulfilled or avoided to establish competition and maintain the situation before infringement. It is obvious that the Board is able to order undertakings and associations of undertakings to act in a certain way or it may prohibit them from performing certain acts. However, while doing so, the orders would be confined to the boundaries of establishing competition and maintaining the situation before the infringement.

Moreover, where the occurrence of serious and irreparable damages is likely until the final decision, the Board may take interim measures which have a nature of maintaining the situation before the infringement. The reasoning of the article provides that interim measures can be taken if there are strong indications that there will be serious and irreparable damages. However, the suffering parties can not be placed in a better or worse position than they were before the abusive practice, as a consequence of the Board's orders.

Furthermore, the Board has to impose a fine up to 10% of the annual gross revenue for anti-competitive agreements and abuses according to Article 16 of the Law No 4054.

With respect to mergers and acquisitions, the Board, upon notification of mergers and acquisitions exceeding certain thresholds, is obliged to permit the merger or acquisition transaction as a result of the preliminary examination to be performed by it within fifteen days, or if it decides to deal with this transaction under final examination, it is obliged to duly notify, with its preliminary objection letter, those concerned of the fact that the merger or acquisition transaction is suspended and cannot be put into practice until the final decision, together with other measures deemed necessary by it. Moreover, where a merger and acquisition transaction whose notification to the Board is compulsory is not notified to the Board, the Board shall deal with the merger or acquisition under examination on its own initiative, when it is informed about the transaction anyway. After the examination; in case it decides that the merger or acquisition creates or strengthens a dominant position as a result of which competition is significantly decreased, it decides that the merger or acquisition transaction be terminated, together with fines; all de facto situations committed contrary to the law be eliminated; any shares or assets seized be returned, if possible, to their former owners, whose terms and duration shall be determined by the Board, or if not possible, these be assigned and transferred to third parties; the acquiring persons may by no means participate in the management of undertakings acquired during the period until these are assigned to their former owners or third parties, and that other measures deemed necessary by it be taken.

To understand how provisions of especially Article 9 implemented in practice, some examples will be mentioned below.

In *BIRYAY*<sup>1</sup> case, two undertakings (BBD and YAYSAT) operating in the market for the distribution of newspapers and journals created a joint venture (BIRYAY) to jointly distribute newspapers and journals. BBD and YAYSAT were owned by two separate groups publishing newspapers and journals. The

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<sup>1</sup> 17.07.2000; 00-26/292-162.

undertakings and their joint venture were considered as jointly dominant in the relevant market for distribution of newspapers and journals as their combined market share in the last five years was 100%. BBD and YAYSAT created JV in order to distribute rival newspapers and journals under different conditions than publications belonging to their groups and force publishing houses to conclude contracts with BIRYAY.

In the market for distribution of newspapers and journals, entry to the market and ability to exist in the market require two elements of critical importance that are setting up sale points the number of which is sufficient enough to present the publications to the readers and feeding the sale points with publications in sufficient numbers and varieties. As a result, it has been considered that the requirement to set up sale points in excess of ten thousand the existing ones of which are hard and economically irrational to substitute is a serious barrier to market entry. Moreover, this barrier to entry was caused by the conduct of distribution firms who had concluded exclusive agreements with sale points prohibiting rivals to use those sale points to sell their publications.

In this case, BBD and YAYSAT complicated activities of rival publishers and distorted the conditions of competition in the market of newspaper and journal publication by forcing rival publishers to sign contracts with BIRYAY, refusing to distribute publications by rival publishers who refused to sign contracts, imposing new commission rates. The publishing houses unwilling to sign contracts were exposed to the risk of not having their publications distributed and not receiving their payment. Therefore, the abusive conduct in the market of newspapers and journals distribution aimed to distort competitive conditions in another market, market of newspapers and journals publication.

Moreover, it was seen that for purposes of rendering difficult the activities of DostBD, the competitor distributor, BBD and YAYSAT attempted to eliminate DostBD sale points by turning them into "BBD and YAYSAT group" dealership, and to push new DBD sale points towards outskirts, that dealership was offered to DostBD sale points in return for not selling publications distributed by DostBD, and that sale points were made to sign backdated contracts in order to prevent DostBD from using the existing sale points for newspapers and journals, and within this framework, it was decided that BBD and YAYSAT jointly abused their dominant position by means of "committing practices which aim at making difficult the activities of their competitors in the market".

After the determination of abuse, in addition to monetary fine, the basic remedy imposed by the Competition Board was removal of two provisions from the contracts between BBD and YAYSAT and the sale points. First clause to be removed included prohibition of display and sale of publications of another distribution firm or publishing house and the second included requirement on the sale points not to supply publications for sale to another person or establishment around its address.

Moreover, the Competition Board decided to notify the decision to municipalities that established or leased to third persons sale points (kiosks) located in main arteries and public squares to do the necessary regulations for sale of all newspapers and journals regardless of the identity of the distribution firm because of their important sales potential due to their location and their limited number.

It is obvious that the remedy in this case is more important than the fine and it proved to be an effective instrument because the complaints terminated after removal of the clauses in the relevant contracts and municipalities' compliance with the Board's notification by carrying out regulations for sale of publications irrespective of the source in kiosks.

In *Turkcell*<sup>2</sup> decision, one of the main issues was the complaint about campaigns organised by Turkcell, the dominant GSM operator in the market for GSM services, with mobile phone distributors in which Turkcell subsidised mobile phones and did not charge fees for the line and the sim card on the condition that the distributors did not work with the other operator. The Board decided that Turkcell, by working exclusively with mobile phone distributors under such campaigns, prevented these distributors from holding similar campaigns with competing operators, and consequently prevented mobile phone devices belonging to these distributors from being sold with the line of the competing operator. Moreover, Turkcell, by means of working exclusively with the mobile phone sale points (dealers and the activation centres and subscription points), complicated the market activities of the competing operator as a joint consequence of the facts that the activation centres and subscription points were at the same time the mobile phone dealers of distributors and almost all of these distributors were exclusively working with Turkcell and made dependent on it. These acts were regarded as abusive as such practices complicated the activities of the rival GSM operator. In addition to fines, the Board decided that in case Turkcell's dealers were the dealers of mobile phone distributors at the same time, the condition of exclusive operation could not be introduced, as it was not possible for competing operators to acquire dealers of the same nature and thus competition in the relevant market would be significantly restricted. Therefore, the Board required that provisions related to exclusivity with Turkcell Activation Centres which were the dealers of the distributors of mobile phones at the same time be deleted within 60 days and it be notified to the Turkish Competition Board.

Another issue in this case was sale of mobile phones with sim lock as part of the campaign organised by Turkcell that prevented the customers to use their mobile phones with the line of the rival operator. As to this conduct, the Board decided to send the following Opinion to the Telecommunications Authority:

- SIM lock shall not be applied to the devices which are not included within the scope of the promotion, that is, part of the price is not covered by a GSM operator depending on the condition of subscription for a certain period of time;
- in case that devices with SIM lock are sold/given within the scope of the promotion;
- the consumer shall be informed that the SIM locked device is sold/given to him/her, that the SIM lock will be released following the expiry of the lock obligation period and upon the demand of the consumer prior to such expiry date, or, about the advantages to be provided to the consumer in case that he/she remains as subscriber following the expiry of such date;
- the consumer shall be informed that the owner of the device shall be free to release the lock prior to the expiry of SIM lock period, and on how much promotion shall be returned to the owner of the device for how much period remained to the operator which performs the promotion in case that the lock is released prior to its period.

These remedies made it possible for the rival operators to organise campaigns with any distributor of the mobile phones and also for the customers to use any mobile phone with the sim card of any GSM operator.

*Digitürk*<sup>3</sup>, another case where the Board imposed behavioural remedies, concerned broadcasting rights for the matches in the Turkish Football Federation (TFF). TFF transferred the broadcasting rights to

<sup>2</sup> 20.7.2001; 01-35/347-95.

<sup>3</sup> 28.08.2002, 02-50/636-258.

Digitürk and Atlas after a tender process and they became the sole broadcaster. Digitürk and Atlas offered to sell the images of the 9 football matches played in a week to the broadcasting organisations as a package lasting 3 minutes and refused demands for such images under different conditions such as images of one or a few matches rather than the whole package or images lasting less than 3 minutes. This was regarded as an abuse of its dominant position in the market for recorded images of matches in the Turkish Premier Professional Football League in another market, i.e. the market for free television broadcasting. They also applied discriminatory conditions in favour of a certain broadcasting organisation they had close relations against others and this was also regarded as an abusive practice. The Board, upon the demand of the complainants, took interim measures before reaching its final decision that required Digitürk and Atlas, upon the request of any broadcasting organisation related with any match played, give images within 45 minutes at the latest from the end of the match, which would be prepared to involve the goals, if any, of the match it belonged to and the other important positions, would have a broadcastable quality, would last for 1-3 minutes, would be of standard lengths (that might be determined as a result of the market survey to be made by the broadcaster), in return for a charge to be paid in cash within the limit stated in the contract referred to and without putting forward any other conditions about the provision of images, provided that they had the same content and they were delivered to the representatives of all broadcasting organisations simultaneously, and practices which resulted in discrimination in favour of any broadcasting organisation be avoided. The Board reminded these conditions in its final decision in addition to fines imposed. The Board aimed to establish competition in the market for free broadcasts by allowing the broadcasting organisations to prepare sport programs including the highlights and it was quite successful in doing so as the relevant images were supplied accordingly.

In *ISS v. Türk Telekom (TTAŞ)*<sup>4</sup> case, the Board initiated an investigation against the incumbent fixed line telecommunications operator and (then) monopolist, TTAŞ, after considering the following alleged conduct in internet service providers markets as serious:

- Preventing directly or indirectly another undertaking from entering into the area of commercial activity, or carrying out actions aimed at complicating the activities of competitors in the market via tariffs and refusal to provide an opportunity to ISPs to offer a dial up internet access service without the local network users' need to subscribe.
- Distorting competitive conditions in the internet services market via offering internet access below cost to internet users.
- Non-provision of Primary Rate Interface (PRI) lines demanded by ISPs to offer services to subscribers using local telephone network, obliging ISPs to use TNet's<sup>5</sup> infrastructure, tying discount system in leased lines for ISPs to the condition to conclude 3-7 years-long contracts, and restricting production, marketing or technical development to the prejudice of consumers by preventing development of rival new networks in this way.
- Providing no response on time to applications by ISPs for lines, tying fulfilment of the demand for lines to the grant of the equipment to be used, denying ISPs other than revenue sharing partners and TNet the opportunity to offer internet access through cable TV network, thereby putting forward different terms to ISPs with equal status for the same and equal rights, obligations and acts.

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<sup>4</sup> 2.10.2002; 02-60/755-305.

<sup>5</sup> TNet is the name of both internet backbone owned by TTAŞ and its internet service providing unit.

- Demanding from the ISPs information that have the nature of trade secrets and using them in favour of its own internet service, allowing return of maximum 10% of VPOPs (Virtual Point of Presence), obliging the ISPs, leasing basic telecommunications facility from TTAŞ, to use products of certain firms in these facilities, and thereby carrying out actions which aim at distorting competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market.

During the investigation process In *ISS* case, the Board took interim measures against TTAŞ that was dominant in the market for internet infrastructure services and decided that:

- The prices of services it offered under the name of TNet in the internet services market and tariffs and practices towards internet service providers (ISPs) which were obliged, in order to operate in the same market, to use the infrastructure services that were essential facilities offered by TTAŞ be redetermined to avoid cross-subsidisation in terms of the internet services it offered under the name of TNet, and competition infringements.
- It would end the practices compelling ISPs to lease only Virtual Point of Presence (VPOP) to offer internet access, and it would ensure ISPs to use, upon their request, technologies that could be used for internet access (ISDN-PRI, ISDN-BRI, No.7 E1 etc) to the possible extent and without leading to discrimination.
- It would open xDSL internet access opportunity and internet access through cable TV network with the facilities that it employed in TNet services, and under reasonable and technically possible conditions without leading to discrimination.
- It would terminate the practice of demanding the information from ISPs that would provide itself a competitive advantage (user identity, name, address, phone number etc.) except for those that were technically necessary.
- It would inform the ISPs in writing about the termination of the practices mentioned above and the necessary regulations on this matter within 15 days from the communication of the decision, and it would notify these transactions to the Competition Authority.

At the end of the investigation, in addition to imposing fines, the Board, in order to be able to establish a healthy competitive environment in the relevant markets, decided to notify TTAŞ that it should not, directly or indirectly, subsidise internet access service tariffs for end users with the revenue obtained from the activities in those markets where it had a dominant position and by redetermining its tariffs without leading to cross subsidisation in the market for internet access service, it should terminate its abuse of dominance in the markets including the infrastructure necessary for offering broadband internet access service to corporate users and narrow band internet access service to local users, which complicated the activities of complainants and other undertakings, operating in the markets for broadband internet access service to corporate users and narrow band internet access service to local users. In general, the decision has been successful to a large extent in limiting the abusive and exclusionary practices of TTAŞ in the ISP markets.

One decision to mention where the Board did not employ behavioural remedies is *National Roaming*<sup>6</sup> decision. In the GSM infrastructure services market, two undertakings, namely Turkcell and Telsim, were operating and they reached 90 percent coverage area at that time. Two other undertakings (İş-TIM and Aycell), having recently obtained licenses and thus newly entering the GSM services market at that time,

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<sup>6</sup> 9.6.2003; 03-40/432-186.

did not have networks covering the entire territory of Turkey and a coverage sufficient to be able to compete in the GSM services market could not be achieved due to geographical and topographical difficulties, legal restrictions, natural monopoly circumstances, formation of bottlenecks, need for public support for building the facilities, technological limitations, and economic limitations that could be grouped under the headings of technical difficulties, legal difficulties and economic difficulties and as a result they could not register subscribers and realise investments with revenues coming from these subscribers. Accordingly, the Competition Board regarded the infrastructures of Turkcell and Telsim as “essential facilities” until a sufficient coverage area was achieved by the new entrants. Therefore, the Competition Board ruled that incumbent operators’ (Turkcell and Telsim) setting access prices far above their costs resulting in an artificial rise in rivals’ costs created a serious barrier to entry of newly arriving operators, İŞ-TİM and Aycell.

In the end, the Competition Board has imposed administrative fines on Turkcell and Telsim amounting to 1% of their net sales for the year 2001, for abusing their dominant position in the telecommunications market via refusing to comply with their obligation to make roaming agreements with İŞ-TİM, the third leading Turkish mobile operator. The amount of fine imposed on both operators was nearly TL 30 trillion (USD 21.5 million). This penalty amount was a record fine imposed by the Competition Board since its foundation in 1997.

The Board did not impose any behavioural remedy itself in order to end the violation after taking into account the likelihood of changes in the market conditions and the change in the need of the new entrants for national roaming in the period between the start of the investigation of the Competition Board and its final decision and it thought it would be proper to refer the matter to the Telecommunications Authority, that was responsible to make necessary regulations in the telecommunications sector and had the most recent information about the market as well as the status of its legislation that was challenged in courts that stayed execution of some of them, to determine how to impose national roaming obligation under market conditions at that time while deciding how to terminate the infringement and the conduct required and to be avoided to re-establish competition in the relevant market.

The Competition Authority has tried to delimit the exclusionary effects of network externalities in the GSM mobile phone markets in Turkey. However, apart from the fact that the fines imposed by the Board could not affect the conduct of violators, Turkcell and Telsim, as the Council of State, the supreme administrative court, stayed the execution of the decision, it was further argued that “*The Competition Board’s decision on roaming arrangements will have little effect on the development of competition in the mobile telephone services market. With the merger of Aria<sup>7</sup> and Aycell, roaming has become a non-issue and it will remain a non-issue until further new entry, which is not likely to take place in the near future.*”<sup>8</sup>

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<sup>7</sup> Aria was İŞ-TİM’s trademark used for its mobile phone services.

<sup>8</sup> See Working Paper Series of Economic Policy Research Institute, “Competition and Regulation in the Turkish Telecommunications Industry” by Izak Atiyas, July 2005, p. 28 available at [http://www.tepav.org.tr/tur/admin/dosyabul/upload/Turkish%20Telecoms%20nc%20\(2\).pdf](http://www.tepav.org.tr/tur/admin/dosyabul/upload/Turkish%20Telecoms%20nc%20(2).pdf)

## SUISSE

### 1. Introduction

En Suisse, les abus de position dominante sont sanctionnés depuis l'entrée en vigueur de la loi révisée le 1<sup>er</sup> avril 2004 par des amendes pécuniaires prononcées par la Commission de la concurrence (Comco). De plus, les entreprises lésées par un abus de position dominante peuvent se tourner vers le juge civil. A la différence de la procédure civile, la procédure auprès de la Comco ne prévoit pas de dommages et intérêts, de réparation morale ou de remise du gain.

En cas d'abus de position dominante, une décision typique de la Comco comporte en particulier la constatation de la position dominante de l'entreprise en cause, la constatation du caractère abusif du comportement incriminé et l'ordonnance des mesures nécessaires à la correction du comportement abusif.

### 2. Objectifs des mesures et des sanctions

Le terme « mesures » selon l'art. 30 LCart est un terme juridique imprécis qui doit être concrétisé pour un cas particulier selon le droit sur les cartels relatif au fond. Il n'y a pas de *numerus clausus* des mesures. Les mesures ont comme objectif de supprimer la restriction. Dans le cas CoopForte (RPW 2005/1 146 ss.), la Comco a ordonné que le grand distributeur Coop rembourse aux fournisseurs un bonus que Coop avait obtenu grâce à sa forte position sur le marché. Ce genre de mesure permet de rétablir l'état avant la violation de la LCart.

Selon l'art. 49a al. 1 LCart, chaque abus d'une position dominante est puni d'une sanction administrative. L'objectif principal des sanctions administratives est celui de la prévention générale et spéciale, raison pour laquelle le montant fixé par la Comco est censé avoir un effet dissuasif dans des cas identiques ou semblables. Un autre objectif est celui de la répression.

### 3. Choix des mesures et des sanctions appropriées

Dans beaucoup de cas, pour supprimer la restriction, il ne suffit pas de constater qu'un certain comportement est illicite et de décider qu'un accord ne peut plus être appliqué, autrement dit qu'il ne lie pas les parties. Dans ces cas, la Comco a jusqu'à présent établi des mesures de comportement, c'est-à-dire des instructions concrètes d'action (ordre d'appliquer des mesures visant à supprimer la restriction) ou de ne pas faire (interdiction de continuer à pratiquer le comportement illicite). Il s'agit des mesures suivantes : obligation de contracter (p.ex. obligation de livraison ; p.ex. ETA SA Manufacture Horlogère Suisse, RPW 2005/1 128 ss. ; Intensiv SA Grancia, RPW 2001/1 95 ss.), interdiction de la discrimination et interdiction d'imposer des conditions commerciales inéquitables (p.ex. Ticketcorner, RPW 2004/3 778 ss. ; Swisscom ADSL, RPW 2004/2 407 ss. ; Kreditkarten-Akzeptanzgeschäft, RPW 2003/1 106 ss.), remboursement d'un bonus illicite (CoopForte, RPW 2005/1 146 ss.). Selon la LCart, en plus des mesures correctives, chaque abus de position dominante est puni d'une sanction administrative.

En principe, il est possible, selon l'art. 30 LCart, d'établir des mesures structurelles dans des cas d'abus de position dominante. Cependant, il ressort de l'interprétation de la LCart qu'il s'agit dans ces cas du contrôle d'un certain *comportement*. En effet, il n'est pas illicite d'être en position dominante, il est uniquement illicite d'en abuser. Traditionnellement, les mesures structurelles visent à éviter de créer ou de

renforcer une position dominante dans le cadre de procédures concernant des concentrations d'entreprises (art. 10 LCart). La Suisse n'a pas eu jusqu'à présent l'occasion de se prononcer sur la problématique d'appliquer des mesures structurelles dans le cadre d'abus de position dominante. Cependant, la Comco a déjà utilisé des mesures de comportement à des fins structurelles (p.ex. obligation de livraison pendant un certain nombre d'années afin que des productions concurrentes aient le temps de s'établir sur le marché).

#### **4. Vérification de la correcte mise en œuvre des mesures de comportement**

Les décisions de la Comco imposent généralement l'obligation à l'entreprise dominante de communiquer à la Comco certaines informations ou mesures correctives adoptées. Alternativement, la décision prévoit la réserve de la Comco de vérifier la correcte mise en œuvre de la décision. Ces ordres sont assortis de la mention que l'inobservation de la décision est passible de sanctions administratives et pénales (art. 50 et 54 LCart). Jusqu'à présent – principalement dans le cadre d'accords amiables (CoopForte, RPW 2005/1, 146 ss. ; ETA SA Manufacture Horlogère Suisse, RPW 2005/1, 128 ss.) – la Comco a ordonné aux parties en question :

- de fournir à la Comco ou au secrétariat de la correspondance – dont il a préalablement été établi le contenu – afin qu'elle soit approuvée ;
- de lui fournir un rapport concernant la mise en œuvre de la décision ;
- d'annoncer au secrétariat au préalable des changements de prix, de rabais, de quantité (pour approbation) ;
- d'informer les entreprises victimes de restrictions illicites à la concurrence qu'elles peuvent prendre contact avec la Comco en cas de problèmes ;
- de lui fournir des informations et des documents sur demande.

Les mesures citées permettent de vérifier la correcte mise en œuvre de la décision indépendamment du type de mesure de comportement. Les vérifications ont en outre été accompagnées de vérifications ponctuelles supplémentaires et de rencontres avec les parties. En raison de la division des tâches entre la Comco et son secrétariat, c'est le secrétariat qui est principalement chargé de faire les vérifications. Aucun problème majeur n'a été rencontré jusqu'à présent.

#### **5. Sanctions administratives**

L'entreprise qui participe à un accord dur horizontal ou vertical ou qui abuse de sa position dominante est passible d'une sanction administrative (art. 49a al. 1 LCart). La LCart ne prévoit pas de différence entre les cas concernant des accords durs et les cas d'abus de position dominante pour le calcul du montant de la sanction (ordonnance sur les sanctions LCart, OS LCart). Le montant de la sanction doit être calculé en fonction de la durée et de la gravité des pratiques illicites. Le profit présumé résultant des pratiques illicites de l'entreprise doit être dûment pris en compte. Le calcul du montant concret est effectué en trois étapes : Le point de départ est le montant de base pouvant aller jusqu'à 10% du chiffre d'affaires réalisé sur le marché pertinent en Suisse au cours des trois derniers exercices. Ce montant est par la suite, en un premier pas, adapté à la durée et à la gravité des pratiques illicites, et en un second pas adapté selon les circonstances aggravantes et atténuantes.

En raison de l'entrée en vigueur récente de la révision de la LCart, la Comco n'a pas encore prononcé de sanctions. Cependant, des procédures de sanction sont en cours. Néanmoins, il est utile d'apporter quelques éléments de réflexion :

Le montant de la sanction est fixé selon le pouvoir d'appréciation de la Comco. Ceci lui permet de fixer le montant de la sanction de manière à ce que le profit tiré de la violation de la LCart soit inférieur à la perte financière provoquée par la sanction ainsi qu'au dommage subi au niveau de la réputation. En outre, le montant des sanctions doit être assez haut afin d'inciter les entreprises à participer au programme de clémence. Le pouvoir d'appréciation de la Comco est limité par le principe de proportionnalité. Conformément à ce principe la Comco doit fixer la sanction de manière à ce que le montant soit financièrement supportable pour l'entreprise en cause.

Les sanctions administratives n'empêchent pas une entreprise de faire valoir son droit à dommages et intérêts auprès d'un Tribunal civil. En effet, en principe les deux types de procédure sont indépendants l'un de l'autre. Comme il s'agit de deux fondements du droit différents, en principe rien ne s'oppose au fait que l'entreprise qui abuse de sa position dominante soit tenue au paiement cumulatif d'une sanction administrative, de dommages et intérêts, de la réparation morale et de la remise du gain.

La LCart prévoit uniquement des sanctions pour des accords durs et des cas d'abus de position dominante. La loi exclut donc déjà des sanctions pour les cas mineurs. En principe, la loi prévoit l'obligation de poursuite de la part de la Comco quand il s'agit d'un comportement pouvant être sanctionné. La pratique démontrera s'il est opportun dans certains cas de renoncer à l'ouverture d'une procédure en raison du principe d'opportunité ou de fixer la sanction à un montant symbolique. Cependant, afin de maintenir la crédibilité de la prévention, la marge de manœuvre pour se montrer clément envers les entreprises dont le comportement est illicite pour peu (« close calls ») est restreint.

## **6. Expériences**

La Comco a fait de bonnes expériences avec les mesures formulées. Le challenge est de trouver des mesures assez précises, mais assez larges afin de ne pas ouvrir le champ à des abus.

## **7. Conclusion**

Jusqu'à présent, la Comco a utilisé des mesures de comportement en cas d'abus de position dominante. Cependant, elle a déjà utilisé des mesures de comportement à des fins structurelles (p.ex. obligation de livraison).

Depuis l'entrée en vigueur de la révision de la LCart le 1<sup>er</sup> avril 2004, la Comco peut prononcer des sanctions directes. Le montant des sanctions administratives doit être calculé en fonction de la durée et de la gravité des pratiques illicites. Le profit présumé résultant des pratiques illicites de l'entreprise doit être dûment pris en compte. Au vu de l'entrée en vigueur récente de la révision de la LCart, la Comco n'a pas encore prononcé de sanctions.



## UNITED KINGDOM

### 1. Introduction

The paper to delegates on this issue from the OECD competition committee has noted that the subject of remedies and sanctions for abuse of dominance tends to be neglected in comparison to the attention given to the other aspects of abuse of dominance. The OFT notes that remedies and sanctions policy is a key part of any effective competition enforcement regime and the position taken towards remedies and financial penalties has implications for other aspects of competition policy.

The OFT believes the following key points need to be borne in mind when considering the issue of effective remedies for abuse of dominance:

- there have been relatively fewer decided cases on abuse of dominance compared with the cases relating to anti-competitive agreements (cartels and distribution agreements in particular);
- more complaints of abuse of dominance may tend to arise in regional or local markets: there are relatively fewer national or European markets where an undertaking holds a dominant position. There may therefore be a greater risk of divergent policies on sanctions and remedies since they are applied by different national competition authorities (possibly using slightly differing legal instruments);
- in EU (and UK) competition law, holding a position of market dominance is not unlawful: it is the abusive *behaviour* which is unlawful. Thus, remedies designed to end an abuse of dominance should first be behavioural. It is only where behavioural remedies cannot work that a structural remedy may be considered<sup>1</sup>. This:
  - contrasts with remedies under merger control regimes where structural remedies (e.g. divestment) tend to be the first choice, with behavioural remedies only being used where structural remedies are unavailable. So, learning from the mergers field may not be directly transferable to abuse of dominance;
  - may lead to over regulation of business behaviour unless remedies for abuse are ‘light touch’. The issue of proportionality is key to successful remedies for abuse of dominance;
- behavioural remedies need to be kept under regular review to ensure that they are still required to protect the competitive process and deliver benefits to consumers, and are not having effects that are disproportionate to the need to cure the abuse;
- a focus on the abuse may not be appropriate in some cases where features of the market (for example government regulation) underpin the maintenance of a dominant position. Advocacy to relevant government departments or other market-level intervention may be more appropriate than direct action against identified undertakings.

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<sup>1</sup> See Article 7(1) of Regulation 1/2003.

## 2. UK legislative background

The OFT applies both domestic and EC competition law on abuse of dominance. The domestic prohibition in section 2 of the Competition Act 1998 (the Chapter II prohibition) is the same as that in European law:

- “(1) Subject to section 19, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.
- (2) Conduct may, in particular, constitute such an abuse if it consists in-
- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
  - (b) limiting production, markets or technical development to the prejudice of consumers;
  - (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
  - (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.
- (3) In this section-"dominant position" means a dominant position within the United Kingdom; and "the United Kingdom" means the United Kingdom or any part of it.
- (4) The prohibition imposed by subsection (1) is referred to in this Act as "the Chapter II prohibition".”

If an undertaking infringes the Chapter II prohibition the OFT may impose a financial penalty and/or direct the undertaking to bring the abusive behaviour to an end.

The OFT may also make market investigation references to the Competition Commission under section 131 of the Enterprise Act 2002 where features of the market appear to restrict or distort competition:

“The OFT may [...] make a reference to the Commission if the OFT has reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom.”

## 3. OFT remedies policy

### 3.1 *Competition Act*

Remedies imposed under the Competition Act have a dual purpose:

- to bring the abusive behaviour to an end; and
- to deter others from engaging in similar behaviour.

### 3.2 *Penalties*

Financial penalties may be imposed having regard to the seriousness and duration of the abusive conduct. When calculating the amount of any penalty, the OFT must have regard to its Penalties

Guidance<sup>2</sup>. The factors which are taken into account in calculating financial penalties for breaches of the Chapter 2 prohibition (see OFT's Penalties Guidance paragraphs 2.1 – 2.20) are:

- seriousness of the infringement, for example predation is seen as particularly serious due to its effect on competition;
- relevant product and geographic market turnover of the undertaking(s) involved in the infringement;
- the duration of the infringement;
- aggravating factors, such as involvement of senior management in the infringement or repeated infringements; and
- mitigating factors, such as co-operation with the investigation process or genuine uncertainty as to the legality of the conduct.

When making its assessment of seriousness, the OFT will consider a number of factors, including the nature of the product, the structure of the market, the market share(s) of the undertaking(s) involved in the infringement, entry conditions and the effect on competitors and third parties. The damage caused to consumers whether directly or indirectly will be an important consideration.

### 3.3 *Behavioural remedies*

The broad guiding principles for remedies are that they are effective in bringing conduct to an end and that their benefit outweighs any actual or potential costs. Any proposed remedy should:

- effectively remedy the identified infringement
  - the remedy addresses the issue identified – but goes no further than necessary to do so; and
  - enable the OFT effectively to implement, monitor and enforce the remedy.
- have minimal potential for adverse side effects on the competitive process or on consumers.

For some abuse of dominance cases remedies will be straightforward, for example a direction to terminate a distribution agreement which forecloses a market. However:

- there may not be any appropriate remedy: for example, predatory pricing which has caused a firm to exit is irreversible. However, financial penalties may be higher to act as a deterrent to discourage repeat offences. The target firm may also sue for compensation;
- there may be no explicit remedy, but the decision de facto imposes a remedy. For example, a predation case imposes a price floor by the relevant measure of cost used in the decision to determine that an abuse has occurred<sup>3</sup>;

<sup>2</sup> "OFT's guidance as to the appropriate amount of a penalty", (OFT 423, December 2004).

<sup>3</sup> For example the Competition Appeals Tribunal (CAT) judgment in *Aberdeen Journals v Director General of Fair Trading* [2003] CAT 11 effectively set a price floor of Average Variable Cost (AVC) on Aberdeen

- a semi-structural remedy may be imposed such as a requirement to license technology;
- explicit behavioural remedies may be required, such as mandating terms and conditions for access to an essential facility; and
- the most intrusive remedy is structural separation of part of the dominant undertaking's business. This remedy is only available in limited circumstances and has not been used by the OFT in an abuse of dominance case.

### 3.4 *OFT remedies in practice*

The OFT has imposed behavioural remedies under a Competition Act decision in one case where an abuse of dominance was found.<sup>4</sup>

The OFT will take action under the Competition Act where an undertaking acts abusively, and will always consider such action first where market power causes a distortion of the competitive process<sup>5</sup>. However, where the structure of the market is the principal cause of the restriction of competition, the OFT will consider a market investigation reference to the Competition Commission under s 131 of the Enterprise Act 2002.

In contrast to the OFT's relatively limited experience with remedies for abuse of dominance under the Competition Act, the OFT has long had responsibilities to review remedies put in place under the Fair Trading Act 1973 (which was similar to the current Enterprise Act regime). This includes remedies put in place in respect of the conduct of a single firm. A register of such 'undertakings' is publicly available<sup>6</sup> and there is a rolling review of them to examine their effectiveness and whether they are still required.

The OFT has recently reviewed undertakings in relation to single firm market power issues. Two firms have been released from their undertakings due to increased competitiveness in the market since the time of the original Commission report<sup>7</sup>. One recent OFT review, 'opium derivatives'<sup>8</sup>, found the existing behavioural undertakings ineffective in constraining the misuse of market power of the firm involved, MacFarlan Smith. It was required to maintain a maximum price list, but this was found to be an ineffective cap on prices. In a survey 84% of customers did not recall receiving a price list and 78% were unaware that a price list existed. The OFT concluded that the cause of the distortion of competition in this market is

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Journal and what costs should be included within this and importantly, some circumstances when going below AVC would be objectively justified. Similarly the OFT decision (Decision No CA98/2/2001 *Napp Pharmaceuticals Holdings Ltd*, 31 March 2001) and CAT judgment (*Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1) in relation to *Napp Pharmaceuticals* has *de facto* imposed price controls. The advantage of this type of non-explicit remedy is that a firm can assess change of circumstances or possible efficiency reasons which may impact on whether prices below this level would be an abuse where market conditions have changed.

<sup>4</sup> Decision No CA98/3/2003 *Exclusionary behaviour by Genzyme Limited*, 27 March 2003.

<sup>5</sup> Market Investigation References (Guidance about the Making of References under Part 4 of the Enterprise Act) (OFT 511, March 2003), para 2.3.

<sup>6</sup> See <http://www.offt.gov.uk/Business/Register+of+Orders/monopoly.htm>

<sup>7</sup> These cases were: "Condoms: Review of the undertakings given by LRC products Limited", March 2006 and "Review of statutory undertakings given by Rentokil Initial plc", March 2003.

<sup>8</sup> Office of Fair Trading, "Opium derivatives: A review of the undertaking given by MacFarlan Smith Limited", March 2006.

government licensing policy which restricts imports of opium derivatives to the UK. The OFT has recommended that the UK Government reconsider this policy.



## UNITED STATES

In the United States, single-firm conduct is governed by section 2 of the Sherman Act (“Section 2”), which prohibits the acquisition or maintenance of monopoly power through the use of exclusionary conduct.<sup>1</sup> Section 2 is enforced through civil litigation, both public and private.<sup>2</sup> The courts are invested by statute “with jurisdiction to prevent and restrain violations,” and they have broad power to craft appropriate remedies.<sup>3</sup> “Courts are not authorised in civil proceedings to punish antitrust violators, and relief must not be punitive.”<sup>4</sup> In addition, the Federal Trade Commission (“FTC”) is empowered to issue administrative cease and desist orders to prohibit “unfair methods of competition,” under section 5 of the FTC Act. Single-firm exclusionary conduct in violation of Section 2 necessarily constitutes unfair methods of competition in violation of section 5 of the FTC Act.<sup>5</sup>

### 1. Remedy Principles and Practices Applied by the Courts

The remedy in a Section 2 case should “seek to ‘unfetter a market from anticompetitive conduct,’ to ‘terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolisation in the future.’”<sup>6</sup> Crafting an appropriate

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<sup>1</sup> See *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985).

<sup>2</sup> Civil actions to enforce Section 2 may seek (treble) damages and well as injunctive relief. In addition, the laws of most states have provisions comparable to Section 2 under which damages and injunctive relief may be sought.

<sup>3</sup> See *International Salt Co. v. United States*, 332 U.S. 392, 400–01 (1947) (Courts “are invested with large discretion to model their judgments to fit the exigencies of the particular case.”). See also *FTC v. Hearst Trust, et al.*, Civ. No.1:01CV00734 (D.D.C. 2001), in which the FTC challenged Hearst’s acquisition of MediSpan as violating the U.S. premerger reporting act (HSR), the FTC Act and Clayton Act (unlawful merger), and the FTC Act as monopolisation. The FTC obtained, via settlement, structural relief (divestiture) for the unlawful acquisition, and monetary relief (disgorgement) for the HSR and monopolisation violations. Certain private plaintiffs joined action and obtained damages as well.

<sup>4</sup> *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961). See also *International Salt*, 332 U.S. at 401 (“the end to be served is not punishment of past transgressions”); *Hartford-Empire Co. v. United States*, 323 U.S. 386, 409 (1945) (a court “may not impose penalties in the guise of preventing future violations”). Although fines are not possible in civil actions to enforce the Sherman Act, the Act authorised the criminal prosecution of all violations, and since 1974 all could have been prosecuted as felonies. Nevertheless, criminal antitrust enforcement in the United States is confined to hard-core cartel activity, and single-firm conduct has never been prosecuted as a felony under the Sherman Act. In the United States, the most recent successful criminal prosecution of single-firm exclusionary conduct appears to have occurred in 1973.

<sup>5</sup> See *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 609 (1953); *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 395 (1953). For an example of an FTC cease and desist order involving single-firm conduct, see *Intel Corp.*, 128 F.T.C. 213 (1999).

<sup>6</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 103 (D.C. Cir. 2001) (en banc) (citations omitted) (quoting *Ford Motor Co. v. United States*, 405 U.S. 562, 577 (1972) and *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 250 (1968)). See also Charles A. James, *The Real Microsoft Case and Settlement*,

remedy, therefore, requires careful consideration of both the nature and scope of anticompetitive effects from the unlawful conduct and, most importantly, the mechanism through which they are achieved.

The typical Section 2 remedy is an injunction consisting of one or more prohibitory provisions framed to prevent the anticompetitive effects of the unlawful conduct.<sup>7</sup> Such provisions generally prohibit the specific conduct found unlawful as well as like conduct with similar anticompetitive effects.<sup>8</sup> As explained by the Supreme Court of the United States:

A trial court . . . has the duty to compel action . . . that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance. Such action is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal. Acts entirely proper when viewed alone may be prohibited.<sup>9</sup>

A purely prohibitory injunction is not always sufficient to accomplish these goals and may be supplemented by mandatory remedial provisions (provisions imposing affirmative duties).<sup>10</sup> Efforts to

ANTITRUST, Fall 2001, 58, 60 (“An antitrust remedy for a Section 2 violation must stop offending conduct, prevent its recurrence, and restore competition.”).

<sup>7</sup> In an appropriate case, monetary relief may be obtained under the FTC Act. *See* note 2, *supra*. The FTC may not impose fines pursuant to the FTC Act. It may, however, seek civil penalties (and further injunctive relief) for violations of its administrative orders. There is, however, “no absolute right to an injunction upon a showing of past violation of the antitrust laws.” *United States v. Borden Co.*, 347 U.S. 514, 519 (1954). “The sole function of an action for injunction is to forestall future violations.” *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952). An injunction must be warranted by “some cognizable danger of recurrent violation.” *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

<sup>8</sup> *See National Society of Professional Engineers v. United States*, 435 U.S. 679, 697 (1978) (An antitrust remedy should restrain the defendant’s “future activities both to avoid a recurrence of the violation and to eliminate its consequences.”). There is, however, “no absolute right to an injunction upon a showing of past violation of the antitrust laws.” *United States v. Borden Co.*, 347 U.S. 514, 519 (1954). “The sole function of an action for injunction is to forestall future violations.” *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952). An injunction must be warranted by “some cognizable danger of recurrent violation.” *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

<sup>9</sup> *United States v. United States Gypsum Co.*, 340 U.S. 76, 88–89 (1950) (footnote omitted). *See also Professional Engineers*, 435 U.S. at 697 (an antitrust remedy “may curtail the exercise of liberties that the [defendant] might otherwise enjoy”); *International Salt*, 332 U.S. at 400 (“it is not necessary that all of the untraveled roads to [an] end be left open and that only the worn one be closed”). There are limits to a court’s authority. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 133 (1969) (a “court may not enjoin all future illegal conduct of the defendant, or even all future violations of the antitrust laws, however unrelated to the violations found by the court”).

<sup>10</sup> *International Salt*, 332 U.S. at 401 (A remedy should “pry open to competition a market that has been closed by defendants’ illegal restraints.”). Under sections 5 and 13(b) of the FTC Act, the FTC has obtained monetary equitable remedies, such as disgorgement and restitution, in monopolisation cases. *See, e.g.* *FTC v. Mylan Laboratories, Inc.*, 62 F. Supp. 2d 25, 36–37 (D.D.C. 1999) (monopolisation case holding that the FTC has the power to seek disgorgement), revised and reaffirmed in pertinent part, 99 F. Supp. 2d 1, 4–5 (D.D.C. 1999). Recognising the need to exercise this authority carefully and sparingly, the FTC has used it only in exceptional circumstances. *See Federal Trade Commission, Policy Statement on Monetary Equitable Remedies*, 68 Federal Register 45,820, 45,821 (Aug. 4, 2003). In determining whether to use these remedies, the FTC has considered whether, based on existing precedent, a reasonable party should have expected that its conduct would likely be found to be illegal under the FTC Act. Thus, the FTC has stated that monetary relief under sections 5 and 13(b) of the FTC Act was not appropriate in a

impose affirmative duties are apt to present serious difficulties (as discussed below). In addition, the affirmative duties imposed must be reasonably necessary to prevent or cure the particular anticompetitive effects the unlawful conduct was found to produce.<sup>11</sup>

All prohibitory and mandatory remedy provisions must be clear enough so that the dominant firm, its rivals, and the administering agency all know whether particular conduct complies with the provisions.<sup>12</sup> Provisions merely reciting general statutory language are pointless,<sup>13</sup> and vague provisions are unlikely to induce effective compliance without extensive further proceedings.

For the last several decades, conduct remedies in Section 2 cases have been of strictly limited duration. By their own explicit terms, remedial decrees generally last for five to ten years.<sup>14</sup> Remedies intended to be in place as long as ten years may make some provision for modification in response to changed circumstances.

Structural remedies generally are considered to be more drastic than prohibitory injunctions.<sup>15</sup> Structural remedies present a number of difficulties and normally are reserved for cases in which a conduct remedy is insufficient.<sup>16</sup> Nonetheless, structural remedies can eliminate the opportunity or the incentive to engage in the exclusionary conduct that would be barred by prohibitory remedy provisions. Structural remedies also might be designed to create new competition and eliminate the defendant's dominant position.

case involving the first government action in a complex regulatory context but warned that future cases involving the same conduct could merit disgorgement. *See id.* at 45,822 (citing *Abbott Laboratories and Geneva Pharmaceutical, Inc.* (March 16, 2000)). Further, the FTC has taken into account the effects and availability of other remedies, including those available to private parties. *See id.* When other remedies are likely to result in complete relief, for prudential reasons, the FTC is likely not to pursue an action for monetary equitable relief under sections 5 and 13(b) of the FTC Act.

<sup>11</sup> *See James, supra* note 6, at 61 (“The relief, however, must have its foundation in the offending conduct.”).

<sup>12</sup> *See United States v. Grinnell Corp.*, 384 U.S. 563, 579–80 (1966) (The “precise practices found to have violated the Act should be specifically enjoined.”); *International Salt*, 332 U.S. at 400–01 (“it is desirable, in the interests of the court and of both litigants, that the decree be as specific as possible, not only in the core of its relief, but in its outward limits”).

<sup>13</sup> *See Hartford-Empire Co. v. United States*, 323 U.S. 386, 410 (1945) (a remedy “must not be ‘so vague as to put the whole conduct of the defendant at the peril of a summons for contempt’” or “enjoin ‘all possible breaches of the law’”) (quoting *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905)); *City of Mishawaka, Indiana v. American Electric Power Co.*, 616 F.2d 976, 991 (7th Cir. 1980) (a remedy provision merely reciting “the broad language of Section 2” is “too vague”).

<sup>14</sup> Judge Posner recommends that “all antitrust injunctions expire after a fixed period specified in the decree. Injunctions of indefinite length cast the enforcement agency . . . and the court in the role of a regulatory agency.” RICHARD A. POSNER, *ANTITRUST LAW* 273 (2d ed. 2001). The decree in the *Microsoft* case terminates after five years. *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144, 195 (D.D.C. 2002). The decree in the *Dentsply* case (entered April 26, 2006) terminates after seven and one-half years.

<sup>15</sup> *See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961).

<sup>16</sup> *See, e.g.*, 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 653c, at 101 (2d ed. 2002) (“If monopoly power is substantial and likely to be durable, if the possible forms of anticompetitive conduct are varied and difficult to predict, then drafting an effective remedy regulating conduct alone is likely to fail.”); E. Thomas Sullivan, *The Jurisprudence of Antitrust Divestiture: The Path Less Traveled*, 86 MINNESOTA LAW REVIEW 565, 609 (2002) (“where the firm proves reticent and unwilling to change its behaviour, divestiture should be the reluctant remedy”).

Structural remedies can take many forms and can vary greatly in complexity. Such a remedy could include divestiture of intangible property rights, which commonly takes the form of licensing intellectual property.<sup>17</sup> Far more complex is the vertical separation of a dominant firm into component parts (e.g., separating operations at different levels of the distribution chain). In the United States, vertical separation was imposed as a structural remedy for Section 2 violations in the film industry, separating film exhibition from film production and distribution,<sup>18</sup> and most notably was applied in the *AT&T* case, separating local and long distance telecommunications services.<sup>19</sup> The least common and most complex form of structural remedy is breaking the dominant firm into competing entities.<sup>20</sup> This sort of remedy has not been used in the United States in recent decades but was applied in the landmark *American Tobacco* and *Standard Oil* cases nearly a century ago.<sup>21</sup>

## 2. Challenges in Crafting Remedies in Section 2 Cases

Crafting any form of remedy poses challenges. Drafting prohibitory remedy provisions can be more challenging than determining whether a violation has been committed. Finding that a dominant firm violated Section 2 requires a careful after-the-fact evaluation of its actual conduct in the particular factual setting presented, but crafting a proper remedy requires a far more complex, forward-looking assessment of all similar conduct under plausible future circumstances. For example, if a dominant firm cuts prices below any reasonable cost benchmark in excluding competition, there is no need to adopt a specific price-cost test before finding the conduct unlawful, but a remedy must set out a specific rule governing future pricing, and that rule must be flexible enough to accommodate a variety of competitive conditions.

Drafting prohibitory remedy provisions also can be challenging because of the difficulty in fashioning “an effective deterrent to a repetition of the unlawful conduct” that does “not stand as a barrier

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<sup>17</sup> Such a remedy was imposed, for example, in *Hartford-Empire Co.* and *United States v. National Lead Co.*, 332 U.S. 319 (1947). Compulsory licensing may raise the thorny problem of determining reasonable compensation.

<sup>18</sup> See *United States v. Griffith*, 334 U.S. 100 (1948); *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1948); see generally MICHAEL CONANT, *ANTITRUST IN THE MOTION PICTURE INDUSTRY* 100–53 (1960).

<sup>19</sup> See *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). The court found that “it is unlikely that, realistically, an injunction could be drafted that would be both sufficiently detailed to bar specific anticompetitive conduct yet sufficiently broad to prevent the various conceivable kinds of behaviour that AT & T might employ in the future” and that “a judicially-created bureaucracy” necessary to supervise the company would be incapable of “performing the unending task of vigilance and oversight that would be required to ensure that an integrated Bell System did not engage in anticompetitive conduct.” 552 F. Supp. at 168.

<sup>20</sup> See *Microsoft*, 253 F.3d at 80 (“Absent some measure of confidence that there has been an actual loss to competition that needs to be restored, wisdom counsels against adopting radical structural relief.”)

<sup>21</sup> *United States v. American Tobacco Co.* 221 U.S. 106 (1911); *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911). The success of the remedies in these cases has been questioned many times, notably by Robert W. Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, 80 OREGON LAW REVIEW 109, 123–41 (2001). Although these remedies did not immediately give rise to intense competition, some believe that they did contribute to the emergence of competition. See 1 SIMON N. WHITNEY, *ANTITRUST POLICIES: AMERICAN EXPERIENCE IN TWENTY INDUSTRIES* 103–10 (1958); 2 SIMON N. WHITNEY, *ANTITRUST POLICIES: AMERICAN EXPERIENCE IN TWENTY INDUSTRIES* 16–20, 27–28 (1958).

to healthy growth on a competitive basis.”<sup>22</sup> Although conduct not itself unlawful may appropriately be prohibited as part of a remedial decree, great care must be taken to avoid overly broad prohibitory provisions that stifle competition by preventing the dominant competitor from innovating, enhancing efficiency, or offering better value to customers.<sup>23</sup> The prohibitions should therefore be limited to conduct closely related to the anticompetitive conduct at issue.<sup>24</sup> To avoid doing more harm than good by preventing the firm from engaging in legitimate competition, a remedial decree may have to identify specific conduct in which the dominant firm is permitted to engage. For example, in a predatory pricing case, it may be desirable, even if quite difficult, to specify permissible responses to entry or to price cuts by rivals. Finally, a remedy must be designed to provide both the dominant firm and its rivals with incentives to compete aggressively for the benefit of consumers.

Mandatory remedy provisions present the same difficulties as prohibitory provisions but to a greater degree. The one-time difficulty of line drawing can be insignificant in comparison with the ongoing difficulty associated with administering mandatory remedy provisions. For example, imposing a duty to aid competitors often “requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited.”<sup>25</sup>

Mandatory remedy provisions may also have negative effects on market competition that must be balanced against positive effects. For instance, compelling a dominant firm to supply rivals an input may have the short-run effect of making the rivals more effective competitors, but it may also have the long-run effect of undermining rivals’ incentives to self-provide or design around the need for the input. In some situations, it may be more beneficial to consumers over the long run for rivals to develop competing standards or networks than to have additional competitors for a given standard or network, and providing competitors with access to existing standards and networks may lessen competition among standards and networks.<sup>26</sup>

Compelling cooperation between rivals also “may facilitate the supreme evil of antitrust: collusion.”<sup>27</sup> Collusion may be an unintended spillover from legitimate cooperation, or it may be the inescapable result of forced cooperation. The remedy in the *Aspen Skiing* case was a return to the prior practice of offering a

<sup>22</sup> United States v. Crescent Amusement Co., 323 U.S. 173, 186 (1948). For a pessimistic view, see POSNER, *supra* note 14, at 273 (“The problem with the antitrust injunction is that if narrowly drawn to avoid preventing legitimate competition by the defendant, it is likely to be porous and ineffectual, while if it is broadly drawn to close up all possible loopholes it is likely to handicap the firm in competing lawfully.”).

<sup>23</sup> See, e.g., New York v. Microsoft Corp., 224 F. Supp. 2d 76, 108–10 (D.D.C. 2002) (stating that conduct restrictions must not deny the firm “the ability to continue to do business and to compete with other participants in the market”); LAWRENCE ANTHONY SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 147–48 (1977) (“There are numerous practices which might be desirable to inhibit in particular settings, but which can only be described in general language,” and remedies incorporating “judgmental concepts” present “severe” problems.).

<sup>24</sup> See, e.g., *Microsoft*, 224 F. Supp. 2d at 110 (conduct restrictions must be “closely related to the anticompetitive conduct”).

<sup>25</sup> Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407–08 (2004)

<sup>26</sup> The potential for mandatory remedy provisions to affect ex ante investment incentives depends on the nature of the conduct involved and the consistency of the remedy used. For example, condemning unconditional refusals to deal as abusive inevitably leads to compelled access, which “may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.” *Trinko*, 540 U.S. at 407–08. But if mandatory remedy provisions are not automatic and are only used in specific cases, the effect on investment incentives is more limited.

<sup>27</sup> *Id.* at 408.

joint lift ticket on which the price was set through an agreement between the only two competitors in the market.<sup>28</sup>

Injunctive remedies should prohibit (or require) conduct that is easily observed. Provisions that, e.g., require certain specified affirmative disclosures or prohibit certain exclusive arrangements can be monitored fairly easily. Provisions that prohibit certain conduct depending upon the intent of the party would be much more difficult to enforce, and should be avoided. Both U.S. agencies actively monitor the compliance of firms subject to remedial decrees to assure that they meet their obligations, and vigorously challenge conduct that violates those orders. Accordingly, the agencies need to be sure those obligations are straightforward and clear.

Structural remedies also present challenges. Divestiture, for example, is the preferred remedy in cases involving acquisitions, which by nature change the structure of the acquiring firm.<sup>29</sup> In a Section 2 case, where single-firm conduct is at issue, structural remedies can avoid problems in monitoring compliance with multi-year conduct remedies but also can create inefficiencies. Firms are not always neatly amenable to being dissected, and divestiture might destroy efficiencies that were achieved by the integrated company.<sup>30</sup> As the court of appeals explained in *Microsoft*, structural remedies in Section 2 cases are generally limited to those cases in which there is a close causal connection between the anticompetitive conduct and the firm's dominant position in the market (e.g., the conduct created the firm's market power).<sup>31</sup>

### 3. Remedy Considerations in Liability Determinations

“The ideal presentation in a monopoly case would be one in which remedial proposal arose organically out of the theory of the case. . . . The remedy would be . . . a public policy goal integral to the entire proceeding.”<sup>32</sup> Two principles follow from this ideal case presentation: First, single-firm conduct should be challenged by an enforcement agency only after careful thought as to the appropriate remedy. Second, a court or administrative agency should not deem single-firm conduct unlawful if a workable and practical remedy is unavailable.

The latter principle is particularly important when an agency or court contemplates imposing a duty to assist rivals. In that context, the Supreme Court of the United States recently adopted the views of a leading scholar: “No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.”<sup>33</sup> The

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<sup>28</sup> Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 598 n.23 (1985).

<sup>29</sup> See *United States v. Microsoft Corp.*, 253 F.3d 34, 105–06 (D.C. Cir. 2001) (en banc).

<sup>30</sup> See, e.g., *id.* at 106; William E. Kovacic, *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 CONNECTICUT LAW REVIEW 1285, 1293 (1999) (“Courts in abuse of dominance cases have tended to regard divestiture as a riskier form of intervention than conduct controls. Perceptions of the greater risk are most acute where the defendant has a record of superior performance and a restructuring might destroy valuable efficiencies or diminish incentives to innovate.”).

<sup>31</sup> See *United States v. Microsoft Corp.*, 253 F.3d 34, 106–07 (D.C. Cir. 2001) (en banc) (holding that absent such a “causal connection,” the firm’s unlawful behaviour should be remedied by conduct prohibitions).

<sup>32</sup> SULLIVAN, *supra* note 23, at 146.

<sup>33</sup> *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415 (2004) (quoting Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST LAW JOURNAL 841, 853 (1989)).

same reasoning applies when the agency, rather than a court, would be placed in such an uncomfortable role and when the required “day-to-day controls” do not relate to the conditions of access. Attempts to regulate aggressive price cutting can be just as problematic as attempts to regulate the terms of access.

#### 4. Illustrative Cases

On April 26 of this year, the trial court issued its final judgment on remand in the *Dentsply* case.<sup>34</sup> Dentsply is the dominant seller of artificial teeth in the United States, with about 80% of the market, and it was found to have unlawfully maintained its monopoly through restrictive distribution practices for more than ten years. Dentsply distributed its teeth through dealers and strictly enforced a policy of not using any dealers that distributed rivals’ teeth. After a trial, the district court found that Dentsply had adopted the policy solely to exclude competitors and that the policy had no procompetitive benefits in this particular setting. The result was to maintain Dentsply’s dominance by preventing rival manufacturers from competing effectively to sell their products.

The final judgment prohibited Dentsply from entering into an exclusive distribution arrangement with any dealer and from taking any of six specific “retaliatory or deterrent actions against a dealer based on that dealer’s sale of non-Dentsply teeth.” At the same time, the final judgment also expressly permits Dentsply to adopt certain measures designed to encourage distributors to promote Dentsply’s products. To assure compliance, the final judgment required Dentsply to adopt procedures to implement the terms of the judgment, to certify annually that it has complied, and to provide the Justice Department with access to its business records and employees.

The FTC issued an administrative complaint in 2003, against The Union Oil Company of California (“Unocal”), alleging that in the 1990s Unocal unlawfully acquired monopoly power in the technology market for producing reformulated gasoline required by the California Air Resources Board (CARB), by misrepresenting, among other things, that Unocal’s research was non-proprietary and in the public domain, although it was at the same time pursuing a patent that would enable it to collect over \$500 million dollars per year in royalties once the research was incorporated by CARB in its RFG regulations.<sup>35</sup> The complaint alleged that, in the absence of Unocal’s deceptive conduct, CARB would not have adopted RFG regulations that substantially overlapped with Unocal’s patent claims.

Under the terms of a consent order executed in 2005, reached in connection with the Chevron Corporation’s acquisition of Unocal,<sup>36</sup> Unocal agreed to an order prohibiting it from enforcing the relevant patents.<sup>37</sup> The order also required Unocal to disclaim or dedicate to the public the remaining term of the relevant U.S. patents. Finally, the order contains standard record-keeping and reporting requirements to ensure the companies’ compliance with their terms. The order expires in twenty years. Because the order requires a virtually complete abandonment of the patents (by dedication to the public), there was no need for additional provisions, which might otherwise have been necessary had Unocal retained certain enforcement rights. In line with the prior discussion of remedial principles, the order requires little on-going involvement by the agency and is carefully tailored to the harm. The prohibitions do not impact any efficiency-enhancing conduct.

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<sup>34</sup> United States v. Dentsply International, Inc., 277 F. Supp. 2d 387 (D. Del. 2003), *rev’d*, 399 F.3d 181 (3d Cir. 2005).

<sup>35</sup> See <http://www.ftc.gov/os/2003/03/unocalcmp.htm>. See generally <http://www.ftc.gov/os/caselist/d9305.htm>.

<sup>36</sup> See In the Matter of Union Oil Co. of California, Docket No. 9305, Agreement Containing Consent Order (June 10, 2005), available at <http://www.ftc.gov/os/adjpro/d9305/050610agreement9305.pdf>.

<sup>37</sup> See <http://www.ftc.gov/os/adjpro/d9305/050610do9305.pdf>.



## EUROPEAN COMMISSION

### Introduction

Regulation 1/2003<sup>1</sup>, which came into force on 1 May 2004, introduced major reforms to the enforcement of EC antitrust law. In addition to enhancing the role of national competition authorities and national courts in the application of the EC antitrust rules, it abolished the system of notification to the Commission of agreements or conduct potentially falling within the scope of the antitrust rules and individual exemption decisions by the Commission.

But Regulation 1/2003 also enhances the Commission's powers in some important respects. It includes two explicit provisions concerning remedies: first, in the context of a prohibition decision, it states explicitly that the Commission is empowered to impose not only behavioural but also structural remedies where they are necessary to effectively bring an infringement to an end; second, a new provision is created enabling the Commission to formally settle cases on the basis of binding commitments voluntarily proposed by the parties.

This reform offers a renewed context for designing an antitrust remedies policy, taking into account its interaction with other enforcement tools. The Commission is currently working on this remedies policy, with an emphasis on the design of remedies, monitoring behavioural remedies and the role of structural remedies. It is worth emphasising that this work is very much at an early stage.

To ease discussion, an outline of the EU legal framework for antitrust remedies, including fines, as well as a brief discussion of policy considerations surrounding remedies, and principles governing the design of remedies are set out below. Much of this paper does not focus specifically on abuse of dominance cases under Article 82 of the EC Treaty – as many of the considerations at issue may apply equally to Article 81 cases (anti-competitive agreements).

### 1. Legal framework

#### 1.1 Remedies

Pursuant to **Article 7(1)** of Regulation 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. [...]*”

Recital (12) of Regulation 1/2003 provides that “[...] 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.”

<sup>1</sup>

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, pp. 1-25.

**Article 9(1)** of Regulation 1/2003 states 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 furthermore 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.”

It follows from the above mentioned provisions that there are two different scenarios for the application of what is traditionally called “remedies” in EC antitrust cases. First, the Commission can *impose* remedies on undertakings where it finds an infringement of Article 81 or 82. Second, the Commission can *accept* remedies (or “commitments”) that the undertakings concerned propose after receiving the Commission’s preliminary assessment, and on this basis close the investigation.

The fundamental difference between these two scenarios is that in the latter case, it is up to the undertakings concerned to propose remedies to settle the case. It is worth noting that a decision by the Commission under Article 9 of Regulation 1/2003, making commitments binding on the parties, does not contain a finding as to the existence or absence of an infringement. Also, the Commission has discretion as to whether or not to accept commitments under Article 9 – as reflected in recital (13) certain types of cases, notably hard core infringements such as cartels, are unlikely to be suitable candidates.

In addition to Article 7 and 9 decisions, the Commission has the power to impose interim measures. **Article 8(1)** of Regulation 1/2003 states 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*”. As a result, the Commission can impose behavioural remedies in exceptional circumstances.

## 1.2 Fines

Recital (29) of Regulation 1/2003 provides that “Compliance with Articles 81 and 82 of the Treaty and the fulfilment of the obligations imposed on undertakings and associations of undertakings under this Regulation should be enforceable by means of fines and periodic penalty payments. To that end, appropriate levels of fine should also be laid down for infringements of the procedural rules.”

Under Article 23(2), “The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently: (a) they infringe Article 81 or Article 82 of the Treaty; [...] or (c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.” For each participating undertaking the maximum amount of the fine may not exceed 10 % of its total turnover in the preceding business year. Pursuant to Article 23(3) in fixing the amount of the fine the Commission must have regard “both to the gravity and to the duration of the infringement”.

Periodic penalty payments are also set out as an additional means of enforcement under Article 24(1), pursuant to which “the Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5 % of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them: (a) to put an end to an infringement of Article 81 or Article 82 of the Treaty, in accordance with a decision

taken pursuant to Article 7; [...] (c) to comply with a commitment made binding by a decision pursuant to Article 9[...].”

### **1.3 Private enforcement**

Regulation 1/2003 has also sought to enhance antitrust enforcement through private actions brought before the national courts.

Article 6 of the Regulation states that national courts have the power to apply Articles 81 and 82 and, as a means of facilitation, Article 15 expressly provides for a number of mechanisms by which courts can ask for an opinion or information from the Commission. Recital (7) of Regulation 1/2003 states that: “*National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements.*”

Thus, the Regulation explicitly acknowledges that, in particular, private damages actions before national courts can play a complementary role to the public enforcement of EC antitrust rules.

## **2. Policy considerations – interaction between remedies, fines and private enforcement**

Regulation 1/2003 gives rise to at least four courses of action for antitrust enforcement by the Commission:

- finding an infringement and punishing ongoing (or past) behaviour by means of an Article 7 prohibition decision, possibly including fines;
- obtaining a change in the future functioning of the market (Article 7 decision, possibly including fines, accompanied by a cease-and-desist order);
- obtaining a change in the future functioning of the market by in addition imposing structural or behavioural remedies in the context of an Article 7 decision (in this context a fine may play a deterrent effect);
- obtaining a change in the future functioning of the market by means of an Article 9 commitment decision.

In practice, an infringement decision under Article 7 is almost always accompanied by a cease-and-desist order. It is in the third and fourth categories of action that enforcement policy has the strongest focus on the prospective effects of the decision on the functioning of the market. The choice of whether to pursue the Article 7 or Article 9 route may depend on the perceived need for a public enforcement authority to adopt an infringement decision.

### **2.1 Prohibition decision without a prospective remedy other than a cease-and-desist order**

The Commission will opt for a prohibition decision under Article 7 without imposing any prospective remedy, other than a cease-and-desist order, where it is convinced that this will bring the infringement (or the effects of a past infringement) effectively to an end.

One benefit of such a decision is that it provides a clear definition of the infringement that will serve to enhance predictability of future enforcement actions. This benefit is clear in abuse of dominance cases, where the nature of the infringement is potentially more complex than for instance a straightforward cartel case. Another consequence may be that it facilitates private damages claims before national courts.

A prohibition decision under Article 7 will often be accompanied by a fine. Any fine that might be imposed has the dual aim of punishing the infringement and of having a deterrent effect, dissuading the undertakings concerned and third parties from reiterating or entering into a similar infringement.

However, the Commission might also decide to adopt a prohibition decision without imposing a fine. For instance, in an abuse of dominance case this might be the case if the infringement is entirely novel. Alternatively in some cases the Commission might decide to impose a merely symbolic fine.

## **2.2 *Decisions imposing/accepting a prospective remedy***

It may however be the case that the mere definition of what constitutes an infringement is not sufficient to bring it to an “effective” end. The Commission has the power to require a company to restore the market conditions absent the infringement and to impose remedies that are necessary to that effect. This principle of necessity is complemented by that of proportionality, so as to ensure that the adopted remedy will not result in over-regulation of the market conditions. Regulation 1/2003 explicitly considers structural remedies for cases where there is a risk of lasting or repeated infringement.

If the infringement amounted to raising barriers to entry, the Commission's decision should ensure that barriers to entry created by the undertakings under review are *effectively* removed. Such appreciation can only be made on a case-by-case basis, taking into account the characteristics of the structure and functioning of the market and of the infringing undertakings.

The choice of imposing remedies or accepting commitments will then depend on the degree of cooperation shown by the undertakings under investigation. In any event, such choice can only intervene when the Commission has carried out an investigation that enables it to identify a potential competition problem, and to evaluate the appropriateness of a proposed remedy. In other terms, investigations that are eventually closed with a commitments decision start much like prohibition procedures. The Commission is convinced that the proposed commitments would, in the same way as any measures that might otherwise have been imposed under Article 7, remedy this problem. If the company under investigation is willing to propose sufficient remedies, a decision under Article 9 may be chosen for reasons of expediency and efficient use of resources, since proceedings are faster and less burdensome. If the negotiation seems unlikely to end up in a satisfactory manner, a decision under Article 7 will be preferred.

It may be worth considering whether the commitments negotiated with the company or undertaking under investigation under Article 9 are likely to be more effective than remedies imposed by the Commission under Article 7. It could be argued that the undertaking itself is best placed to assess the feasibility of implementing remedies in practice, and that as a result remedies negotiated with the undertaking in question are likely to be more effective. This has, of course, to be balanced against the need to prevent the party under investigation engaging in avoidance tactics. This risk has to be reduced by a careful scrutiny of proposed commitments and possibly the use of a trustee mechanism.

## **2.3 *Consequences with regard to private enforcement***

Private enforcement is a complement to public enforcement in the field of antitrust. To acknowledge this role as well as seek to identify means of enhancing it, the Commission published a Green Paper on actions for damages in antitrust cases, on 19 December 2005.

This complementary role can play in various ways.

In cases where the Commission has not led an investigation and made a finding as to the existence of an infringement, national courts can do so. This includes cases in which the Commission has adopted a

commitments decision under Article 9 of Regulation 1/2003 (which after all does not make a finding as to the existence of an infringement).

Thus, in cases in which the national courts are fully applying the EC antitrust provisions, they may also have to impose remedies, such as nullifying agreements, imposing cease-and-desist orders and awarding damages.

In cases in which the Commission has adopted a prohibition decision finding an infringement, a plaintiff can bring a complementary action for damages before a national court, which would add a private financial penalty and enhance the deterrent effect of enforcement.

### 3. Design of remedies

Regulation 1/2003 categorises remedies as either *structural* or *behavioural* in nature. This terminology deserves further discussion, notably because Article 7(1) of Regulation 1/2003 stipulates that 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.

#### 3.1 Structural remedies

Regulation 1/2003, in light of Recital 12, defines structural remedies as “*changes to the structure of an undertaking*”. The most obvious one is the *divestiture* of an existing business. This is a common remedy in merger cases, where part of the merging firms’ businesses is divested to a third party in order to prevent a competition problem. The selection of the purchaser is of crucial importance to ensure that the remedy will effectively maintain competition on the market.

However, the line between behavioural and structural remedies is not always easy to draw. For instance, less straightforward are cases of removal of cross placement of directors on the board of directors (interlocking directorates), or remedies creating information firewalls within an undertaking. Although they may change the organisation of the undertaking, they do not as such have an impact on its structural presence on the market. On the other hand, the mandatory granting of an exclusive, non-limited and irrevocable licence that is paid upfront does not change the organisation of an undertaking but may have the same effect on the market as the divestiture of a business branch.

Some suggest that a structural remedy should be defined as a measure that does not lead to an *ongoing relationship* between the parties concerned, namely the *addressee* of the decision and *third parties*. Thus a structural remedy is defined as a one-off measure that does not lead to structural links between the addressee and third parties and that does not require ongoing monitoring by the enforcement agency (“clean break principle”). The justification for considering remedies that create ongoing links between firms as non-structural is that they do not enable the same degree of competition in the market place that a clear-cut structural solution would create. Any lasting dependence between firms entails the risk of competition problems. In order to prevent this, ongoing monitoring is necessary.<sup>2</sup> The classification

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See for example Massimo Motta, Michele Polo and Helder Vaconcelos : Merger Remedies in the European Union : An overview, paper presented at the Symposium on « Guidelines for Merger Remedies – Prospects and Principles », Ecole des Mines, January 17-18, 2002, pp. 14-15. See also the same authors in F. Lévêque and H. Shelanski (Eds.), Merger Remedies in American and European Union Competition Law, London: Edward Elgar Publishers, 2003. See also Jenny, Frédéric, Design and Implementation of Merger Remedies in High-Technology Industries, in Shelanski/Lévêque (2003), p. 164.

described above also seems to underlie the position of the ICN Merger Working Group that characterises structural remedies as “one-off remedies that intend to restore the competitive structure of the market”.<sup>3</sup>

A tentative definition of structural remedies is:

*“A structural remedy is a measure that effectively changes the structure of the market by a transfer of property rights regarding tangible or intangible assets, including the transfer of an entire business unit, and that does not lead to any ongoing relationships between the former and the future owner. After its completion, a structural remedy does not require any further monitoring.”*

### 3.2 Behavioural remedies

*Behavioural* remedies on the other hand, can be subdivided into *conduct* remedies and *performance* remedies. Whereas the former prescribe or prohibit a certain *conduct*, the latter directly prescribe or prohibit certain market *outcomes*. Although the borderline between these two categories may sometimes be blurred, *performance* remedies can be characterised as belonging typically to the toolkit of *regulatory measures*. They encompass for example price, quality and output regulation imposed on the firm(s). Performance remedies can have adverse effects, e.g. over-investment as a consequence of price regulation of a dominant firm based on return on capital employed (ROCE).<sup>4</sup>

Examples of *performance* remedies can be found in a report by the OECD of its Roundtable on Merger Remedies.<sup>5</sup> Such remedies would include, for instance, production level maintenance, price control, production increases, export increases, investments, marketing expenditure increases, quality improvement, sales increases, price decreases, enlargement of the distribution network, maintenance of brands, and maintenance of obsolete goods in the market... The Commission, in its past practice in antitrust as well as merger remedies, has generally not used these types of remedies. Such remedies seem to amount more to a regulatory approach than to that of an antitrust enforcement agency.

*Conduct* remedies are probably the category with the largest scope of measures. They oblige the addressee of a decision to act in a certain way or to omit certain types of action, rather than setting the final outcome of their conduct.

A non-exhaustive list of examples includes:

- the obligation to supply third parties with certain goods, services or technology licenses, or to provide third parties with access to certain facilities or networks on a non-discriminatory basis.
- the obligation to provide certain information to third parties, which is essential for their ability to develop certain products or provide certain services;
- the obligation to unbundle two or more goods previously offered jointly;
- the obligation not to tie certain services to the sale of a good;

<sup>3</sup> ICN Merger Working Group : Analytical Framework Subgroup, Merger Remedies Review Project, Report for the fourth ICN annual conference, Bonn, June 2005, p. 7, para 3.6.

<sup>4</sup> Lexecon Ltd in association with Weil, Gotshal & Manges LLP and others, Remedies in EU Competition Law: The Policy and Practice of the European Commission, A report for Directorate General IV of the European Commission, May 1998, p. 4.

<sup>5</sup> OECD Roundtable on Merger Remedies, Directorate for Financial and Enterprise Affairs, Competition Committee, DAF/COMP(2004)21, hereafter OECD Report on Merger Remedies.

- the obligation to discontinue the offer of certain rebate schemes;
- the obligation not to price discriminate between customers;
- the obligation not to share certain information between several firms or between business units within a single firm (information firewalls).

Analogous to the tentative definition of structural remedies proposed above, a tentative definition of behavioural remedies could be:

*“A behavioural remedy is a measure that obliges the concerned undertaking(s) to act in a specific way or to omit specific anti-competitive conduct. Compliance with behavioural remedies has to be monitored and enforced.”*

### **3.3 Principles for designing the appropriate remedy**

With respect to the type of remedy that can be imposed in an antitrust case, it follows from the principle of proportionality, that any burden imposed must not exceed what is appropriate and necessary to reach the objective of bringing the infringement effectively to an end. This means that there is an inherent link between the nature of the infringement and the remedies available to the Commission, and that the assessment of the effectiveness and necessity of any remedy must be based on the facts and circumstances of the individual case. It will therefore depend on the case whether a behavioural and a structural remedy can be equally efficient in re-establishing compliance with the rules.

Structural remedies are therefore most appropriate, in terms of effectiveness, where there is a direct link between the infringement and the holding of certain assets. For instance, in the case of a vertically integrated company active up- and downstream that is dominant upstream and decides to no longer supply the upstream input to rival downstream firms. An appropriate remedy would be of a structural nature, namely to sever the link between the upstream input producer and the downstream firm that creates the incentive for the refusal to supply to competing downstream firms. On the other hand, a behavioural remedy could be devised, based on a formally simple cost-based formula triggering highly complex monitoring and updating issues.

In the case where both behavioural and structural measures are effective, it will also depend on the individual circumstances of the case and of the envisaged remedies, whether a structural measure is more burdensome than a behavioural obligation. The latter require close monitoring, that may interfere with the business conduct of the dominant company and its ability to compete on the merits. For instance, a behavioural remedy in the form of price control, with accompanying accounting requirements and monitoring for an extended duration, may be significantly more burdensome than a structural remedy in the form of an obligation to sell a shareholding.

It may also be the case that the dominant firm has repeatedly abused its dominant position. It would then be reasonable to draw the conclusion that behavioural remedies are ineffective and that a structural remedy is warranted.

### **3.4 Monitoring**

What is common with most behavioural remedies is that they do not change the incentives of the firms to engage in anti-competitive behaviour. A logical consequence is that compliance with behavioural remedies has to be *monitored* and that firms have a clear incentive to *circumvent* the remedy. In order to

prevent circumvention of the remedy, it has to be designed in such a way that a strategy to comply with the letter of the obligation but not its spirit can be prevented.<sup>6</sup> This could lead to very complex remedies that exhibit regulatory characteristics and that may be difficult to monitor.

Structural remedies also require some monitoring until they are completed, however, after completion, the incentive and the means to engage in unlawful behaviour are removed. They are therefore very “effective” in the sense that the risk of a lasting or repeated illegal behaviour is eliminated. Behavioural remedies on the other hand tend to involve a much longer need for supervision since the incentive and the ability to restrict competition are still present. Monitoring can be undertaken by different actors, including not only the Commission, but also, depending on the stipulations of the decision, monitoring trustees or other participants. It should be borne in mind that monitoring is a costly activity, irrespective of whose task it is.

### **3.5 Compliance**

In cases where non-compliance is alleged, a further question relates to who should *enforce* compliance. Again, several different actors can concur in performing this task, including not only the Commission, but also ordinary national courts or, in certain circumstances, arbitral courts.

As regards possible enforcement mechanisms, the feasibility of sanctions for non-compliance seems essential for ensuring that firms do not simply disregard the obligations imposed on them or the commitments they have entered into. Article 24(1) provides for the Commission to impose periodic penalty payments to enforce compliance with remedies, whether imposed under Article 7 or rendered binding under Article 9, of up to 5% of the daily turnover (of the preceding business year) per day.

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Examples are manifold: Price regulation can be circumvented by quality degradation, non-discriminatory access obligations can easily be circumvented by accounting measures which raise transfer prices or by quality discrimination, contractual bundling can be circumvented by technical bundling, the publication of price lists in order to avoid price discrimination is meaningless if there is unobserved individual discounting etc. In order to prevent the possibility of circumvention, very complex and detailed obligations become necessary. On the other hand, a general obligation to adhere not only to the letter but also to the spirit of a specific obligation is naturally prone to disputes as to whether there has been compliance or not.

## CHINESE TAIPEI

### 1. Policy goals

The enactment of the Fair Trade Act (hereinafter the “Law”) in 1992 demonstrated that economic development had reached the age of competitiveness. As stated in Article 1 of the Law, it was enacted for the purpose of maintaining trading order, protecting consumers’ interests, ensuring fair competition, and promoting economic stability and prosperity. The 1995 economic development policy declaration, “Competition Policy Foremost, Industrial Policy Assisting,” made by the then premier Dr. Lien Chan, has subsequently had a substantial impact. This economic policy has driven many industries to undergo major structural changes and has also had an extremely positive impact on consumers’ interests and, at the same time, has led to macroeconomic development.

The Fair Trade Commission of Chinese Taipei (hereinafter the “Commission”) has devoted its resources to identifying the monopolistic enterprises and to preventing the abuse of a monopolistic position by the incumbents in the relevant markets. Such behavior has been deemed a serious violation of the Law and as being against the national economic policy. Therefore, in strictly following the national economic policy, the decisions of the Commission have not been affected by any other policy interests as it has reviewed cases involving the abuse of monopolistic position.

### 2. Choosing the right tool

The tools that the Commission utilises to justify the damage done as a result of the abuse of monopolistic position include ordering the infringing entities to cease there from, rectify their conduct, or take necessary corrective action within the time prescribed in the order. In addition, the Commission may assess upon such entities an administrative penalty ranging from 50 thousand to 25 million New Taiwan Dollars(NTD). For repeat offenders, the fine can be doubled and a criminal punishment of up to 3 years imprisonment can be imposed. The regulations related to these remedial tools are as follows:

- *Article35*

If any enterprise violating the provisions of Articles 10, 14, or paragraph 1 of Article 20 is ordered by the central competent authority pursuant to Article 41 to cease there from, rectify its conduct, or take necessary corrective action within the time prescribed in the order, and after the lapse of such period, shall such enterprise fail to cease there from, rectify such conduct, or take any necessary corrective action, or after its ceasing there from, shall such enterprise have the same or similar violation again, the actor shall be punished by imprisonment for not more than three years or detention, or by a fine of not more than one hundred million New Taiwan Dollars, or by both.

- *Article41*

The Fair Trade Commission may order any enterprise that violates any of the provisions of this Law to cease there from, rectify its conduct or take necessary corrective action within the time prescribed in the order; in addition, it may assess upon such enterprise an administrative penalty

of not less than fifty thousand nor more than twenty-five million New Taiwan Dollars. Shall such enterprise fail to cease there from, rectify its conduct or take any necessary corrective action after the lapse of the prescribed period, the Fair Trade Commission may continue to order such enterprise to cease there from, rectify its conduct or take any necessary corrective action within the time prescribed in the order, and each time may successively assess thereupon an administrative penalty of not less than one hundred thousand nor more than fifty million New Taiwan Dollars until its ceasing there from, rectifying its conduct or taking the necessary corrective action.

Consequently, behavioural remedies, structural remedies, and monetary penalties may be utilised as remedial tools in relation to the sanctions of the Commission in accordance with the Law. In the past in the early stages of the enforcement of the Law, the Commission used to resort to negotiation rather than confrontation for abuse of dominance cases to justify the misconduct of the monopolistic enterprises. However, after accumulating much experience, enforcing a monetary punishment instead of ordering the infringing parties to restore the previous level of competition has gradually become a more accessible and acceptable means for both of the Commission and the infringing entities, because most of the damage caused by anti-competitive behaviour, such as losing competitive advantage, trading opportunities, market share, profits, employees, raising the market price, or being excluded from entering a market, cannot possibly result in the former condition being restored. Thus, the Commission tends to levy relatively high fines on monopolistic enterprises characterised by abuse of dominance in order to discourage similar offences in the future.

The first enforcement actions against dominant firm abuse in 2000 led the Commission to seek monetary penalties at a relatively high level. The Commission imposed a fine of 5 million NTD on the historically monopolistic petroleum company for refusing to supply a new distributor of jet fuel. The Commission also warned the company not to enter into long-term contracts to supply retail service stations just before the import market was opened to competition.

### **3. Monitoring behavioural remedies**

The regulation of monopoly pricing has been a long-standing issue. The Law requires that monopolistic enterprises not improperly set, maintain or change the price of goods or the remuneration for services. To apply this provision, the Commission takes the position that both predatory pricing behavior and excessive pricing behavior shall be prohibited.

As for predatory pricing, in issuing the Regulatory Notes on the Telecommunications Industry under the Law, the Commission defines predatory pricing such that “monopolistic enterprises set a price much lower than cost, at the price of sacrificing short-term profit to drive competitors from the market or block their entry into it, so as to gain excessive profits in the long term.” Above and beyond this general description, the Commission specifies that an additional set of conditions, inclusive of market share, price vs. cost, efficiency and entry barriers, be fulfilled in order to meet the requirements of predatory pricing.

With respect to excessive pricing, it is difficult for the Commission to identify a specific case where excessive pricing behavior in conjunction with undue profits has occurred during the past 13 years. The Commission has encountered fewer than ten cases involving excessive pricing. Among those few cases, it was determined that some were illegal, but in no instance was this based on economic grounds. The common perception by society at large that some monopolistic enterprises, especially some IPR owners, earn too much money and thus violate the relevant provisions of the Law has been a longstanding challenge for the Commission.

#### 4. Setting fines

When assessing fines in accordance with the Law, all circumstances shall be taken into consideration, and the following items shall be noted pursuant to Article 36 of the Enforcement Rules to the Law:

1. the motivation, purpose, and expected improper benefit from the act;
2. the degree of the act's harm to market order;
3. the duration of the act's harm to market order;
4. the benefits derived on account of the unlawful act;
5. the scale, operating condition, and market position of the enterprise;
6. whether or not the type of unlawful act involved in the violation has been the subject of correction or warning by the Central Competent Authority;
7. types of, number of, and intervening time between past violations, and the punishment for such violations; and
8. remorse shown for the act and attitude in cooperating in the investigation.

#### 5. Remedies in high technology and network effects markets

##### 5.1 *Case involving remedies in the high technology market*

The Commission's important decision regarding CD-R patents was related to remedies in the high technology market. In 2002, the Commission imposed fines of 8 million, 4 million and 2 million NTD on Philips, Sony and Taiyo Yuden, respectively, in relation to a patent-licensing pool set up by them. At that time, Chinese Taipei was the largest manufacturer of CD-R products, with a 70% world market share. As demand for the product multiplied and prices dropped, local makers were losing profit because the minimum per-unit license fee remained fixed. In 1996, the effective license rate was 3% of the net sales price of each CD-R disc, but as the price of the product dropped by more than 90%, the alternative fixed minimum (of JPY .10) meant that the effective rate was about 18%. Since the manufacturers refused to pay the licensing fee, the licensor took them to court to collect, and the manufacturers then approached the Commission to investigate.

The Commission found that the patent-licensing pool was formulated on the basis that Sony and Taiyo Yuden would grant Philips an exclusive and sub-licensable license including all of their CD-R relevant patents to enable Philips to grant a license to all CD-R producers. The licensing revenue collected by Philips was to be distributed in the proportion of 7:2:1 to Philips itself, Sony and Taiyo Yuden, respectively.

The joint licensing pool amounted to a restrictive agreement that should have been notified and approved, thus violating Article 14, in that the refusal to reconsider the royalty rate was abuse of a joint monopolistic position, and that including non-essential, invalid and substitute patents in the license constituted tying. The crux of the Commission's concern appears to be the licensor's refusal to renegotiate a lower royalty rate, despite its greatly increased total licensing revenue due to the growth in demand for the discs.

In August 2005, the High Administrative Court reversed the Commission's decision, finding that the pool was not a horizontal agreement because its members' technology contributions did not compete with each other. Among the disputes of the case, one of the issues that resulted in the Court opposing the Commission's decision was related to the monetary penalties. The judge of the High Administrative Court requested that the Commission explain on what grounds it was imposing fines based on an 8:4:2 proportion rather than on a 7:2:1 proportion of the total licensing revenue. The 8:4:2 penalty proportion implied that Philips, Sony and Taiyo Yunden were, respectively, sharing 57%, 29% and 14% of the total value of the penalties. In comparison with the allocation of the total licensing revenue which was 70%, 20% and 10%, Philips apparently shared less responsibility for fines than Sony and Taiyo Yunden. The Commission alleged that the factors involved in considering the assessment of the amount of the penalties were not only based on the expected improper benefit from the acts. Other factors included the violator's motive, the harm to market order, the duration of the harm, the violator's actual benefit from the violation, the size and market position of the violator, any previous enforcement or warnings regarding the type of violation, the violator's previous record of compliance with the law, and the violator's "remorse" and co-operation with the investigation according to Article 36 of the Enforcement Rules to the Law. The Commission has appealed this case further.

## **5.2 Case involving remedies in the network effects market**

An example in this market involved electronic data interchange regarding cargo clearance, which was originally set up as a government monopoly and later corporatised. In 1990, the Ministry of Finance established the Cargo Clearance Automation Division to set the Electronic Data Interchange (EDI) standard to facilitate the process of cargo clearance. In 1996, the said Division was then reformed as Tradevan Information Services Co., and it monopolised the cargo clearance information transmission network market. Later in 2001, a new entrant, Universal EC Inc., intended to enter the market and requested access to Tradevan's network. Numerous complaints were soon filed with the Commission.

The Commission reached the conclusion that the incumbent Tradevan had been misusing its market position by deploying a fidelity discount scheme to prevent market entry, and levied a fine of 1.5 million New Taiwan Dollars against the loyalty discount scheme.

The users of the cargo clearance information transmission network have a tendency to participate in the network on a larger scale and with numerous customers. The incumbent firms in the market with the network effect relatively speaking have the first mover advantage compared with the new entrants. The network effect results in the users lacking the interest to alter the original network suppliers and this becomes a barrier to new entrants in this case. Thus, although the Commission imposed a penalty at a high level on the incumbent Tradevan, it is still in a monopolistic position in the market and the new entrant.

## **6. Taking private actions into account**

There are seven factors that shall be taken into consideration when the Commission assesses fines in accordance with Article 36 of the Enforcement Rules to the Law. Private actions are not a concern, because damage to the market and the public interest that results from the abusive conduct of monopolistic enterprises cannot be easily recovered by private actions. However, the parties damaged by the misconduct of the monopolistic enterprises may claim three times the compensation for damages with the civil court in accordance with Article 32 of the Law or the related provisions of the Civil Code.

## **7. Experience**

Although the Law has been implemented for more than 10 years, the experiences of the Commission in terms of enforcing the abuse of dominance cases are relatively few when compared with those of the

agencies in developing countries. The provisions of the Law related to remedies and sanctions for a first offense in abuse of dominance cases are similar to those in other types of anti-competition and unfair competition cases. Although the remedial tools utilised by the Commission include structural remedies, behavioral remedies and monetary penalties, monetary punishment has become the major way in which the Commission exacts compensation. Furthermore, to distinguish the harm caused to the market by the abuse of dominance as compared with other cases, the fines imposed on the monopolistic enterprises tend to be higher than in other cases under the statutory cap.

To deter future violations of the Law, substantial sanctions against abuse of dominance acts shall be significant enough to prevent the monopolistic enterprises from deriving benefit as a result of avoiding punishment. The general regulation of the statute on sanctions seems adequate to deter smaller firms from smaller violations, but not enough to deter the monopolistic enterprises from the abuse of dominance. Although monetary sanctions for violations of the Law are now higher than sanctions provided against other kinds of business misconduct, setting fines based on a proportion of turnover or other flexible measures such as targeting gains from the violation may achieve the policy goals of sanctions more effectively.

In practice, behavioral remedies or structural reforms in comparison with monetary punishments might provide alternative approaches to restore the level of competition in the market. In the CD-R case, in order to justify the terms of the licensing contract, to start the negotiations on the royalty rate, and to keep the substitute patents outside the joint-licensing pool, the application of other remedial tools to correct the licensor's misconduct, such as setting a regulatory principle instead of monetary penalties, might have been more effective and efficient. In the cargo clearance case, although the Commission levied a historically high fine on the incumbent firm, the new entrants could still be excluded as the result of the network effect of the market; which implies that a structural remedy might be an effective solution to the case.

After accumulating its experiences of enforcement and participating in the peer review activity of the OECD, the Commission found that the present sanctions provided under the Law were insignificant, and that the remedial tools in the form of the drafted amendments would be characterised by the way in which the misconduct was determined. For the abuse of dominance cases, the statutory cap of the monetary punishment was to be increased to prevent the violation of the Law.



## INDONESIA

### 1. Introduction

A dominant position in general is a condition which a business actor has no significant competitor in financial capacity and access to the supplies and or consumers, that create a capability to adjust the supply and demand of certain goods and or services. A dominant position by a business actors can be occurs in every level of market, from domestic market with a conventional technology to multinational market with a sophisticated technology using a complicated system.

Having a dominant position can be reaching legally by a business actor through innovation of product or efficiency in production. The Competition Law should not be applied on that condition until the dominance begin to abuse their position with creates barrier to entry to the relevant market as charging an excessive price, refusal to deal, giving a predatory price, etc. In extreme conditions, abuse of dominant position has intention to criminal attitude in barring the potential competitors entering the market.

Abuse of dominant position has the same effect and purpose with monopolisation that taking the consumers welfare and eliminating competitors. The Commission should be very careful in handling abuse of dominant cases because very difficult to prove an abuse behaviour.

### 2. Abuse of Dominant Position and Sanction in Law No. 5 of 1999

Law No. 5 of 1999 has stipulated a definition on Dominant Position as follows:

*“Dominant position is a situation in which a business actor has no significant competitor in the relevant market with regard to the market share being controlled, or a business actor has the strongest position among its competitors in the relevant market with regard to its financial capacity, access capacity to the supplies or sales, and capability to adjust the supply and demand of certain goods or services”.*

And after a long and hard process, the lawmaker had agreed that business actors can be referred in dominant position if:

- one business actor or a group of business actors controls 50% (fifty percent) or more of the market share on one type of goods or service; or
- two or three business actors or groups of business actors control 75% (seventy five percent) or more of the market share on one type of certain goods or services.

Law No. 5 of 1999 limits that Business actors are *per se illegal* prohibited from taking advantage of their dominant position either directly or indirectly, in order to:

- a. impose trade terms with the intention preventing and/or barring the consumers to acquire competitive goods and/or services, both in terms of price or quality; or
- b. restrict the market and technology development; or

- c. barring other business actors having a potential to become their competitors to enter the relevant market.

Law No. 5 of 1999 regulates that The Commission has an authority to imposed sanction to business actor who proven guilty, at the lowest is an order to end their abuse of dominant position and at the highest is giving a minimum penalty of Rp. 1,000,000,000 (one billion rupiah) and at the maximum of Rp. 25,000,000,000 (twenty five billion rupiah), and also giving a compensation payment if request by the plaintiff.

Nevertheless, The Commission believes that the objective at the beginning implementation of Law No. 5 of 1999 is to educate the business actors to change their behaviour in order to make a fair business competition among them. This is one from several reasons from the Commission in giving remedies and sanctions.

A penalty imposed on the business actors is basically, intended to give the business actors a deterrence effect. Therefore, the penalty is not the one and only tool for punishing the business actors proven guilty.

The form of sanction imposed on the business actors who is proven guilty in abuse of dominant position is the sanction assumed to be able to change the behaviour of the business player. With the business actors' willingness to change their behaviour, then the sanction shall not necessary imposing compensation and or penalty. The sanction to be imposed can be in other form but still comes under the framework of provisions of Law No. 5 of 1999, as mention above, in the form of an order to end their abuse of dominant position.

The sanction imposed to the business actors who are proven guilty, if the abuse of dominant position has really jeopardised the competition such as it has ousted other business actors in the market concerned, or the behaviour of abuse of dominant position has been conducted for a long period of time and the business actors has intentionally violated the law.

A high penalty has not been certainly effective to provide the business actors with deterrence effect. A mistake in imposing a high penalty may result in fatal impact, for example, the bankruptcy of the business actors or disappearance of competitive capability. Therefore, the amount of penalty besides calculate the damage that occur, will be consider the financial capability of the business actors also.

Litigation cost and time consuming in litigation also become a consideration from The Commission for the business actors in choosing whereas appeal or accept The Commission Verdict.

In the framework of competition, the rapid development of sophisticated technology may lead a business actor in a dominant position. A sophisticated technology shall first be associated with the intellectual property rights, which include: license, patent, trademark, copyright, design, of industrial product, integrated electronic series, and trade confidentiality as well agreement related to franchise because based on Law No. 5 of 1999, all that matters are excluded. Therefore, the rapid development of sophisticated technology needs to be seen first whether or not it is related to intellectual property right. If it is not related with intellectual property right, then there is no discrimination of treatment in applying the competition law related to the change of technology.

Law No. 5 of 1999 does not stipulate the provisions concerning remedy. Even so, this law includes possibility of remedy for the business actors abusing their dominant position. As has been described previously, the objective of Law No. 5 of 1999 is the establishment of behaviour of business actors who

upholds the principles of fair business competition. As such, the final objective is the changing behaviour of business actors to fulfil the fair business competition principles in running their business activities.

The remedy made by The Commission is for the behaviour of business actor that may lead to the occurrence of unfair business competition but the result of such behaviour has not prevailed against the law yet; this is the remedy that will be the subject of supervision to be conducted by The Commission.

### **3. Implementation on case handling**

Based on The Commission experience, imposing a minimum or a maximum penalty to a business actor who is proven guilty on abusing its dominant position does not giving any differences, because almost every convict verdict of The Commission whereas imposing a penalty or not, filed to the court by appellant.

Some of Indonesian business actors in a dominant position have a unique but embarrassing attitude, that always though every business activities they runs are already appropriate with the law and never confess guilty even the evidence said so.

This condition appears in many cases, such as The PT. Jakarta International Container Terminal Case, in this case, The Commission verdict said that The Jakarta International Container Terminal was found guilty violating The Law No. 5 of 1999. Even The Commission verdict had been strengthened by The Supreme Court and based on Law No. 5 of 1999, The Supreme Court verdict is a final and binding decision, The Jakarta International Container Terminal still refuse to confess that they were guilty.

The similar condition also occurs in PT. Telekomunikasi Indonesia Case, the largest Indonesian telecommunication company, and PT. Garuda Indonesia Case, the largest Indonesian air flight company. All three cases above had been calculated causing a billion rupiahs damage, but only on PT. Garuda Indonesia Case, The Commission imposing a minimum penalty, on other 2 (two) cases, PT. Jakarta International Container Terminal Case and PT. Telekomunikasi Indonesia Case, The Commission did not impose a penalty but only giving an order to end their abuse of dominance.

Different condition occurs in PT. ABC Case and Cinema Movie Distributors Case, that both of the business actors had accept The Commission verdict.

PT. ABC is a distributor for brand “ABC” manganese battery, the most consumed battery in Indonesia. The commission found that PT. ABC creates a “shift competitor program”, which is giving a 2% additional discounts for convenience stores if they are not displaying The ABC’s brand competitor specifically mention in a written agreement: The “Panasonic” brand. The Commission has imposed The PT. ABC an order to end their program without any penalty.

On Cinema Movie Distribution Case, The Commission found that 2 (two) largest movie importers licensed company only distribute their imported movie to 21 Cinema, the largest Cinema Company in Indonesia. The Commission has imposed to the 2 (two) importers to accept the request from the 21 competitors.

The concept of remedy has been once applied by The Commission in handling the assumption of violation to the cartel of concrete asphalt marketing by Concrete Asphalt Association (AABI) of North Sumatra.

Based on the result of preliminary examination it is acquired the facts that the business actors providing concrete asphalt in North Sumatra having Asphalt Mixing Plant (AMP) facilities in joining in the AABI have meet an agreement, that will not give any supporting letter or any warranty/guarantee for using

the equipment of asphalt mixing plant including its support belonging to the company which member of AABI to other company for the purpose of pre-qualification as well as for the purpose of taking part in the tender for the work using hot mix. AABI was not prepared to give loan/rental of AMP equipment including its supporting accessories for using hot mix work to other company that is not a member of Regional Board of AABI of North Sumatra. AABI is not willing to serve the sale of hot mix to other company that is not a member of Regional Board of North Sumatra.

That agreement is assessed for being able to lead to unfair business competition because it deters the opportunity to business actors who is not the member of AABI to running their business in North Sumatra. Even though this agreement is evidence that found in the preliminary investigation, but on the other hand, also has been found the facts that agreement has not been carried out by the members of AABI that means there are no impact or victim caused by it. Based on this particular, The Commission has discontinued the investigation, in the event that in future it turns out that illegal agreement is running effectively, it will be resumed with further investigation.

#### **4. Conclusions**

The sanction shall not necessary imposing compensation and or penalty when business actors have a willingness to change their behaviour. The sanction to be imposed can be in form of an order to end their abuse of dominant position but still comes under the framework of provisions of Law No. 5 of 1999. On the other hand, abuse of dominant position has the same impact with monopolisation, which is taking the consumer welfare and barring the potential competitor entering the market that may cause a billion rupiahs damage. The Commission should be more careful in giving a sanction or remedies to avoid make a mistake in imposing a high penalty that may result in fatal impact or give a low sentence may repeating the violation.

## ROMANIA

### 1. Legal regime of sanctions and remedies in cases of abuse of dominant position

The Article 6 of the Romanian competition law, similar to Article 82 of the EC Treaty, prohibits the abuse of a dominant position.

The sanctioning regime of anticompetitive practices is differentiated mainly according to the gravity and duration of the infringement. From this point of view, abuse of dominant position belongs to the category of the most severe infringements of the competition law, taking into account the consequences of this behaviour that distorts competition and harm consumers' interests.

Within the current legal framework, a wide range of sanctions and remedies can be used by the Competition Council for punishing the law infringements and for restoring the competition on the market.

The legal regime for sanctioning abuses of dominant position includes:

- Sanctions:
  - **sanctions for abusing the dominant position** – fines (monetary penalties) imposed by the Competition Council;
  - sanctions for failing to comply with measures or conditions ordered by the competition authority in cases of abuse of dominant position – daily monetary penalties imposed by the Competition Council.
- Remedies:
  - **behavioural remedies** – conditions and measures imposed by the Competition Council aimed at restoring the competition and preventing future abusive conduct;
  - **structural remedies** – may be imposed by the court at the Competition Council's request in cases where the application of fines and behavioural remedies has proved to be inefficient for restoring the competitive environment.

In order to adopt a more deterring sanctioning system and to continue the transposition of the *acquis communautaire* into the Romanian legislation, the sanctioning regime in case of anticompetitive practices was further amended. Due to the amendments brought to the competition Law in 2003, the Competition Council has the power to impose, in cases of abuse of dominant position, a fine up to 10% of the offender's annual turnover.

At the same time, in order to ensure that the conditions and obligations imposed by the Competition Council are strictly observed, the law gives the competition authority the power to impose a daily penalty whenever the offender fails to comply with a condition or measure ordered by the Competition Council. In such cases, the law provides for a penalty up to 5% of the offender's average daily turnover for every day of delay.

### **1.1 Policy goals**

The sanctioning of the law infringement is a valid goal for the competition authority's action but this has to remain only a mean for achieving the main objective which is to restore the competition environment affected by the abusive conduct and thus, to achieve a better protection of the consumer's interest.

The Romanian competition law does not prohibit firms from obtaining profits legally. If a firm holds a dominant position as a result of its efficient, innovative and competitive activity, such firm cannot be punished for its success. This is the reason why the competition law does not prohibit the mere holding of a dominant position but only the abusive use of such position. If a firm tries to obtain supplementary profits by speculating its dominant position, the conduct of such firm would result in a severe distortion of the market and an unfair transfer of resources in favour of the dominant firm. The consequences of such behaviour are born by other competitors, suppliers or beneficiaries of the abusing firm and, in the end, by the consumers.

Whenever decides to apply a sanction or impose a remedy in a case of abuse of a dominant position, the Competition Council's assessment takes into account *the following effects of a sanction*:

- **The effect of restoring the competition** – this is the most important objective since a sound competitive environment allows consumers to benefit from the best alternatives in terms of variety, quality and price;
- **The sanctioning effect** – the punishment of the law infringement;
- **The prevention effect** – the dominant firm is discouraged to rely in the future on a similar conduct;
- **The deterring effect** – a severe sanction applied to a firm abusing its dominant position is a warning for any firm in a similar position that any abusive conduct could be severely punished. A communication strategy developed by the competition authority is necessary for making the sanctioning decision known as widely as possible, increasing the deterring effect of the sanction applied; In this respect, the Competition Council advocates its sanctioning policy, making use of a large range of communication tools such as press releases and decisions' publication on its website both in Romanian and English languages.

### **1.2 Choosing the right remedial tool**

According to the legal regime in Romania, whenever, after conducting an investigation, it identifies and proves an abusive conduct, the Competition Council can, together with imposing a fine, make use of a remedial tool.

The Competition Council is entitled to make use of a whole range of behavioural remedies in abuse cases. Apart from ordering the offender to terminate its abusive conduct, the Competition Council may impose the incumbent specific market behaviour in the future, depending on the case's particularities.

This could refer, for example, to the obligation imposed on the offender to supply a certain product or service to all the beneficiaries irrespective of their ownership status (private undertaking or state-owned company) or to allow the competitors' access to the network controlled by the dominant firm.

The remedies imposed by the competition authority may lead to the elimination of entry barriers, leading thus to the opening up of the markets to a greater extent or even to the creation of new markets. These positive effects could emerge in the market where the dominant firm acts, in an upstream or downstream market or even in a neighbouring market.

Whenever behavioural remedies ordered by the competition authority in a particular case prove to be inefficient for achieving the appropriate level of competition, the Competition Council may resort to structural remedies.

The mechanism for imposing a structural remedy in abuse cases is provided for by the Competition law. This could be briefly described as follows:

- the Competition Council imposes a fine and orders the necessary behavioural remedies, whenever, after conducting an investigation, it finds that a firm abused its dominant position;
- the fines imposed and the remedies ordered by the competition authority prove to be inefficient for preventing the recurrence of the abusive behaviour and the restoring of the competition. In this case, the Competition Council may request the court to order structural remedies aimed at terminating the dominant position held by the firm in question.

According to the law, the structural remedies available are:

- invalidating contracts or contractual clauses through which an undertaking exploits, abusively, its dominant position;
- invalidating the act or acts through which an economic concentration creates a dominant position, even if the legal act or acts at issue would have created a new legal entity;
- restraining or prohibiting access to the market;
- selling assets;
- restructuring through division of the undertaking.

The competition authority is entitled to point out the most appropriate structural remedy/remedies that fits/fit to a particular case. The court is obliged to consider only the remedy/remedies suggested by the Competition Council, without having the possibility to order other structural remedies than those indicated by the competition authority.

### **1.3 *Monitoring behavioural remedies***

The monitoring of the remedies linked to the pricing policy of a dominant firm is deemed to be the most difficult.

The assessment of the correctness of the information provided by the monitored firm requires a high level of expertise, especially since the firms tend to make use of all kinds of financial and accounting tricks to disguise their real pricing policy. In such cases, the monitoring of the prices requires important human resources and could be quite inefficient, especially in cases of products or services with a very complicated price structure. A better approach could be that of imposing the incumbent to hold separate accounting evidences for different activities instead of making efforts to identify in the firm's documents a possible cross-subsidisation, for example.

In any case, the monitoring of prices should be used for a time-limited period and designed in a manner that allows the competition authority to efficiently check the pricing policy. The aim of the remedies ordered by the competition authority should not be the control of prices but the creation of conditions for the correct functioning of the market, so that the price charged for a certain product would be the point where the demand and offer meet.

In comparison with the monitoring of the remedies linked to the pricing policy, the observance of other behavioural remedies is indeed easier to be controlled by the Romanian competition authority. In this respect, the firms affected in the past by the abusive conduct can be a reliable source of information for the competition authority.

In case of remedies, their success depends on the correct identification of the most suitable remedy in a given case and, at the same time, on the way the competition authority monitors the incumbent's compliance with the prescribed conduct.

#### **1.4 *Setting fines***

According to the Romanian legislation, in all the cases where an abusive conduct is identified and proved, the Competition Council imposes a fine on the firm holding a dominant position.

The right to apply fines is one of the most powerful tools in the hands of our competition authority.

The criteria taken into account by the competition authority when setting the amount of fine are provided for by the law. The methodology for setting the fine applicable in a specific case is stipulated in the Guidelines, approved by the Competition Council. According to the Guidelines, a basic level of the fine is determined taking into account the gravity and duration of the infringement and then, after considering any identified aggravating or mitigating circumstances, the final amount of the fine is established. In any case, the overall amount of fine may not exceed 10% of the offender's turnover in the year prior to the year when the sanctioning decision is issued.

With regards to the criterion of "duration", the Guidelines provide for three categories of infringements: short-term infringement (less than 1 year), medium term infringement (1-5 years) and long-term infringement (more than 5 years), a different percentage being thus added to the basic level of the fine.

To sum up, the success or failure of a sanction depends on the ratio between the amount of fine, the size of the incumbent, the gravity and duration of the infringement. It depends as well, to a large extent, on the timing, i.e. the sooner the sanction is imposed, the more efficient its application is.

It's worth mentioning that according to the Romanian competition law, the sanctioning regime in abuse of dominance cases is similar to the one applied in cartel cases. Although, there is one major difference: while in cartel cases, the Romanian competition legislation provides for a lenient treatment aiming at encouraging participants in a cartel to reveal it and to supply the competition authority with the critical evidence for combating this type of anticompetitive practices, in abuse cases there is no room for leniency.

#### **1.5 *Remedies in high technology and network effects markets***

The Romanian law does not provide for specific remedies applicable to sectors characterised by a rapidly changing technology. In these cases, the efficiency of the remedies depends crucially on the timing – the sooner the remedies are applied the more efficient they are. On the contrary, a long lasting

investigation conducted by the competition authority and any delay in enforcing the remedies order could result in driving the abused firms out of the market.

In case of firms controlling networks, especially those that can be considered as essential facilities, the most frequent abusive behaviour is denying access to the network. In these cases, the most important remedy consists in compelling the dominant firm to grant the access to its network for all its competitors or clients, without discrimination.

A close cooperation between the competition authority and the regulatory authority, where such a regulator exists, is very important for increasing the level of competition on markets dominated by firms that inherited historic infrastructure monopolies. The screening of the regulations specific to such sectors could reveal the existence of legal or administrative provisions that facilitate or even permit an abusive conduct of the dominant firm.

### **1.6 Taking private actions into account**

The competition authority protects a public interest - ensuring a normal competitive environment that allows the consumers to access the best quality at the best price possible.

The private actions aim at protecting a private interest – the recovery of damages bore by a natural or legal person as result of an abusive behaviour. According to the legal system in Romania, the public action, conducted by the Competition Council, and the private action, conducted by the private entities do not exclude each other. On the contrary, the decision issued by the competition authority can be used in front of a civil court as a legal base in a damages action.

### **1.7 Romanian Competition Council's Experience - Examples**

In its practice, the Competition Council applied a wide range of remedies, for example:

#### **1.7.1 In the case of a company that held a dominant position on the market for services of keeping the registries of undertakings' shareholders, the Competition Council ordered the incumbent:**

- to transfer, upon request, the shareholders registry of an undertaking to any independent registry company indicated by the undertaking in question, without imposing any supplementary conditions or charges;
- to establish a transparent and non-discriminatory system of facilities granted to its clients.

At the same time, the Competition Council recommended the National Securities Commission to inform the undertakings that they have the possibility to choose their own registry company upon their will.

As a result of the Competition Council's intervention, the market was opened up and the quasi monopolistic position held by the incumbent was terminated.

#### **1.7.2 in the case of a vertically integrated company that refused to provide its competitors with the by-products necessary for producing nails and, at the same time, introduced a discriminatory treatment based on the ownership structure of its beneficiaries, the Competition Council ordered the incumbent:**

- to supply all the beneficiaries with the necessary by-products;

- to abolish the discriminatory payment conditions based on the beneficiary's ownership structure (private companies or state-owned companies).

The Competition Council's intervention resulted in an increased level of competition on the nails market.

*1.7.3 In the case of a dominant firm acting on the Romanian chipboard market, which abused of its dominant position by unjustifiably raising the prices charged for its products*

The Competition Council took into account the commitment undertaken by the incumbent with regards to the decrease of prices and, in addition, it ordered the incumbent:

- to submit four times a year the monthly financial statements together with the costs' calculation;
- to submit twice a year an information about the negotiations carried out with its beneficiaries.

The immediate effect of the Competition Council's intervention was that the prices for raw particle boards decreased, leading accordingly to positive effects in the downstream market – in this case, the furniture market.

In all three examples shown above, the Competition Council imposed significant fines. These fines represented both sanctions for the incumbents as well as a warning for other dominant firms saying that any abusive conduct shall be severely prosecuted.

To conclude, the Competition Council is set to focus its resources on preventing and fighting against infringements of article 6 concerning the abuse of dominant position, strongly making use of its legal powers.

## BIAC

### 1. Overview of BIAC Position

Key policy goals in imposing remedies in abuse cases should be directed toward:

- a) The promotion of competition, not toward aiding particular competitors;
- b) A proportionate remedy that does not go beyond provisions necessary to restore competition, having regard to:
  - minimisation of potential chill on future innovation;
  - promotion of economic efficiency; and
  - respect for a party's fundamental IPRs.

When imposing remedies for abuse, behavioural remedies directed toward eliminating barriers to restore competition are clearly preferable to structural remedies.

Fines are an inappropriate remedy for abuse of dominance, except where there has been an intentional failure to comply with a pre-existing remedial order.

Enforcement agencies conducting parallel or sequential reviews of the same or similar abuse cases should craft and apply remedies that are comity oriented and not inconsistent.

### 2. Policy Goals for Effective Remedies in Abuse Cases

While policy goals in imposing remedies in abuse cases will in part be dictated by the country's specific policy objectives and the stage of its economy (i.e. developed or in transition), a balanced approach should inform the choice of any remedy, namely, one that goes no further than necessary to restore competition to the relevant market having regard to:

- minimisation of the potential chill on future innovation;
- promotion of economic efficiency; and
- respect for a party's fundamental IPRs.

#### 2.1 *Minimise Potential Chill on Future Innovation/Least Interventionist Remedy*

The requirement for restraint is particularly compelling in the case of rapidly changing industries. As noted by Robert Pitofsky, former U.S. FTC Chairman:

Competition agencies must take into account certain unique attributes of high technology industries when applying competition laws, such as the complexity of the technical issues involved, the speed of market transition, the "self-correcting" nature of high-tech markets through the rapid and seemingly

perpetual introduction of new products, and the inapplicability of traditional theories of output and price effects.<sup>1</sup>

The need for caution in the high-tech area was reinforced by Assistant Attorney General Hew Pate's remarks on the recent EC Decision in the Microsoft case:

Imposing antitrust liability on the basis of product enhancements and imposing 'code removal' remedies may produce unintended consequences. Sound antitrust policy must avoid chilling innovation and competition even by 'dominant' companies. A contrary approach risks protecting competitors, not competition, in ways that may ultimately harm innovation and the consumers that benefit from it. It is significant that the U.S. district court considered and rejected a similar remedy in the U.S. litigation.<sup>2</sup>

To the extent possible, any remedy should be "technology neutral". A remedy should not affect the market for a particular technology, nor the incentives to innovate and develop future technologies, other than affecting specific incentives through the elimination of any improper barriers to entry or expansions, or other anti-competitive conduct.

Competition law agencies should also act with restraint when considering the imposition of remedies that impinge on a party's IPRs. Invasive remedies that reduce the value of IPRs can have a chilling effect on lawful product investment, research and innovation. Firms that would otherwise be encouraged to develop technological advancements may be reluctant to invest the necessary resources to do so, for fear that the anticipated benefits would ultimately be dissipated by overzealous antitrust enforcement policies. A dominant firm which believes there is real risk that its innovations may be labelled "essential" would be unlikely to invest in research and development to the same extent as it would absent such risk.

The Canadian Competition Tribunal has commented that its function in making an order under section 79 of the Competition Act does not include imposing penalties or punitive measures and that "simple clear-cut remedies targeted at the fundamental issues are preferable to more complex and interventionist ones that will have a perpetual life and may not cover adequately all situations present and future".<sup>3</sup>

## **2.2 *Promote Economic Efficiency***

Efficiencies are often discussed in terms of three major components: production efficiency, innovation/dynamic efficiency and allocative efficiency.<sup>4</sup> The promotion of dynamic efficiencies is of

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<sup>1</sup> Robert Pitofsky, Chairman FTC, "Antitrust Analysis in High-Tech Industries: A 19th Century Discipline Addresses 21st Century Problems", Remarks for the ABA Section of Antitrust Law's Antitrust Issues in High-Tech Industries Workshop, Scottsdale, Arizona February 25-26, 1999, the unique economic characteristics of high tech industries and appropriate competition law responses were also discussed by Richard Corley in "IP and Competition Law: Enforcement Challenges of the Information Economy", a paper presented at the Annual Conference of the Canadian Bar Association, Competition Law Section, Ottawa, Ontario, October 1, 1999.

<sup>2</sup> "Assistant Attorney General For Antitrust, R. Hewitt Pate, Issues Statement On The EC's Decision In Its Microsoft Investigation", United States Department of Justice Press Release, March 24, 2004.

<sup>3</sup> Laidlaw

<sup>4</sup> See Brodley, J., *The Economic Goals of Antitrust: Efficiency, Consumer Welfare and Technological Progress*, November 1987, New York University Law Review, pp. 1020-1043 at 1025. Production efficiency is achieved when output is produced using the most cost-effective combination of productive resources available under existing technology. Innovation or dynamic efficiency is achieved through the invention, development and diffusion of new products and production processes. Allocative efficiency is

paramount importance in rapidly changing technology markets, where companies are constantly striving to achieve greater innovation, synergies, cost savings and network efficiencies, and where dynamic efficiency gains represent the greatest opportunity for increased future economic and consumer well-being.

The Canadian Competition Bureau's Intellectual Property Enforcement Guidelines (IPEGs) reflect the Bureau's recognition that dynamic change and innovation, which are fostered by the protection of IPRs, are increasingly important drivers of economic activity and productivity gains and, in many industries, are now the most important indicia of competition.<sup>5</sup>

Accordingly, remedies in abuse cases should take into account the need to support, or at least not chill, the realisation of dynamic efficiencies. There is a danger that the traditional competition law focus on shorter-term allocative efficiency goals may result in enforcement activities which could adversely affect the incentives to innovate and the long-term benefits to society that flow from the research and development activities which are fostered by the protection of IPRs.

Awareness of this danger is reflected in the U.S. approach to balancing the exclusive rights afforded to the owner of intellectual property and the objectives of competition law, as succinctly summarised by Debra A. Valentine, former General Counsel, U.S. FTC:

Antitrust law promotes market structures that encourage initial innovation with a competitive market 'stick' - that is, firms that fail to innovate will get left behind. Intellectual property law encourages initial innovation with the 'carrot' of limited exclusivity, and the profits that flow there from. Antitrust law enables follow-on innovation by protecting competitive opportunities beyond the scope of the exclusive intellectual property right. Intellectual property law enables follow-on innovation by requiring public disclosure of the initial innovation (at least in the patent context) and affording follow-on innovators rights of 'fair use' and freedom from intellectual property 'misuse'. The basic principle that mediates the tensions ... is that intellectual property rights provide legal monopoly power, but only within the defined, limited scope of the right.<sup>6</sup>

Canadian law implicitly recognises that traditional competition laws and IPRs are designed for the same purpose – to reward success on the merits of skill and hard work. For example, there is an IP exception to the Competition Act to the abuse of dominance provisions, which provides that an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act, Industrial Design Act, Integrated Circuit Topography Act, Patent Act, Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act. In addition, the abuse provisions include a "superior competitive performance" exception that states that in determining whether a practice will prevent or lessen competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.

### **2.3 Promote Competition, not Competitors**

Remedial orders which are directed toward aiding particular competitors interfere with the effective functioning of competitive markets, preventing the achievement of the benefits that would otherwise have

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achieved when the existing stock of goods and productive output are allocated throughout the price system to those buyers who value them most, in terms of willingness to pay or willingness to forego other consumption.

<sup>5</sup> Competition Bureau, Intellectual Property Enforcement Guidelines (21 September 2000) available at <http://strategis.ic.gc.ca/pics/ct/ipege.pdf> (last visited 28 September 2004).

<sup>6</sup> "Abuse of Dominance In Relation To Intellectual Property: U.S. Perspectives And The Intel Cases", Remarks before The Israel International Antitrust Conference, Tel Aviv, Israel, November 15, 1999.

been achieved as a result of competition. Further, protecting competitors puts the competition agency in the role of industrial engineer, which is not something it, or any government agency, is particularly well suited to do.<sup>7</sup>

This objective also reflects and encompasses the accepted and respected international competition and trade norms of non-discrimination and procedural fairness in the application of a state's laws, particularly with respect to "national champions".<sup>8</sup> No special treatment favour or aid should be directed toward any specific entity in a remedial order; rather, the focus of the remedy should be on removal of anti-competitive barriers and practices in order to restore the process of competition to the relevant market.

### 3. Behavioural Remedies to be Favoured

#### 3.1 *BIAC submits that when imposing remedies for abuse, a predisposition to behavioural remedies is mandated*

In abuse cases, a structural remedy may deprive the market of aggressive and efficient dominant firms particularly when:

- i. dealing with IPRs;
- ii. rapidly changing markets; and
- iii. cases involving an element of superior competitive performance.

A behavioural remedy is a more effective tool than a divestiture remedy, permitting the realisation of the projected efficiencies while constraining the future exercise of market power.

Behavioural remedies can be more specifically designed to meet particular anti-competitive practices. For example, in enforcing the Canadian Competition Act, remedial orders in abuse of dominance cases have been directed toward the elimination of specific contract clauses (rights of first refusal and other types of ties) as well as anti-competitive types of conduct. These have been considered effective in restoring competition.

In addition, divestiture remedies are inflexible. If a behavioural remedy is adopted, any misjudgement of the potential anti-competitive effects can be addressed by adjusting the remedy.

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<sup>7</sup> As noted by the U.S. Supreme Court in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872 (2004).

<sup>8</sup> Both the ICN and the WTO have endorsed the principles of non-discrimination and procedural fairness. The ICN's Guiding Principles For Merger Notification and Review include non-discrimination on the basis of nationality and procedural fairness. (<http://www.internationalcompetitionnetwork.org/icnnpguidingprin.htm>) The structure of the WTO is similarly based on these principles. For example, TRIPs provides that WTO Members shall accord the treatment provided for in the Agreement to the nationals of other Members. Article 3 embodies the national treatment principle, providing that each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property. Further, Article 4, *Most-Favoured-Nation Treatment*, provides that, "with regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members".

Moreover, structural remedies are potentially problematic in rapidly changing markets because it is reasonably likely that the competitive dynamics of the market will have fundamentally shifted by the time the remedy is implemented. In such a case, the dominant entity may no longer have the market power it had at the time of the investigation and may be prevented from being an effective competitor by a divestiture remedy. A behavioural remedy is more flexible and can be adapted to changing market conditions. Arguably, requiring divestitures in rapidly changing markets may unduly stifle innovation and efficiency.

### 3.1.1 *Removal of Barriers to Competition*

The focus of remedial orders in abuse of dominance cases should not be on punishment of the dominant firm, but on facilitating competition in the relevant market. Remedies that eliminate barriers or constraints on competition are preferable to structural remedies or punitive fines.

In Canadian abuse cases, for example, unlike in merger cases, the Competition Tribunal has focused on behavioural remedies. Remedial orders issued by the Canadian Competition Tribunal have included prohibitions against one or more of the following:

- enforcing certain contractual terms (e.g. exclusivity clauses) (NutraSweet; Laidlaw; Nielsen);
- entering into certain contractual terms (e.g. long term contracts or contracts with exclusivity clauses) (NutraSweet; Laidlaw; Nielsen);
- acquisitions of competitor (Laidlaw);
- withdrawing from a market (Laidlaw);
- threatening litigation (Laidlaw);
- rejecting customer orders (Tele-Direct);
- delaying processing of customer orders (Tele-Direct);
- disparaging services of others (*Tele-Direct*).

The Competition Tribunal has issued one order to supply for a defined term. (*Nielsen*)

Monitoring a carefully crafted behavioural remedy is not likely to be more onerous than monitoring a divestiture remedy in a merger case, which involves not only monitoring the sale process but the interim management of the assets; the behavioural remedy just may have to be monitored periodically for a longer period of time. In addition, various mechanisms can be used, in appropriate cases to remove the mentoring burden. For example, the terms of the order can be widely publicised and reliance can be placed on industry members to bring any issues forward with provision that monitoring of a behavioural remedy could be delegated to an arbitration process.

### 3.1.2 IPRs

The protections offered by IP laws provide incentives to innovation, leading to dynamic efficiency gains.<sup>9</sup>

The requirement that IPRs be protected in order to provide incentives for the development of valuable works, has been accorded global recognition in treaties such as the World Intellectual Property Organisation (WIPO) treaties and the WTO treaty concerning Trade-Related Aspects of Intellectual Property (Art. 7). [Specifically, Article 7 of TRIPs provides that the protection and enforcement of IPRs should contribute: (i) to the promotion of technological innovation and to the transfer and dissemination of technology; (ii) to the mutual advantage of producers and users of technological knowledge; (iii) in a manner conducive to social and economic welfare; and (iv) to a balance of rights and obligations.] Overriding these valuable protections may be expected to stifle innovation, impede efficiency gains and detract from consumer and public welfare.

The Canadian abuse of dominance provision states that the mere exercise of an IPR is not an anti-competitive act. In Canadian cases where anti-competitive conduct with respect to IPRs has been alleged or remedies have been sought which affect a party's IPRs, the Competition Tribunal has demonstrated a respect for, and reluctance to interfere with the mere exercise of, such rights. The Canadian IPEGs<sup>10</sup> indicate that conduct involving a mere exercise of IPRs will only be challenged in circumstances where invoking a remedy against the IPR holder would not adversely alter the incentives to invest in research and development in the economy; the alleged competitive harm stems directly from the refusal and nothing else; and no appropriate remedy is available under the relevant intellectual property statute.

## 4. Fines

Fines are an inappropriate remedy for abuse of dominance, except in circumstances where there has been a clearly established intentional failure to comply with a pre-existing remedial order.

## 5. Consistent Remedies

Where more than one jurisdiction is reviewing the same or similar conduct in the course of an abuse of dominance investigation, they should aim, at a minimum, to adopt a comity-oriented approach. This should encompass consultations on a timely basis which take into account each others' concerns, and, to the fullest extent possible, devise remedies that are not inconsistent, but rather are compatible with another and will operate coherently throughout the relevant market.<sup>11</sup> This should ultimately be more efficient and effective for the market, reduce costs both for the public and private sectors, and avoid system frictions as well as unnecessary uncertainties.

<sup>9</sup> See Brian Jackson (2003), "Innovation and Intellectual Property: the Case of Genome Patenting" 22 *Journal of Policy Analysis and Management*, and John Barton (1999), "Intellectual Property Rights and Innovation" in Nicholas Imparato, ed. *Capital for our Time: The Economic, Legal, and Management Challenges of Capital* (Stanford: Hoover Institution Press) at 123.

<sup>10</sup> Competition Bureau, *Intellectual Property Enforcement Guidelines* (21 September 2000) available at <http://strategis.ic.gc.ca/pics/ct/ipege.pdf> (last visited 28 September 2004).

<sup>11</sup> Karel Van Miert, *International Cooperation in the Field of Competition: A View from the EC*, Address Before the Fordham Corporate Law Institute 24th Annual Conference on International Law & Policy (Oct. 16, 1997), available at [http://ec.europa.eu/comm/competition/speeches/text/sp1997\\_073\\_en.html](http://ec.europa.eu/comm/competition/speeches/text/sp1997_073_en.html). See also the paper presented by BIAC to the OECD WP3 Regarding the Re-examination of the 1995 Recommendation Regarding Comity, June 7, 2006.

## SUMMARY OF THE DISCUSSION

Competition Committee Chairman Frédéric Jenny began by making some general observations based on the delegates' written contributions. There are contrasting views about the usefulness of monetary sanctions in unilateral conduct cases, with some countries calling for more severe financial sanctions and others being more interested in conduct remedies or commitments. Most of the contributions, however, focus on conduct remedies.

There also seems to be a distinction between countries that advocate what they call "light-handed remedies" and other countries that do not seem so worried about being light-handed and advocate the early imposition of remedies – sometimes as interim measures – or extensive remedies. There is not a great deal of discussion on the difference between behavioural remedies and structural remedies. The contributions concentrate on behavioural remedies.

Competition authorities tend to monitor very closely compliance with the remedies they have imposed and with the commitments they have extracted from firms. Authorities do not tend to track closely the effectiveness of the remedies they impose, though. In fact, the question of whether the commitments and remedies that have been implemented are a sufficient deterrent to unilateral anti-competitive practices is rarely discussed.

The Chairman suggested that the discussion begin with fines, continue with (non-monetary) remedies and finish up with commitments.

### 1. Fines

The Chairman raised the issue of whether fines are appropriate and useful in abuse of dominance cases. He read from the contribution of Japan, which notes that "Private Monopolisation where a powerful firm dominates the business activities of other firms in a certain market and when the powerful firm controls the price and supplies of the total market by ordering price, the amount of supplies, and to whom the provisions should be sent, is economically not different from a price cartel and so it would be necessary to order payments of surcharges." There is a different view in some of the other contributions, however, which contend that because abuse of dominance cases are more difficult than cartels in that it is often hard to be sure that one is discriminating accurately between pro-competitive and anti-competitive conduct, heavy sanctions in abuse of dominance cases may have deterrent effects on some conduct that may not be anti-competitive. The Chairman then asked the Japanese delegation if it is appropriate for the JFTC to impose fines in abuse of dominance cases, and secondly whether it could amplify the statement quoted above.

A delegate from Japan responded first by clarifying the basic nature of surcharges in the Anti-Monopoly Act. It is quite true that the surcharge has the nature of a sanction and is expected to have a deterrent effect. But its basic nature in Japan is concerned with the disgorgement of unlawful gains. As such, the JFTC cannot exercise any discretion in determining the amount of surcharge. Instead, the amount is calculated in accordance with a formula stipulated in the Anti-Monopoly Act. Surcharges are imposed for both cartel activities and what is called the control type of private monopolisation because the economic loss caused by such private monopolisation seems equal to the loss caused by cartel activities. While the delegate agreed that there might sometimes be cases in which proving private monopolisation is

harder than proving that there is a cartel, he did not think that this is always the case. He pointed out that dubious activities of firms that amount to private monopolisations are not concealed in most cases.

The Chairman then noted that Spain's contribution addresses the difficulties of setting fines and particularly the difficulties that the *Defence de la Competencia* has had with the courts. In about 50% of its judgments, the *Audiencia Nacional* (which is the appeal body) backs the Tribunal's reasoning regarding the substantive issues, but reduces or totally removes the fines on different grounds, such as lack of proportionality regarding the effects of the conduct, insufficient reasoning or disparate treatment for similar situations. Furthermore, around 30% of the judgments annulling or partially annulling the tribunal's resolutions involved abuse of dominance cases. This raises the question of whether it is feasible to impose monetary sanctions against firms that abuse their dominant position, or whether the requirements of proportionality are such that it is nearly impossible to use this means of discouraging abuses. Are remedies therefore the only recourse that one has for firms that abuse their dominant position?

A delegate from Spain replied that these data could lead to an inaccurate view. Very few decisions are appealed and thus very few judgments annul decisions. In fact, only 10% of these decisions are reversed, completely annulled or changed so as to reduce the fine. In addition, very few of the judgments involve abuse of a dominant position, so there are actually only 4 cases in which fines were reduced by the court between 1997 and 2004, while over 1000 decisions were taken in that period. The delegate agreed, however, that the fines might not have a sufficient deterrent effect, given that they are relatively low so far and that they are paid after a substantial delay because the court usually grants an interim suspension of the payment of the fines. Therefore, they are paid many years later and that obviously limits their deterrent effect.

The delegate also stated that structural remedies can play a better role with respect to abuses of a dominant position. A draft law will soon be taken to the Parliament, and it will contain some pertinent reforms. A substantial increase in the fines imposed as well as in their predictability is anticipated, and this will hopefully lead to an increased deterrent effect as well as a reinforcement of the standing that the Tribunal has over the competition authority before the court.

Next, the Chairman observed that the contribution from Chinese Taipei suggests that high fines for abuse of a dominant position may sometimes be preferable to remedies or commitments (which are non-monetary) because fines have a stronger deterrent effect. In addition, fines may be preferable because remedies and commitments may be inappropriate in compensating for the harm done by anti-competitive practices. It seems that the Fair Trade Commission's position on this has shifted over time and that it now uses fines more liberally than it did in past years. The Chairman asked the delegation from Chinese Taipei to comment on whether his understanding was correct.

A delegate from Chinese Taipei confirmed that the written submission suggests that high fines for abuse of a dominant position may be preferable in some circumstances to negotiated solutions. The delegate also verified that the practice of the FTC in this regard has shifted over time. Until the 1999 amendment of the Fair Trade Law, the abuse of a monopolistic position incurred two measures: a remedy such as ordering the infringing entities to cease or rectify its conduct or an administrative penalty ranging from 50,000 to 25 million NT dollars. Only in the case of repeat offenders could a fine or criminal punishment be imposed by a court. Therefore, the Commission did not have the right to give criminal sanctions. But the amended version of the law empowers the Commission to seek a relatively high level of fines. In the FTC's view, instead of ordering the infringing parties to restore the previous level of competition, the monetary punishment has become a more acceptable means to achieve that end. The reasons for this are that i) most of the damage caused by anti-competitive behaviour makes it impossible to restore the former competitive conditions; ii) the monetary punishment cap of 25 million NT dollars is higher than all other administrative penalties; and iii) this high level of fines may draw more attention and

awareness from the public, the business community and the press. Consequently, by imposing relatively high fines, the Commission may achieve the goals of deterring the violation and promoting the concept of competition to society.

A delegate from BIAC intervened at this point. He noted that BIAC's submission takes the position that fines are not an appropriate remedy for abuse of dominance unless there has been an intentional failure to comply with a pre-existing remedial order. The focal point of remedial orders in abuse of dominance cases should not be punishing the dominant firm but rather facilitating competition. Remedies should therefore be focused on limiting barriers or restraints to competition. The delegate also asserted that there is a fundamental factual and public interest distinction between cartels, which operate in a secret fashion, and the conduct of a single firm operating in a unilateral and open manner.

The Chairman then turned to Germany, noting that in contrast to Japan, Spain, and Chinese Taipei, it seems not to be a great proponent of fines in abuse of dominant cases. The Chairman asked the delegation from Germany whether it agrees with BIAC's reasoning or if it has other reasons for not wanting to impose fines in abuse of dominance cases.

A delegate from Germany began by noting that the Bundeskartellamt has just imposed a fine in an abuse case against repeat offenders, so it does impose fines. But the procedural rules in Germany differ according to whether the proceedings end with a cease and desist order or with a fine, and the standard of proof and the defence rights are much stronger in fine proceedings. Most of the abuse cases in Germany are "borderline" cases (i.e., cases that are difficult to assess), and it would meet the standard of proof if only a cease and desist order is sought. It is somewhat different in hardcore cartel cases, where if you have enough evidence to prove the cartel then it is a very straightforward case; there is no need for economic and legal analysis. The delegate emphasised that even in administrative proceedings (in which fines are not sought), the government has the right to request that the court skim off the profits that the company made as a result of its illegal conduct, which has a kind of deterrent effect. Is it enough of a deterrent effect? The delegate agreed that in principle fines might be more effective, but in most borderline cases he would not consider them to be appropriate. The delegate added that for the deterrent effect to occur, it is important to impose remedies within a reasonable timeframe. Although more time is enables investigators to make a deeper economic and legal analysis, the deterrent effect depends on a short timeframe.

A delegate from the EU intervened, stating that he could not understand BIAC's position. If the competition rules redress only future problems, then what is a prohibition system with an inherent deterrent effect will become a control of abuse system. That would be very nice for companies because they could abuse as long as the authority hasn't found that there is an abuse, knowing that the worst that could happen to them is that they might have to change their future behaviour. That is an old type of competition system, but modern prohibition systems are meant precisely to put companies at risk for being fined for past behaviour if they violate the law. This is essential for the deterrent effect. Borderline cases are different, of course. If it is a case where it is unreasonable to assume that a company could have foreseen that its actions were illegal, then the conditions for fining would not be met because in the EU regulation for fining you have to prove that either the behaviour was either intentional or negligent. Furthermore, the delegate stated, unilateral conduct can be as detrimental to consumers as a cartel. In fact, it can be even worse because it may be maintained even longer than a cartel. A cartel may disintegrate earlier and quicker than unilateral conduct by a very strong dominant firm. Therefore, from a philosophical, conceptual and protection point of view, it is not clear why we would make any distinction between fining cartels on the one hand and fining unilateral conduct on the other hand.

The delegate from BIAC responded by saying that some jurisdictions have adopted this significantly different approach to the subject of abuse of dominance, pointing to decisions of the Parliament of Canada as an example. Therefore it is not set in stone that there must be only one right way.

The Chairman then asked Canada whether BIAC's assertion was correct.

A delegate from Canada replied that a recent Parliamentary Committee recently suggested that there be fundamental changes to the regime because they find it unacceptable that the competition authority does not have the ability to levy fines and that private parties cannot bring their own actions. The OECD has also recognised that it seems to be a weakness in the Canadian system that there is no ability to fine and that private parties cannot take actions under the competition law.

## **2. Remedies**

The Chairman then began to discuss the issue of (structural and behavioural) remedies, noting that the contributions reveal a variety of views. The US contribution states that "courts and agencies should not even consider single firm conduct to be unlawful in the first place unless there is a workable and practical remedy which is available." In other words, the US seems to be saying that irrespective of what you do on fines, unless you have a remedy you don't have a violation. The Chairman said it would be useful to know more about how one can define what a workable and practical remedy is on an a priori basis. He also asked the US delegation whether its agencies have had any cases in which it was decided that there was no violation because there was no apparent remedy available.

A delegate from the US answered by stating that there are certain forms of business behaviour that are simply inherent in the natural operation of markets but which the competition authority wants to reduce or discourage. But by doing so, the authority would necessarily place itself in the posture of a regulatory agency. The perspective of the US agencies and courts is that this is not a proper role for the competition authorities. If that is the nature of a given market, then other forms of intervention may be appropriate, but competition law is not normally the right one.

The delegate added that this is a limited issue, and that people often forget the frequency of interventions by the Justice Dept and the FTC against what they believed were dominance problems. So it is not as if the US agencies are not intervening on dominance grounds, but as the law has evolved there are 2 particular types of cases for which traditional dominance types of remedies are destined to failure in the view of the US. The first relates to collective dominance and tacit interdependence. A view evolved in the US in the 1960s that there was a limit to what could be done by competition authorities in the area of oligopolistic interdependence. When the FTC later attempted to reach collective dominance under US antitrust law, the courts did not accept the idea. The delegate's view was that the courts were correct.

The second type of case involves monopolists that simply exercise the pricing power that accrues to short term market power, which are the so-called 'exploitation cases.' Here again there is not much that an agency can do without placing itself in the role of a regulator, which is not a role that the US agencies want to assume. In fact the US view is that if a firm has developed short term market power – typically through innovation – then the best course is to let them reap those rewards, thereby encouraging further innovation throughout the economy and inducing entry into that market. Exclusionary cases are more difficult. They are the ones where there may well be remedies that work. But in those instances when we conclude that the nature of the industry is such that it is structurally non-competitive, i.e., that the dominance is simply something that cannot be remedied through a structural or behavioural intervention, then it would be appropriate for the competition authority to ask whether competition law principles are the right regulatory tool for correcting the market failure.

A second delegate from the US added that the American antitrust agencies approach this issue with the goal of trying to promote consumer welfare, so they intervene only if they believe that consumer welfare will not be made worse than it was if there had been no intervention. Therefore it is entirely natural to consider the question whether or not there is a workable remedy before proceeding to find a

violation. There are some types of cases in which this question is difficult to answer. Predatory pricing is a good example. If the standard for determining whether predatory pricing occurred is based on a fairly objective set of criteria, you may be able to impose a workable remedy even though you must be careful about the fact that you may be encouraging prices to remain artificially high.

Refusal to deal cases serve as another example. An injunction is going to require the court to set or regulate the terms and conditions of business transactions. If you, as a governmental entity, are going to have to engage in product design and second guess innovation decisions, the delegate said, this should make you think hard about whether or not you should proceed.

Finally, addressing earlier remarks by the EU, the US delegate offered a reason for fining cartels but not fining single firm conduct violations. The simple reason is overdeterrence. We don't really think about overdeterrence in the cartel area because it is a naked anti-competitive activity with no justification. But in the single firm conduct area it can be hard for individual companies to know what is going to be found to be a violation, and if you impose significant punitive fines then you are likely to deter pro-competitive activities and thereby harm consumer welfare. Finally, from the US perspective it would be particularly inappropriate to impose fines because the US has private trouble damages litigation that can lead to compensatory relief.

The Chairman then asked for a clarification. If fines are not the appropriate choice in abuse of dominance cases and remedies should not be imposed in predatory pricing, refusal to deal, interdependence, and collective dominance cases, then what do you do? There is no remedy and no fine, there is nothing.

The US delegate explained that there is a middle category of cases that the American agencies approach with caution, but not with the mindset that they will never be pursued. This is a category in which there is a significant potential that one could do more harm than good by bringing a case, and therefore one should think through the idea of bringing a case very carefully. To illustrate, the delegate raised the example of the Department of Justice bringing a predatory pricing case against American Airlines. Therefore the US is not saying that an agency should never bring a predatory pricing case, but rather that it should do so cautiously.

The Chairman then turned his attention to Turkey's contribution, which discusses an interesting case in which the Board decided not to impose a remedy. This was a case involving exclusionary practice by a dominant firm. The Chairman asked Turkey to explain why it came to the conclusion that no remedy was appropriate.

A delegate from Turkey replied that the Competition Board established the existence of an abusive practice in the Turkcell decision as well as the necessity of providing national roaming services to rivals in order to end this practice. However, setting the conditions that would apply to the provision of national roaming services was an issue within the responsibility of the Telecommunication Authority, which is the basic sector regulator. Therefore the Competition Board referred the matter to the Telecommunication Authority to decide the terms and conditions under which parties will provide roaming for rival operators. In this very specific case we see that a fine was imposed on the parties, but after that it became useless because of the intervention of the High Administrative Court. Again for this very specific case we can say that there are two reasons: first, the market was developing and technology-driven at that time and second, there was a need for some institutional regulation such as that provided by the Telecommunication Authority. Thus the Board initially believed that there was a need for the remedy but the conditions were changing and the remedy became useless.

The Chairman concluded that the Turkcell case was one in which there was another policy instrument that could be used (the sector regulator) to solve the problem. But the US was making a more general statement: if you don't have another tool, you don't always use competition law because sometimes it's not the most appropriate tool. But that raises a question, because if you have nothing else to use – suppose there is no sector regulator, for example – then what do you do? The Chairman indicated that the discussion would address that issue later. He then mentioned a short discussion in Norway's contribution of structural vs. behavioural remedies. There is not a great deal of interest expressed in the contributions regarding this topic. Everyone says that the line between structural and behavioural remedies is not very clear. But Norway's contribution is interesting because it states that, under the Norwegian Competition Act, structural measures may be ordered only if there are no equally effective behavioural measures. The rest of Norway's contribution explains all kinds of things about behavioural and structural remedies that seem to contradict the spirit of the law. For example, Norway says “as a general observation behavioural remedies seem to qualify for more extensive monitoring than structural measures.” It also says that “structural remedies are consequently considered to be more effective and less costly than behavioural remedies.” At the end, one gets the impression that the Norwegian Competition Authority may not like its law very much. The Chairman asked the Norwegian delegation to clarify its position on behavioural and structural remedies.

A delegate from Norway assured the Chairman that the Authority does not dislike the new Competition Act, but that the law is so new that there is no decisional practice on remedies in abuse cases yet. Therefore, only preliminary observations can be made at this point. What Norway intended to pinpoint in its submission is that an assessment of remedies under Norwegian law is case-based. The assessment is essentially governed by the principle of proportionality. So the nature of the infringement and the remedies available are closely related. In observing that certain remedies in abuse cases may be the most effective and least costly ones, we're referring to cases where you could theoretically design a behavioural remedy; but such a remedy would require extensive monitoring by the authority. There is also a concern that it might be highly uncertain whether the remedy would effectively remove the infringement. The delegate used the example of a vertically integrated company that has a dominant position in an upstream market and supplies its subsidiaries in a downstream market. In such a case, even though you might devise behavioural remedies, a structural remedy could appear to be the most appropriate remedy. First, the disintegration of the company might be fairly easy if separate entities already exist. Second, because the behavioural remedy might require extensive monitoring as well as obligations for the company to report to the authority, there could be quite a burden for the company. Third, especially if the undertaking in question has a history of abusive conduct, a behavioural remedy might not effectively remove the concern that the company will reengage in abusive conduct. So a structural remedy seems in many abuse cases to be the more appropriate remedy.

The Chairman pointed out that Canada discusses another remedies issue: punitive vs. remedial remedies. Its contribution clearly states that there should be no punitive remedies, but rather only remedial ones. He asked what it means for deterrence if the only thing that a firm risks by engaging in abusive conduct is a remedial remedy. In other words, what is the incentive not to infringe the law in the first place?

A delegate from Canada explained that the current statutory framework in Canada was set up about 20 years ago and up to that time the law had been entirely penal in nature. In 1986 new legislation was passed reflecting the view that one had to be cautious in the area of abuse of dominance because it was sometimes difficult to distinguish between merely aggressive behaviour which was pro competitive and behaviour that might be anti competitive. Thus the legislation allowed for remedies that were prospective only, i.e., that were aiming at restoring competition, because the desire was to avoid a chilling effect in the market place. However, it is true that such a framework could indeed encourage companies to give abusive conduct a try, just to see whether it would work, knowing that the only negative effect it could have would be the

issuance of a prohibition order. In this regard Canada is quite distinct from other antitrust agencies in that we have no ability to levy fines, nor are parties able to bring actions. Our Parliament is not happy with this state of affairs. The previous government was considering the possibilities of introducing administrative monetary penalties, private actions or perhaps a combination, but when that government was defeated these considerations came to a halt. It is now too early to know what the current government is going to do, but this debate will continue.

The Chairman then turned to the Japanese contribution, which describes a case in the newspaper industry, the Hokkaido Shimbun case. The publisher of the daily newspaper Hokkaido Shimbun decided to slash the price of advertising to the small and medium-size firms that had been customers of a new entrant and the JFTC intervened. The JFTC recommended that the Hokkaido Shimbun should increase the price it charges for advertising by revising "its advertisement rates and handling fees for local newspapers to appropriate rates and fees." The Chairman asked the Japanese delegation whether it agrees with the UK contribution, which states that behavioural remedies should be "light-touched." Was this a light touched remedy? And how did the JFTC decide what was the appropriate rate for advertising that the Hokkaido Shimbun should respect? What was the result?

A delegate from Japan replied that the Hokkaido Shimbun halved its price for advertisements in its local edition as part of intentional measures to prevent the entry of a potential competitor into the relevant market. That price level actually caused operational losses for the Hokkaido Shimbun. Later, in response to our recommendation, the Hokkaido Shimbun proposed increasing the advertisement price to the same level as its competitor, taking into account the actual market situation of advertising at that time and in that particular area in Japan, and then the JFTC accepted its proposal. So the Hokkaido Shimbun actually took the necessary measures of stopping all its activities to prevent entry of competitors in accordance with the JFTC's recommendation. Secondly, the JFTC ordered the Hokkaido Shimbun to publicise those measures so that the public could be fully aware of what the Hokkaido Shimbun was going to do. By making the Hokkaido Shimbun publicise the measures it took in accordance to the JFTC's recommendations, particularly to its rivals, an indirect but quite effective monitoring mechanism was put in place. The delegate added that a competitor filed a civil damage action against the Hokkaido Shimbun, which is still being litigated at the Tokyo High Court.

Turning to the question of whether Japan agrees with the UK view that remedies in abuse of dominance cases should be light-touched or not, the delegate stated that the JFTC's view is that remedial measures should be necessary and sufficient i) for stopping the business activities that substantially restrained competition; ii) for restoring competition in the market up to its level prior to the unlawful activities; and iii) for preventing the repetition of the same kind of activities. Of course in designing and determining necessary and sufficient remedial measures, it is necessary to pay due attention to the issue of proportionality between the remedy and the infringements.

Next, the Chairman noted that in Korea, the punishment imposed by the KFTC in most abuse of dominance cases has been cease and desist orders and surcharges. The focus of Korea's contribution, however, is on remedies in high tech and network industries, and in particular on the Microsoft case. The Chairman asked the Korean delegation to present that case, focusing on the KFTC's reasoning and on the outcome.

A delegate from Korea explained that in December 2005 the KFTC decided to order Microsoft Corporation and Microsoft Korea to unbundle Windows Media Server from Windows Server Operating System, Windows Media Player and Instant Messengers from Windows Operating System and to impose a surcharge of approximate 33 billion won (approximately 31 million US dollars) for abuse of dominance and unfair trade practices. The KFTC found the following practices by Microsoft to be in violation of the Korea Fair Trade Law: i) tying Windows Media Service to the Windows Server Operating System, where

Microsoft has market share; ii) tying Windows Media Player to the Windows PC Operating System, where Microsoft has monopoly power; and iii) tying an instant messaging program to the Windows PC Operating System, where Microsoft has monopoly power. The KFTC found such tying practices to have eliminated competition and exacerbated monopolisation of the tied product market. The tie-in sales generated drastic tipping effects for Windows Media Server, Windows Media Player, and MSN Messenger.

The delegate added that those tying practices also led to an increased supply of Windows Media Player and other applications that complemented Windows Media technology. This, in turn, led to higher entry barriers for the PC Server operating system and PC operating system market, resulting in greater monopoly power for Microsoft in each market. Furthermore, because the tie-in sales denied consumers the opportunity to purchase products with no tied product or to select competitor's products, the Commission ruled that this infringed consumers' right to choose products based upon quality and performance and ultimately undermined consumer welfare.

The KFTC imposed the following remedies. Microsoft was obliged to unbundle Windows Media Service from the Windows Server operating system. It was also required to offer two versions of the Windows PC operating system, one stripped of Windows Media Player and Instant Messenger, the other containing a variety of competing media players and instant messengers. Furthermore, for Windows PC operating systems that were already sold and currently in use at the time of the decision, Microsoft was required to provide users with "Media Player Centre" and "Messenger Centre" through CDs or internet updates. The remedy will remain effective for 10 years and after five years, Microsoft will have an opportunity each year to request KFTC to review the remedy to account for changes in the market environment. Finally, a total of 27,92 billion won in surcharges was imposed on Microsoft. Once Microsoft reports revenue data for 2005, the KFTC will determine and impose a surcharge for 2005. It is estimated that the total surcharge including the amount for 2005 will be approximately 33 billion won.

A delegate from Italy then took the floor and noted that he agreed with the US delegation's general perspective that agencies should not intervene against exploitative abuses. The delegate pointed out, however, that the Robinson-Patman Act is used widely in private litigation in the US. He asked for information on the extent of its use. The delegate also made a point regarding why fines are important in abuse cases. Although there are some cases in which it is not clear that a defendant was in a dominant position or that its behaviour was an abuse, most abuse cases involve defendants whose dominance is beyond question. For those kinds of companies and for behaviour which is clearly exclusionary, there is no question that agencies have to be able to impose fines. Otherwise, the deterrent effect is completely eliminated.

In response to the Robinson-Patman Act question, a delegate from the US noted that the Justice Department first called for the repeal of the Robinson-Patman Act in 1976. Both American agencies have reiterated that call from time to time, most recently within the last few weeks in connection with the antitrust modernisation commission process. The fact that Robinson-Patman has perverse effects is increasingly recognised by US courts and while private cases are probably more common than the agencies would like, the ability of private plaintiffs to seek a recovery has been increasingly restricted by the courts. The most significant step in that direction was the very recent *Volvo* decision by the Supreme Court. The delegate added that he would not necessarily agree that the Robinson-Patman Act is aimed at exploitative abuses. In many instances Robinson-Patman liability attaches only where there is an adverse market effect.

Another US delegate responded to the comment about defendants that are clearly dominant and whether that warrants being less hesitant about imposing sanctions for a perceived violation. The delegate agreed with the general proposition that where one is doubtful about the question of dominance, then there

is even more reason to be cautious. But even if one accepts that a company is dominant, one must not lose sight of the fact that we want to encourage even dominant companies to engage in competitive behaviour.

A delegate from BIAC then remarked that the EC says it has a legal basis for accepting commitments, but that it also says there will be no commitments in cases where the Commission intends to impose a fine. That begs the question of when one is going to impose a fine. There has been a substantial number of cases in which the Commission accepted commitments that the companies offered in anticipation of what the Commission would do absent a settlement. As many cases have been settled without a fine as have involved a fine, and BIAC applauds that. Secondly, the Commission's discussion paper advocates a more economic approach to abuses, especially with regard to practices that have been fined consistently since *Hoffman La Roche* – exclusive dealing, rebates and predatory pricing. But if one advocates such an approach, one admits that these practices are not per se unlawful and therefore not the best candidates for fining. Finally, if we assume for argument's sake that fines are the cornerstone of a prohibition system, then dominant firms should be able to apply for leniency. The delegate acknowledged that he did not think this would be a good idea, but he wanted to make the point that if the EC's logic were pushed to the limit, this should be the consequence.

A delegate from the EU countered by pointing out that leniency is not meant to allow companies to get away without being punished. Leniency is put in place in order to detect secret cartels where there are several companies involved and where you want to create an incentive to get a firm to reveal the cartel. It is a bizarre idea to suggest there should be leniency for a dominant company whose unilateral conduct is illegal. That would not be a prohibition system or a control of abuse system, but rather an escape system. Furthermore, to link the effects-based approach that the EC advocates in its discussion paper to the issue of fines is also bizarre because what you are basically saying is that fines should be applied only in cases with restrictions by object and not by effect. That approach would limit the risks companies run where there is a negative effect on consumers. In the end, consumers would have to pay the bill and the dominant company could go unpunished. Moreover, the delegate saw no difficulty with the fact that the Commission cannot impose fines in commitment decisions because the Commission should always have the discretion either to correct a negative effect in the market for the future and not focus on the punishment for the past, or to punish for the past and also to correct for the future. It must have these two options at its disposal; otherwise the agency would have its hands bound to always punish.

The delegate also addressed the subject of being cautious with regard to fining unilateral conduct. Using the example of predatory pricing, he acknowledged that it is an abuse for which agencies should be extremely cautious in levying fines. It would be counterproductive to inadvertently create a kind of price umbrella for competitors by being too aggressive with fines. Dominant firms must be allowed to compete on the merits. But rivals also have a right to compete on the merits. If the dominant firm prices below an appropriate cost benchmark, thereby enabling it to systematically eliminate entry, then there is a problem and you have to take into account the protection of the new entrants. To do that, you have to draw the line somewhere, and that means you should send a clear signal to the market that if you go below a certain benchmark, then you are subject to a fine. That is essential because otherwise you will always be running behind behaviour like that, and you will never get the effect that you need to get, which is protection of entrants in the market. Granted, there is a certain risk of over-enforcement, but on the other hand there is also a huge risk that new entrants would not be given a chance to get a foothold in the market and then you would forego the dynamic competition linked to that entry.

A delegate from France agreed with the EU delegate's remarks, but he expressed some discontent with the debate because it seemed to him that there were really two debates occurring. First, he said, there is the issue of how to distinguish abusive unilateral conduct from lawful unilateral conduct. Second, there is the question of which instrument is the best for sanctioning or rectifying conduct found to be abusive. The first debate is difficult, but it is a philosophical error and it does not assist companies if agencies say:

“We do not know if you violated the law or not because we do not know if you are dominant, and even if you were dominant, we still would not know, but nevertheless it would be better if you would change your behaviour.” If we do that, we will not clarify for the companies what is licit and what is illicit, so if the companies are mistaken in their own evaluation of what they are allowed to do, it is we who will be at the origin of their mistake. The first priority of a competition authority is to apply the law such as it is, even if it is intellectually difficult, and to tell the company whether its behaviour is abusive.

At this point a delegate from the US intervened once more to express agreement with the delegate from the EU on a number of issues. First, leniency does not apply very well to abuse of dominance cases for precisely the reasons the EU delegate gave. Second, it is important for the Commission to be in a position to decide not to proceed with the fine as well as to decide to impose one. Finally, it is appropriate to be extremely cautious in this area. There is a risk of over enforcement. Nevertheless, at times we should proceed with fining the violation and imposing a remedy. One possible clarification is that after an abuse is found, it is important to bear in mind whether it was clear to the defendant at the time it undertook the action that it was going to be a violation, as opposed to whether it was clear after it had gone through the legal proceedings.

The Chairman then said that the provisional conclusion to this debate is that BIAC is misguided in its desire to extend leniency programs to abuse of dominance or unilateral cases. He then turned to a case presented in Romania’s contribution. It concerns exploitative abuse by a dominant firm in the chipboard industry where there was a question of pricing. The Chairman asked whether the commitment made under the threat of a remedy, and whether competition has been restored in that market thanks to the commitment.

A delegate from Romania replied that immediately after the Competition Council opened its investigation in this case, the defendant proposed commitments involving its pricing policy. The Council took these commitments into account in its final decision, which introduced several obligations. The incumbent was obliged to submit financial statements four times per year together with cost calculations and to submit a statement regarding negotiations carried out with beneficiaries twice per year to prove that the prices were the result of a negotiation and not of an imposition. At the same time, the Council imposed a fine of about 1 million euros. As a result of the Council’s intervention, prices decreased. The delegate stressed that the success of the intervention came not only from the specific remedies imposed in this case, but also from the general sanctioning policies followed by the Competition Council because in recent years the Council has relied on a more severe sanctioning policy. Furthermore, the Council did not keep the new policy a secret. Instead, it advertised every decision to impose sanctions as much as possible so as to increase the deterrent effect.

A delegate from the UK intervened at that point, noting that one of the cases mentioned in the UK’s contribution, the LRC Products case, also involved undertakings related to pricing. The undertakings, which had been imposed in the 1980s, contained a remedy against excessive pricing. When the Monopolies and Mergers Commission reviewed the undertakings it found that the remedy was preventing entry. The new undertakings therefore removed the pricing remedy and addressed only strategic behaviour that could prevent entry. The OFT recently recommended that these undertakings be removed altogether because entry had occurred and the market was more competitive, so even the undertakings addressing only strategic behaviour were no longer appropriate.

The Chairman then raised a different subject, noting that behavioural remedies may necessitate a great deal of monitoring and therefore be very costly. He observed that Switzerland’s contribution indicates that on the one hand, the competition authority has not yet used its capacity to sanction companies that abused their dominant position, but that on the other hand it has often imposed injunctions. When injunctions are entered in abuse cases, defendants are often required to bring information to the Secretariat of the

Commission so that it can verify that the injunctions are actually being followed. The Chairman asked whether the Commission uses many resources to monitor compliance with the injunctions. He also asked whether, in general, the injunctions are followed by the defendants.

A delegate from Switzerland referred to the ETA/Swatch as an example. ETA, a company almost in the position of a monopoly, had decided to cease the deliveries of *ébauches* - the sketches or blueprints that are used in the production of watches. Following the complaints of some customers, the Competition Commission intervened and established provisional measures obliging ETA to give its customers a progressive phase-out period of 5 years. This decision was confirmed by the higher court, the Federal Tribunal. It is noteworthy because of the length of the phase-out period and because of the considerable load with regard to monitoring the implementation of the decision. The Commission set up an arbitration system such that ETA agreed to be subjected to an arbitration court and to respect its decisions. This model has been effective. The arbitration system has a disciplinary effect, as we have not had any more cases until now. Meanwhile, other firms succeeded in expanding their output of *ébauches*. Thus the costs of monitoring were moderated by the success of the measures taken.

The Chairman observed that competition authorities tend to monitor the compliance with the remedies that they impose fairly closely, but authorities monitor the effectiveness of their remedies less frequently. The contribution from Turkey provides some exceptions. It states that the remedies imposed in the Turkcell case, for example, were quite useful. There is also a comment about the Digiturk case, in which “the remedy was quite successful in establishing competition on the market for free broadcast.” The Chairman asked whether Turkey has a system for systematically monitoring the results of remedies in terms of their effect on competition. Alternatively, he asked, are the comments in the contribution just remarks on those particular cases, but not in the context of a systematic review of the effectiveness of the remedies?

A delegate from Turkey stated that the effectiveness of remedies is systematically monitored, though this is not required by law. With regard to the cases mentioned by the Chairman, the delegate noted that before the Turkcell decision, mobile phones had been available only with Turkcell SIM cards. After the remedies imposed by the Turkish Competition Board, however, distributors were able to organise sales campaigns with other GSM operators. For the time being, all of the distributors can sell their products to any of the operators and customers who wish to buy. There is no more exclusivity on mobile phones arising from the GSM operators. The Board monitored the market after the decision and gave additional fines when necessary to protect competition. Eventually, the Board saw that no more fines or regulation were needed because a competitive market arose. Therefore, the board modified the regulations on Turkcell and gave exemptions to the contracts between Turkcell and its vendors. In the Digiturk case, Digiturk and TCS digital were required to submit the terms of sale they offered, together with documents such as invoices and notary papers proving the accuracy of their responses. The remedy was deemed successful by the competition authorities because broadcasters could obtain terms and conditions comparable with the ones imposed by an interim measure.

The Chairman then returned to the British contribution and the concern in the UK over proportionality. According to the contribution, there was a systematic review of whether remedies imposed under the Fair Trading Act had been effective. In a few cases it was found the remedies were either ineffective or were discontinued because they could actually have been anti-competitive. The Chairman asked the UK delegation to describe how the process of examining the effectiveness of the remedies – as opposed to compliance with the remedies – worked.

A delegate from the UK first noted that the OFT has a duty to keep the remedies imposed under the Fair Trading Act under review, but that this was not done very systematically until recently because it was considered a low priority. One reason it is now considered a higher priority is the large number of

undertakings that exist. The conditions in many of the markets have changed substantially over time, so the undertakings need to be examined because they may have become ineffective or because some of the defendant companies no longer exist. Another reason for reviewing the undertakings is that the Fair Trading Act has been superseded by the Competition Act, which is similar to articles 81 and 82 and therefore is a very different and more powerful tool. Consequently, the need for undertakings under the previous regime may not have been the same as under the existing regime. The review process itself is quite simple: the market is re-examined and the focus is on determining how it is different from the way it was when the undertakings began. That is done primarily by getting data from customers.

The Chairman then asked for some examples of cases in which the review process revealed that circumstances had changed and that a revision of some kind was necessary.

The delegate from the UK first identified the LRC case, mentioned earlier, which involved a dominant supplier of condoms that segmented the market through its behaviour. The undertakings initially involved price controls, but that was changed later because this was not helpful for the dynamics of the market. The market has changed significantly, partly because there are more players now and partly because the retailers are much more powerful and can bargain more successfully with the suppliers. Because there is more choice available, prices have fallen and the kind of conditions that existed in the 1980s no longer exist. Another case involved a dominant pest control company that engaged in predatory pricing. That market has also changed significantly, there are more players and there is much more competition. In addition, the Competition Act is now available, so it could be used in the future if the company were to engage in predatory pricing again. Another case concerned opium derivatives in pain killing drugs. That market essentially has one dominant company, and the reason that company is dominant has to do with the way the government restricts access to the UK market for other providers of that drug. There have been continuing discussions with the Health Department, the Home Office and the Security Services to try to change that prohibition.

Another UK delegate added that the Competition Act regime is based on prohibition and that deterrence is extremely important. In fact, in all of the abuse of dominance cases where an infringement was found, fines were imposed and the appeal process has shown that the fine amounts have tended to be too high rather than too low. The UK's commitments regime calls for a formal, negotiated remedy, but the guidelines say that commitments should not be taken if doing so would undermine deterrence. The delegate also stated that the UK's experience with remedies in Competition Act cases is somewhat limited, as a remedy has been adopted in only one case. For instance, in predation cases price remedies have not been imposed on the theory – and this turned out to be correct – that the decision itself was a sufficient remedy and that it was inappropriate to indicate what price policy the company should adopt. Finally, regarding the issues of monitoring compliance with and the effectiveness of remedies in Competition Act cases, the two things are essentially the same because if the remedy addresses the competition problem, then if there is no compliance and thus competition is not working, we would expect the competitors or customers to alert us. So it is expected that most remedies that will be adopted in the future will be self-policing.

A delegate from Canada intervened to make the point that it is very resource-intensive to follow remedies in the marketplace to see if they are addressing an ongoing problem. One way of alleviating those costs is to set up a mechanism whereby the parties that are affected by a remedy can come forward and ask for the competition agency to revisit the remedy and change it. That has happened on several occasions in Canada when market conditions had changed and it was no longer necessary to have a remedy in place.

### 3. Commitments and Interim Measures

The Chairman then addressed the issue of commitments and interim measures more directly. He began by noting that the France's contribution shows that it has a variety of instruments that are actively used by the Competition Council. One of the subjects raised by the French delegation is interim measures. In a great number of cases involving abuse of a dominant position, the Council put measures in place before the case had ended. The Chairman queried whether there is a risk in imposing measures before it is even established that a violation occurred. Secondly, if interim measures are used, what happens if it is later determined that there was no violation?

A delegate from France verified that the Competition Council can force a defendant to take a number of measures which make it possible to reverse the effects of exclusion and preventing entry. This capability is used most often in the field of telecommunications because there are emerging markets in which the factor of time is quite important. The high-speed Internet market is a good example. The French market is among those that are the most open to competition with respect to high speed Internet access, due to the unblocking of France Telecom's lines. That, in turn, happened mainly because of a series of interim measures that were ordered by the Competition Council. Three conditions are required before interim measures can be applied: 1) it must be likely that the behaviour can be characterised as an abuse of a dominant position; 2) there must be serious and immediate damage either to the market sector, to consumer welfare, or to the interests of a plaintiff company; and 3) the behaviour in question must be the direct and certain cause of that damage.

The delegate continued, turning the Chairman's questions around by asking whether it is not also a risk in not intervening and not imposing a fine but then determining that there was indeed an abuse that was so effective that the market was monopolised in the meantime and new firms will no longer have any opportunity to enter. There is a risk in acting too quickly, but conversely there is also a risk in waiting too long, such that any intervention comes too late to be effective. The judge who controls the Competition Council acknowledged that latter risk by using a reduced standard of proof, calling not for a demonstration of the existence of an abuse, but simply for a showing that the behaviour is likely.

Since November 2004 the Competition Council has had a second instrument, which is modelled on Article 9 of Regulation 1-2003 that the EC uses: the possibility of accepting commitments on behalf of the companies – in particular, commitments to modify their behaviour or their structure to put an end to conduct that could be qualified as abusive. It is a very interesting tool and one sees that these commitments can be rather quickly. They are tending to replace interim measures more and more.

The commitments process has a number of advantages. First, it helps to ensure that the change is practicable since it is the company itself that will propose it. Second, one can suppose that if it is the company that makes the proposal, then it will act in good faith. Third, from the point of view of the culture of competition, the advantage of commitments as opposed to unilateral injunctions is that the company is going to be led to adopt the diagnosis that the competition authority will make and to discuss it inside the company, not only among lawyers, but also among the sales managers and operational staff. The delegate added that it is clear that if the defendant company is not afraid of the sanction it could receive, then it would have no incentive to propose commitments. Therefore, these commitments procedures are complementary to interim measures and are effective only if they are supported by a policy of dissuasion that is clearly posted, understandable and transparent.

The Chairman said that the EU contribution raises questions about whether commitments are always reliable because the firms making the commitments might actually have a strategic interest in them. One could certainly conceive of cases in which a firm would commit to increase its price to a very high level, thereby satisfying all of its competitors because everybody would enjoy a monopoly rent. The complaints

would therefore go away but the commitment itself would be possibly anti-competitive. The Chairman asked the EU how the risk of that happening can be minimised. He also asked for a description of the European Commission's experience with using trustees to verify the quality of and the compliance with commitments.

A delegate from the EU first stated that the Commission is currently working on a review of its remedies policy. He then recast the Chairman's question into a different form: What is more effective, an article 7 remedy or an article 9 commitment? But then one has to ask what is meant by "more effective"? One could mean more effective in terms of time, quality, or resources and costs. Commitment decisions have an element of information asymmetry that may allow more specific remedies, given that they are proposed by the parties. But of course we also have to worry about the transmission of the information to the competition authority. Of course there are strategic incentives not to provide the information. There are also the questions of circumvention, of companies proposing what are actually ineffective solutions, and the possibility that the commitment process could be used to further coordination.

The most important point on behavioural remedies is that they raise dynamic aspects that are not present in structural remedies. Monitoring is one of the key aspects that need to be addressed, and obviously it opens a possible role for a trustee. With structural remedies there is an obvious link to merger enforcement where agencies have extensive experience with trustees. But monitoring is not just about compliance, which may not even be the most important aspect because we have to keep in mind the effectiveness of the remedy over time. Behavioural remedies are inherently trial and error processes that may require dynamic adaptation. As market conditions change, the remedy would ideally change, as well. So to some extent it seems inevitable to share the more pessimistic view that was advanced by some submissions with respect to performance remedies, maybe less so with respect to conduct remedies and definitely less so with structural remedies. The delegate mentioned that the Commission shares the Norwegian position regarding the advantages of structural remedies. But he also noted that it is impossible to find perfect remedies, so there is a need to recognise that even imperfect remedies may be preferable to doing nothing in some cases.

Finally, the delegate from the EU stated that in a merger context the trustee experience has been quite positive. The role of a trustee in merger cases is often different from the role one could envision for a trustee in abuse of dominance remedies, especially when one thinks about behavioural remedies as opposed to structural ones.

The Czech Republic's contribution observes that one of the possible drawbacks of accepting commitments is the fact that they could deprive the victims of their ability to bring a civil case because often if there is a commitment, then there is no final decision regarding whether the law was violated. The Chairman asked whether this has been a problem in the Czech Republic.

A delegate from the Czech Republic stated that the Czech Competition Office now strives much more often to conclude cases by adopting commitments. Commitments are used in cases where an abuse of dominance was caused negligently, took place only in the short term and did not result in substantial changes in the market. On the other hand, sanctions and remedies are ordered by the Competition Authority only in cases of serious infringement which had a negative and long lasting impact on a broad range of entities, or in cases of repeated breaches by the same entity. Sanctions are especially appropriate in 2 situations: 1) in cases of intentional abuses of dominance with serious or irremediable effects on competition; and 2) in cases where a party to the proceedings does not accept the objections of the competition authority and continues its wrongful behaviour. The latter category includes cases in which a party cooperates with the competition authority only for appearance's sake, with the actual aim of delaying the final resolution. To further illustrate his point, the delegate mentioned two cases. One involved a very big company that distributes 99% of the natural gas in the Czech Republic. Another involved the owner of

a small area around a bus station in a small town. Both parties abused a dominant position, but it is clear that in the first case it was necessary to impose a very big penalty or to be very tough and in the second one it was really a question of negotiation and of not continuing the wrongful behaviour, rather than imposing a big penalty.

With respect to the Chairman's precise question, the delegate said that the situation for third parties is difficult in the Czech Republic. Proving the dominance element as well as the abusive nature of the conduct is extremely demanding in terms of the resources and expertise needed. On the other hand, according to civil procedures, the court deciding the damages is bound by the decision of the competition authority regarding whether the anti-competitive conduct took place and who committed it. But if there is to be a commitment, the third party must prove that the company is in a dominant position, that it would be abusing its dominant position, and it must also calculate and prove the damages.

#### **4. General Discussion**

The Chairman expressed appreciation for the discussion of whether fines are useful at least in some circumstances and he concluded that there was some agreement that the answer is yes, particularly if it was clear *ex ante* that there was a dominant position and a violation. Regarding remedies, much thought was given to the fact that remedies can be a clumsy instrument but are often still quite effective for restoring competition. There was some discussion of whether or not we should look more widely at the possibility of evaluating remedies' effectiveness, i.e., the extent to which they accomplish what they were designed to do. That would be a way to avoid the risk of over-regulation or bad regulation while still maintaining the ability to intervene in time. There needs to be a more systematic process for going back and looking at the effectiveness of past remedies. With respect to commitments, it seems that there is now a natural tendency to favour commitments. There were at least two contributions, however, that said before using commitments we must think about whether or not they are adequate and about whether those who offer the commitments are acting strategically. There may also be a weakening of the deterrent effect of civil actions if one resorts to commitments too often. He then gave the floor to Sweden.

A delegate from Sweden offered the observation that the deterrent effect from fines is perceived to be greater than that from remedies (whether structural or behavioural), which are limited to a certain case or a certain sector, whereas fines have an effect on companies in a dominant position in other markets. The delegate also made the clarification that when we talk about remedies being "proportionate," what we mean is that the seriousness of the violation must determine the action that the competition authority takes. Thus it is unlikely that any competition authority is willing to accept commitments in cases involving a very serious violation. Another observation is that interim measures can be an effective tool as illustrated in the French contribution, but Sweden's experience is that in concentrated markets, the complainant may use a request to the competition authority for an interim measure as a competitive tool. So the competition authority needs to be cautious because of that. Finally, the delegate noted that structural and behavioural remedies, in markets where there are sector regulators, may come close to overlapping with the task of the regulator. At least, a very close cooperation between the sector regulator and the competition authority may be necessary.

A delegate from Brazil noted that Brazil does not differentiate between cartels and unilateral conduct with respect to fines. Dominant firms and cartels alike can be fined from 1% to 30% of the firm's turnover. In practice, however, only cartels have been fined with the highest possible fine, which shows that Brazil has been cautious on unilateral conduct. Most of the unilateral conduct cases in Brazil have involved vertically integrated firms that engage in exclusionary conduct in a downstream market. It has proven very difficult to design remedies – much more difficult than to impose fines – but remedies are more effective. Still, the Brazilian authorities have found the deterrent effect of fines to be necessary. Sometimes the effectiveness of a decision is greater and quicker when there are commitments. There are

lots of discussions at the judicial level in Brazil, so court decisions can take years to be implemented. But commitments are implemented more rapidly and efficiently.

BIAC's delegate urged that proportionate remedies should always be strived for and that the term should be interpreted as meaning remedies that don't unnecessarily create a chill that thwarts innovation or economic efficiency while at the same time ensuring that competition is adequately and effectively restored and maintained in the market. The delegate also expressed the view that behavioural remedies generally are preferable to structural remedies for the reasons given in BIAC's submission and the Secretariat's Background Note.

A delegate from Canada spoke up to emphasise that the legislation before the House of Commons does not attempt to create punitive fines, but that it is still meant to create a proper deterrent or an incentive to comply. A useful way of looking at fines might be the way the US approaches disgorgement. The American agencies do not impose civil fines, but the FTC has succeeded in obtaining monetary sanctions designed to force abusive dominant firms to give up the profit they made as a result of their unlawful actions. There might be a useful link between the US regime where there is private action plus the ability to obtain disgorgement orders and a jurisdiction that wishes to impose fines where the fines would aim to achieve that type of redress in the marketplace.

The Chairman asked whether the US FTC has sought disgorgement in many unilateral conduct cases and whether those cases have been sufficiently dissuasive.

A delegate from the US replied that the FTC has not used disgorgement frequently. There have been only a handful of cases and the FTC is still in the process of considering whether disgorgement is likely to be useful in any future cases. From time to time, for a very limited set of appropriate cases, it may be. The agency took great care to put out a statement several years ago that substantially limited the circumstances under which disgorgement would be invoked as a remedy. The FTC continues to stand by that. No one should anticipate that this will be a frequent remedy.

The Chairman closed the roundtable by remarking on how frequently the idea was expressed that competition authorities have to be cautious about abuse of dominance cases and remedies. Unless someone can identify areas where no caution is warranted, the Chairman said, this is an empty statement. Agencies have to be cautious in everything they do. The call for caution does not yield much substance in terms of what should and should not be done. The issue is not so much to be cautious, but to find the right balance between sufficient deterrence and overregulation being used by competitors in a strategic way, and today's discussion has covered some of those issues.

## RÉSUMÉ DE LA DISCUSSION

M. Frédéric Jenny, président du Comité de la concurrence, commence par formuler un certain nombre d'observations générales basées sur les contributions écrites des délégués. Les avis divergent sur l'utilité des sanctions monétaires dans les affaires de comportement unilatéral, certains pays plaidant en faveur de sanctions financières plus sévères, tandis que d'autres privilégient les mesures correctrices et les engagements. Toutefois, la plupart des contributions mettent l'accent sur les mesures correctrices d'ordre comportemental.

Il existe visiblement une distinction entre les pays partisans d'une certaine retenue dans l'application des mesures correctrices et ceux qui adoptent une vision plus radicale et préconisent l'imposition précoce de mesures palliatives – parfois même sous la forme de mesures provisoires – ou de mesures correctrices de grande ampleur. La différence entre mesures correctrices comportementales et mesures correctrices structurelles ne fait pas l'objet de beaucoup de discussions. Les contributions se concentrent sur les mesures correctrices comportementales.

En général, les autorités de la concurrence surveillent très étroitement l'observation des mesures correctrices qui ont été imposées et des engagements obtenus des entreprises. Néanmoins, elles ne mesurent pas systématiquement l'efficacité des mesures correctrices qu'elles décident. La question de savoir si les engagements et les mesures correctrices mis en oeuvre constituent un moyen de dissuasion suffisant contre les pratiques anticoncurrentielles unilatérales est rarement traitée.

Le président suggère d'engager la discussion sur la question des amendes, de poursuivre avec les mesures correctrices (non monétaires) et de terminer par les engagements.

### 1. Amendes

Le président pose la question de savoir si les amendes sont une réponse utile et adéquate dans les cas d'abus de position dominante. Il donne lecture de la contribution du Japon, qui souligne que « lorsqu'une entreprise puissante domine les activités commerciales d'autres entreprises sur un marché donné et contrôle les prix et les approvisionnements de l'ensemble du marché en fixant les prix, la quantité des approvisionnements et les destinataires des provisions, la situation économique qui en résulte n'est pas différente d'une entente sur les prix, ce qui justifierait d'imposer le paiement de surtaxes. » Toutefois, d'autres pays expriment une vue différente, estimant que compte tenu de la complexité particulière des affaires d'abus de position dominante liée à la difficulté de faire la distinction entre comportement proconcurrentiel et anticoncurrentiel, des sanctions lourdes dans de telles affaires peuvent avoir des effets dissuasifs sur certains comportements qui ne sont pas forcément anticoncurrentiels. Le président demande alors à la délégation japonaise si la JFTC impose des amendes dans les cas d'abus de position dominante, et si elle est en mesure d'explicitier la déclaration citée ci-dessus.

Un délégué du Japon répond en clarifiant la nature fondamentale des surtaxes dans la loi contre les monopoles. Il est tout à fait exact que la surtaxe est par nature une sanction et entend être dissuasive. Néanmoins, son objectif fondamental est de permettre la restitution des gains illicites. À ce titre, la JFTC n'exerce aucun pouvoir discrétionnaire dans la fixation du montant de la surtaxe. Au contraire, le montant est calculé conformément à une formule définie dans la loi contre les monopoles. Les surtaxes sont imposées à la fois aux activités constitutives d'ententes et aux types de contrôle exercés par les monopoles

privés. Le délégué reconnaît que, dans certains cas, il peut être plus difficile de prouver l'existence d'une monopolisation privée que celle d'une entente, mais il ne pense pas que cela soit systématique. Il souligne que les activités douteuses d'entreprises qui s'apparentent à des monopoles privés ne sont pas dissimulées dans la plupart des cas.

Le président fait ensuite remarquer que la contribution de l'Espagne examine la difficulté de fixer des amendes, et notamment les difficultés que la Defensa de la Competencia rencontre avec les tribunaux. Dans environ la moitié de ses jugements, l'Audiencia Nacional (l'organe de recours) confirme le raisonnement du Tribunal sur les questions de fond, mais réduit ou supprime entièrement les amendes pour différents motifs, tels que le manque de proportionnalité par rapport aux conséquences du comportement, une argumentation insuffisante ou un traitement différent dans des situations analogues. En outre, environ 30 % des jugements qui annulent entièrement ou partiellement les décisions du Tribunal impliquent des affaires d'abus de position dominante. Cela soulève la question de savoir s'il est matériellement possible d'imposer des sanctions monétaires à des entreprises qui abusent de leur position dominante, ou si les exigences de proportionnalité sont telles qu'il est pratiquement impossible d'utiliser ce moyen pour dissuader les abus. Les mesures correctrices constituent-elles par conséquent la seule et unique solution dont on dispose pour les entreprises qui abusent de leur position dominante ?

Un délégué d'Espagne répond que ces données risquent d'induire en erreur. Très peu de décisions font l'objet d'un recours et, par conséquent, très peu de jugements annulent des décisions. En réalité, 10 % seulement de ces décisions sont invalidées, complètement annulées ou modifiées en vue de réduire le montant de l'amende. En outre, très peu de jugements impliquent un abus de position dominante : entre 1997 et 2004, quatre dossiers seulement ont donné lieu à une réduction du montant de l'amende par le tribunal, sur plus de 1 000 décisions prises durant cette période. Le délégué convient toutefois que les amendes n'ont peut-être pas un effet dissuasif suffisant, compte tenu de leur montant relativement faible et du fait qu'elles sont payées après un délai prolongé car le tribunal accorde généralement une suspension provisoire du paiement des amendes. Elles sont donc acquittées avec un retard de plusieurs années, ce qui limite clairement leur effet dissuasif.

Le délégué ajoute que les mesures correctrices structurelles sont susceptibles d'être plus efficaces dans les cas d'abus de position dominante. Un projet de loi prévoyant des réformes appropriées sera bientôt examiné par le Parlement. Les amendes imposées et leur prévisibilité devraient être considérablement augmentées, ce qui devrait accroître l'effet dissuasif et renforcer la position du Tribunal vis-à-vis de l'autorité de contrôle de la concurrence.

Le président mentionne ensuite la contribution du Taipei chinois, selon laquelle des amendes élevées dans les cas d'abus de position dominante seraient parfois préférables aux mesures correctrices ou aux engagements (de nature non monétaire), parce qu'elles ont un effet dissuasif plus puissant. En outre, les amendes peuvent être préférables parce que les mesures correctrices et les engagements sont parfois inadaptés pour compenser le préjudice causé par les pratiques anticoncurrentielles. Il semble que la position de la Commission des justes pratiques commerciales (Fair Trade Commission) à ce sujet ait évolué au fil du temps, et qu'elle utilise les amendes de manière plus libérale qu'elle ne le faisait les années passées. Le président demande à la délégation du Taipei chinois de lui indiquer si son interprétation est correcte.

Un délégué du Taipei chinois confirme que la contribution écrite signifie bien que des amendes élevées dans les cas d'abus de position dominante peuvent être préférables dans certaines circonstances à des solutions négociées. Le délégué confirme également que la pratique de la Fair Trade Commission a évolué à cet égard au fil du temps. Jusqu'à l'amendement en 1999 de la loi sur le commerce loyal (Fair Trade Law), l'abus de position monopolistique entraînait deux types de mesures : une mesure correctrice sous la forme d'une injonction adressée à l'entité contrevenante de mettre un terme à sa conduite ou d'y

remédier, ou une pénalité administrative allant de 50 000 à 25 millions de NT dollars. Un tribunal n'était habilité à imposer une amende ou une sanction pénale qu'en cas de récidive. C'est pourquoi la Commission n'était pas autorisée à ordonner des sanctions pénales. Néanmoins, la version amendée de la loi autorise désormais la Commission à prononcer des amendes d'un montant relativement élevé. Selon la Fair Trade Commission, au lieu d'ordonner aux parties contrevenantes de rétablir le degré antérieur de concurrence, la sanction monétaire est devenue un moyen plus acceptable de parvenir à cet objectif. Les raisons en sont les suivantes : i) la majeure partie des préjudices entraînés par le comportement anticoncurrentiel empêchent de rétablir les conditions concurrentielles antérieures ; ii) le plafonnement des sanctions monétaires à 25 millions de NT dollars est plus élevé que la totalité des autres sanctions administratives ; et iii) ce niveau élevé de pénalités est susceptible d'alerter et de sensibiliser davantage le public, les milieux d'affaires et la presse. Par voie de conséquence, en imposant des amendes relativement élevées, la Commission peut atteindre l'objectif de dissuader les infractions et de promouvoir le concept de concurrence au sein de la société.

Un délégué du BIAC prend alors la parole. Il souligne la position adoptée dans la contribution du BIAC, selon laquelle les amendes ne sont pas un recours adéquat dans les cas d'abus de position dominante, sauf si le contrevenant a volontairement négligé d'observer une ordonnance corrective préexistante. La finalité des ordonnances correctives dans les affaires d'abus de position dominante ne doit pas être de punir l'entreprise dominante, mais de faciliter la concurrence. Les mesures correctrices doivent donc viser à limiter les barrières ou les restrictions à la concurrence. Le délégué ajoute qu'il existe une distinction fondamentale, tant factuelle qu'au plan de l'intérêt général, entre les ententes, qui opèrent en secret, et la conduite d'une entreprise individuelle qui agit de manière unilatérale et au grand jour.

Le président en vient alors à l'Allemagne et souligne qu'à la différence du Japon, de l'Espagne et du Taipei chinois, ce pays ne semble pas être un partisan résolu des amendes dans les cas d'abus de position dominante. Le président demande à la délégation allemande si elle est d'accord avec le raisonnement du BIAC ou si elle a d'autres raisons de ne pas vouloir imposer d'amendes dans les affaires d'abus de position dominante.

Un délégué d'Allemagne note en premier lieu que l'Office fédéral des cartels vient d'imposer une amende dans une affaire d'abus à l'encontre de récidivistes, ce qui confirme qu'il a bien recours aux amendes. Néanmoins, les règles de procédure en Allemagne varient selon que la procédure se termine par une ordonnance de cesser et de s'abstenir ou par une amende, et la norme de preuve ainsi que les droits de la défense sont beaucoup plus importants dans les procédures se soldant par une amende. La plupart des cas d'abus en Allemagne sont des cas « limite » (difficiles à trancher), et la norme de preuve serait satisfaite si une ordonnance de cesser et de s'abstenir est le seul résultat recherché. La situation est quelque peu différente dans les cas d'ententes injustifiables, pour lesquels l'affaire est très simple dès lors que l'on dispose de suffisamment d'éléments qui prouvent l'existence de l'entente ; il n'est pas nécessaire d'effectuer une analyse économique et juridique. Le délégué souligne le fait que même dans les procédures administratives (qui n'entraînent pas d'amendes), les pouvoirs publics sont fondés à demander que le tribunal récupère les bénéfices que l'entreprise a réalisés grâce à sa conduite illégale, ce qui a un certain effet dissuasif. Cet effet est-il suffisant ? Le délégué reconnaît qu'en principe, les amendes pourraient être plus efficaces, mais que dans la plupart des cas limite elles ne sont pas appropriées. Il ajoute que pour que l'effet dissuasif se manifeste, les mesures correctrices doivent être imposées dans un délai raisonnable. Certes, une période de temps plus longue permet aux enquêteurs de procéder à une analyse économique et juridique plus approfondie, mais l'effet dissuasif dépend de la brièveté du délai.

Un délégué de l'UE intervient en indiquant qu'il ne comprend pas la position du BIAC. Si les règles de la concurrence permettent uniquement de remédier aux problèmes futurs, le dispositif qui est censé constituer un système de prohibition ayant un effet dissuasif intrinsèque va se transformer en simple système de contrôle des abus. Cela ferait le jeu des entreprises qui pourraient se livrer à des abus tant que

l'autorité ne s'en rend pas compte, sachant que le pire qui puisse leur arriver est de devoir modifier leur comportement à l'avenir. Cette logique est celle des anciens systèmes de contrôle de la concurrence, alors que les systèmes de prohibition modernes visent précisément à exposer les entreprises au risque d'être sanctionnées pour leur comportement passé si elles violent la loi. C'est une condition essentielle à l'effet dissuasif. Les cas limite sont bien évidemment différents. S'il n'est pas raisonnable de supposer qu'une entreprise aurait pu prévoir la nature illégale de ses actions, les conditions requises pour imposer une amende ne seraient pas réunies parce que la réglementation de l'UE sur les pénalités stipule qu'il faut prouver que le comportement était intentionnel ou relevait de la négligence. En outre, un comportement unilatéral peut être tout aussi préjudiciable aux consommateurs qu'une entente. Il peut même être plus dangereux dans la mesure où il est susceptible de perdurer plus longtemps qu'une entente. Une entente peut être démantelée plus rapidement et plus facilement qu'une conduite unilatérale d'une entreprise fortement dominante. C'est pourquoi, d'un point de vue philosophique, conceptuel et pour des motifs de protection, on ne voit pas clairement pourquoi il faudrait opérer une distinction entre les amendes à l'encontre des ententes d'une part et les amendes sanctionnant les conduites unilatérales d'autre part.

Le délégué du BIAC répond en expliquant que certains pays ont adopté cette approche sensiblement différente de la question de l'abus de position dominante et évoque les décisions du Parlement du Canada à titre d'exemple. Plusieurs approches sont donc possibles.

Le président demande alors au Canada si le point de vue du BIAC est correct.

Un délégué du Canada répond qu'un Comité parlementaire a récemment suggéré d'apporter des modifications fondamentales au régime en place, jugeant inacceptable que l'autorité de la concurrence ne soit pas en mesure d'imposer des amendes et que les parties privées ne puissent pas tenter leurs propres actions. L'OCDE a également reconnu que le fait de ne pouvoir imposer des amendes et que les parties privées ne puissent entreprendre des actions au titre de la loi de la concurrence constituait en effet une faiblesse dans le système canadien.

## **2. Mesures correctrices**

Le président aborde ensuite la question des mesures correctrices (structurelles et comportementales), indiquant que les contributions traduisent un large éventail de points de vue. La contribution des États-Unis stipule que « en l'absence de mesures correctrices applicables et pratiques, les tribunaux et les agences doivent se garder de considérer a priori la conduite d'une entreprise comme illégale ». En d'autres termes, les États-Unis semblent juger qu'indépendamment de la question des amendes, il n'y a pas violation à moins qu'une mesure correctrice n'existe. Le président estime qu'il serait utile d'en savoir plus sur la définition d'une mesure correctrice applicable et pratique a priori. Il demande également à la délégation américaine si ses agences ont été confrontées à des cas dans lesquels elles ont jugé qu'il n'y avait pas de violation du fait de l'absence de mesures correctrices apparemment disponibles.

Un délégué des États-Unis répond en indiquant qu'il existe certaines formes de comportement des entreprises inhérentes au fonctionnement naturel des marchés, mais que l'autorité de la concurrence souhaite réduire ou décourager. Ce faisant, l'autorité doit nécessairement jouer le rôle d'un organisme de réglementation. Les agences et les tribunaux américains estiment que tel n'est pas le rôle des autorités de la concurrence. Si la nature d'un marché donné impose tel ou tel comportement, d'autres formes d'intervention peuvent être adaptées, mais le droit de la concurrence n'en fait normalement pas partie.

Le délégué ajoute que cette question est de portée limitée, et qu'on oublie souvent la fréquence des interventions du département de la Justice et de la FTC contre ce qu'on pense être des problèmes d'abus de position dominante. Non pas que les agences américaines n'interviennent pas pour des abus de position dominante, mais la loi a évolué et il existe deux types de cas spécifiques dans lesquels les mesures correctrices traditionnelles sont vouées à l'échec. Le premier porte sur les situations de domination conjointe et d'interdépendance tacite. Dans les années 60, on pensait aux États-Unis qu'il y avait une limite au pouvoir d'action des autorités de la concurrence dans le domaine de l'interdépendance oligopolistique. Lorsque la FTC tenta par la suite de faire valoir le concept de domination conjointe sous l'angle de la législation antitrust américaine, les tribunaux se sont opposés à cette idée. Le délégué estime que les tribunaux avaient raison.

Le deuxième type de cas implique les entreprises monopolistiques qui se contentent d'exercer le pouvoir de fixation des prix qui s'apparente à une emprise à court terme sur le marché, ce qu'on appelle les « cas d'exploitation ». Là encore, pour agir, une agence doit rapidement assumer le rôle d'une autorité réglementaire, rôle que les agences américaines refusent d'endosser. Les États-Unis estiment que si une entreprise a acquis une emprise sur le marché à court terme – en général par l'innovation – la meilleure chose à faire est de la laisser en récolter les fruits, ce qui encourage l'innovation dans l'économie et favorise l'entrée sur ce marché. Les cas d'exclusion sont plus délicats. Ils peuvent donner lieu à des mesures correctrices efficaces. Néanmoins, lorsqu'on conclut que, par nature, le secteur est structurellement non concurrentiel, à savoir qu'il est impossible de remédier à la position dominante par une intervention structurelle ou comportementale, l'autorité de la concurrence serait fondée à se demander si les principes du droit de la concurrence constituent le meilleur outil réglementaire pour remédier aux défaillances du marché.

Un deuxième délégué des États-Unis ajoute que les agences antitrust américaines abordent cette question avec pour objectif de promouvoir le bien-être des consommateurs ; par conséquent, elles n'interviennent que si elles pensent que la situation du consommateur n'en sera pas pénalisée. Il est donc logique d'examiner si un recours possible existe avant d'enquêter sur une éventuelle violation. Il existe certains cas dans lesquels il est difficile de répondre à cette question. La fixation de prix d'éviction en est un bon exemple. Si la norme pour déterminer s'il y a eu fixation de prix d'éviction est basée sur un ensemble objectif de critères, on peut être en mesure d'imposer un recours possible, même s'il faut être attentif au risque de maintenir les prix à un niveau artificiellement élevé.

Les cas de refus de vente constituent un autre exemple. Une injonction met le tribunal en demeure de définir ou de réglementer les conditions et modalités de transactions commerciales. Si, en tant qu'entité publique, vous êtes amené à prendre des décisions après-coup sur la conception du produit ou l'innovation, explique le délégué, cela devrait vous faire réfléchir à deux fois avant d'intervenir.

Enfin, revenant sur les remarques formulées par l'UE, le délégué américain donne une raison pour infliger des amendes aux ententes mais pas aux entreprises individuelles contrevenantes : la dissuasion excessive. Il n'y a pas vraiment de risque de dissuasion excessive dans le domaine des ententes car il s'agit d'une activité anticoncurrentielle flagrante que rien ne justifie. Mais les entreprises individuelles peuvent avoir du mal à déterminer ce qui constitue une violation, et imposer de lourdes amendes risque de dissuader les activités pro concurrentielles et nuire ainsi au bien-être des consommateurs. Enfin, les États-Unis jugent particulièrement inadéquat d'imposer des amendes dans la mesure où ils disposent d'une procédure de dommages et intérêts dans les affaires privées qui peut donner lieu au paiement d'indemnités compensatoires.

Le président demande un éclaircissement. Si les amendes ne sont pas la bonne réponse dans les affaires d'abus de position dominante et si les mesures correctrices ne doivent pas être employées dans les affaires de prix d'éviction, de refus de vente, d'interdépendance et de domination conjointe, quelle autre solution reste-t-il ? Il n'y a ni recours, ni amende, ni quoi que ce soit d'autre.

Le délégué américain explique qu'il existe une catégorie intermédiaire d'affaires que les agences américaines abordent avec prudence, mais sans pour autant chercher à éviter systématiquement les poursuites. Pour cette catégorie, porter l'affaire en justice comporte un risque élevé de faire plus de mal que de bien, il faut donc y réfléchir à deux fois. À titre d'exemple, le délégué cite le cas du département de la Justice qui a traduit en justice *American Airlines* pour fixation de prix d'éviction. Par conséquent, les États-Unis ne prétendent pas qu'il faille systématiquement s'abstenir de porter une affaire de prix d'éviction devant la justice, mais simplement qu'il faut le faire avec prudence.

Le président examine alors la contribution de la Turquie, qui étudie une affaire intéressante dans laquelle le Conseil de la concurrence a décidé de ne pas prendre de mesure correctrice. Cette affaire impliquait des pratiques d'éviction de la part d'une entreprise dominante. Le président demande à la Turquie d'expliquer pourquoi elle a conclu qu'une mesure correctrice n'était pas appropriée.

Un délégué de Turquie répond que le Conseil de la concurrence a établi la preuve d'une pratique abusive dans la décision *Turkcell* et la nécessité de fournir des services itinérants nationaux à des rivaux pour mettre un terme à cette pratique. Toutefois, définir les conditions applicables à la fourniture de services itinérants nationaux relevait de la responsabilité de l'Autorité des télécommunications, le principal organisme de réglementation du secteur. C'est pourquoi le Conseil de la concurrence a renvoyé l'affaire devant l'Autorité des télécommunications pour qu'elle établisse les conditions et modalités régissant la prestation de services itinérants aux opérateurs rivaux. Dans ce dossier très spécifique, une amende a été infligée aux parties, mais elle s'est avérée inutile du fait de l'intervention de la Haute Cour administrative. Là encore, dans cette affaire bien particulière, deux raisons motivaient ce choix : premièrement, au moment de la décision, le marché était en plein développement et porté par la technologie, et deuxièmement une intervention réglementaire d'une institution telle que l'Autorité des télécommunications était nécessaire. Le Conseil a donc jugé opportun d'imposer une mesure correctrice, mais les conditions ont évolué et la mesure s'est avérée inutile.

Le président conclut que l'affaire *Turkcell* illustre la possibilité de recourir à un instrument politique supplémentaire (l'organisme de réglementation du secteur) pour résoudre le problème. Les États-Unis formulent une remarque de portée plus générale : si vous ne disposez pas d'un autre outil, cela ne signifie pas que vous utilisiez systématiquement le droit de la concurrence, car parfois ce n'est pas l'instrument le plus approprié. Mais cela pose la question suivante : s'il n'y a aucune autre possibilité disponible - pas d'organisme de réglementation du secteur par exemple - que peut-on faire ? Le président indique que l'on reviendra à cette question ultérieurement. Il cite alors une section de la contribution de la Norvège qui porte sur la différence entre mesures correctrices structurelles et mesures correctrices comportementales. Cet aspect ne suscite pas beaucoup d'intérêt dans les contributions des autres pays. Tout le monde s'accorde à reconnaître que la ligne de partage entre mesures correctrices structurelles et comportementales n'est pas très claire. La contribution de la Norvège est intéressante dans la mesure où elle explique que, selon la loi norvégienne sur la concurrence, des mesures structurelles peuvent être ordonnées uniquement en l'absence de mesures comportementales aussi efficaces. Le reste du rapport norvégien développe beaucoup d'arguments sur les mesures correctrices structurelles et comportementales qui semblent être en contradiction avec l'esprit de la loi. Par exemple, la Norvège estime que « sur un plan général, les mesures correctrices comportementales semblent mériter un suivi plus étroit que les mesures structurelles. » Elle soutient également que « les mesures structurelles sont donc jugées plus efficaces et moins onéreuses que celles comportementales ». On a finalement l'impression que l'Autorité norvégienne de la concurrence

n'apprécie pas beaucoup sa législation. Le président demande à la délégation norvégienne de clarifier sa position sur les mesures correctrices structurelles et comportementales.

Un délégué de la Norvège assure au président que l'Autorité n'a rien contre la nouvelle loi sur la concurrence, mais qu'elle est si récente qu'on ne dispose d'aucun précédent en matière de décision sur les mesures correctrices dans les cas d'abus de position dominante. À ce stade, seules des observations préliminaires sont possibles. La Norvège entend souligner dans sa contribution que, dans sa législation, la détermination des mesures correctrices s'effectue au cas par cas. Elle est principalement régie par le principe de proportionnalité. La nature de l'infraction et les recours disponibles sont donc étroitement liés. En faisant observer que certaines mesures structurelles dans les affaires d'abus de position dominante peuvent être plus efficaces et moins onéreuses, nous nous référons aux affaires où il serait théoriquement possible d'élaborer un recours d'ordre comportemental, mais où un tel recours exigerait des efforts de suivi considérables de la part de l'autorité. À cela s'ajoute le degré élevé d'incertitude quant à l'efficacité de ce recours pour remédier à l'infraction. Le délégué cite l'exemple d'une entreprise verticalement intégrée qui occupe une position dominante sur un marché en amont et qui approvisionne ses filiales sur un marché en aval. Dans une telle affaire, même si l'élaboration de mesures correctrices comportementales est possible, une mesure structurelle semble être la mieux adaptée. Premièrement, le démantèlement de l'entreprise peut être très facile si des entités séparées existent déjà. Deuxièmement, sachant que la mesure comportementale peut exiger d'importantes activités de supervision et soumettre l'entreprise à l'obligation de rendre compte à l'autorité, la charge peut s'avérer lourde pour l'entreprise. Troisièmement, surtout si l'entreprise en question est coutumière des pratiques abusives, une mesure comportementale ne garantit pas que l'entreprise ne récidivera pas. Par conséquent, une mesure structurelle semble être la meilleure solution dans de nombreux cas d'abus.

Le président souligne que le Canada envisage une autre facette de la question des mesures correctrices : la différence entre mesures punitives et correctives. Sa contribution indique clairement sa préférence en faveur des mesures correctives et son rejet des mesures punitives. Le président demande quels sont les moyens de dissuasion si tout ce qu'une entreprise risque en se livrant à des pratiques abusives est une mesure corrective. En d'autres termes, quelle est l'incitation de ne pas violer la loi ?

Un délégué du Canada explique que le cadre législatif en vigueur au Canada date d'il y a une vingtaine d'années et que jusqu'à cette époque, la loi était exclusivement de nature pénale. En 1986, une nouvelle loi a été adoptée, reflétant la nécessité de faire preuve de prudence dans le domaine des abus de position dominante, parce qu'il était parfois difficile de faire la distinction entre un comportement simplement agressif mais proconcurrentiel et un comportement anticoncurrentiel. Aussi la législation autorisait-elle des mesures correctrices qui étaient uniquement préventives, c'est-à-dire qu'elles visaient à rétablir la concurrence, afin d'éviter de « geler » la situation sur le marché. Il n'en est pas moins vrai qu'un tel cadre pouvait encourager les entreprises à tenter des pratiques abusives, sachant que tout ce à quoi elles s'exposaient se limitait à la délivrance d'une ordonnance d'interdiction. À cet égard, le Canada se distingue des autres pays dans la mesure où les autorités de contrôle de la concurrence n'ont pas la capacité d'infliger des amendes et les parties ne peuvent pas engager des actions en justice. Le Parlement canadien n'est pas satisfait de cette situation. Le gouvernement précédent envisageait d'introduire des sanctions monétaires administratives, des actions privées ou éventuellement une combinaison des deux, mais lorsqu'il a perdu les élections ces projets ont été suspendus. Il est encore trop tôt pour savoir ce que le nouveau gouvernement compte faire, mais ce débat se poursuivra.

Le président en vient alors à la contribution du Japon, qui expose une affaire dans le secteur de la presse, l'affaire *Hokkaido Shimbun*. L'éditeur du quotidien Hokkaido Shimbun décida de sacrifier les tarifs publicitaires pour les petites et moyennes entreprises qui étaient clientes d'un nouveau concurrent, ce qui déclencha l'intervention de la JFTC. La JFTC demanda au Hokkaido Shimbun de relever ses tarifs en révisant ses « taux publicitaires et frais de gestion de manière à les aligner sur ceux en vigueur pour les

journaux locaux.» Le président demande à la délégation japonaise si elle est d'accord avec le Royaume-Uni qui prétend que les mesures correctrices comportementales doivent être « modérées ». Était-ce une mesure modérée ? Comment la JFTC a-t-elle décidé du tarif publicitaire adéquat que le Hokkaido Shimbun devait appliquer ? Avec quel résultat ?

Un délégué du Japon répond que le Hokkaido Shimbun a divisé par deux ses tarifs publicitaires dans son édition locale, dans le cadre de mesures visant à empêcher l'entrée d'un concurrent potentiel sur le marché. Ce niveau de prix s'est soldé par des pertes d'exploitation pour le journal. En réponse à la recommandation de la JFTC, le Hokkaido Shimbun a alors proposé de porter ses tarifs publicitaires au même niveau que ceux de son concurrent, prenant en compte la situation effective sur le marché de la publicité à cette époque et dans cette région particulière du Japon. Le journal a donc pris les mesures nécessaires pour cesser toutes ses activités visant à empêcher l'entrée de concurrents, conformément à la recommandation de la JFTC. En second lieu, la JFTC a ordonné au Hokkaido Shimbun de rendre ces mesures publiques afin que ses lecteurs soient pleinement informés de ce que le journal allait faire. En contraignant le Hokkaido Shimbun à publier les mesures prises pour faire suite aux recommandations de la JFTC, et notamment à l'égard de ses rivaux, un mécanisme de supervision indirect mais très efficace a été mis en place. Le délégué ajoute qu'un concurrent a engagé une action civile pour dédommagement à l'encontre du journal, qui est toujours examinée par la Haute Cour de Tokyo.

Abordant la question de savoir si le Japon est d'accord avec l'analyse du Royaume-Uni selon laquelle les mesures correctrices dans les cas d'abus de position dominante doivent être modérées, le délégué indique que, de l'avis de la JFTC, ces mesures doivent être nécessaires et suffisantes pour i) mettre un terme aux activités commerciales qui entravent significativement la concurrence ; ii) rétablir sur le marché le niveau de concurrence qui existait avant les activités illicites ; et iii) prévenir la répétition de ces mêmes activités. Bien évidemment, il convient de tenir dûment compte de la question de la proportionnalité lorsqu'on élabore et choisit les mesures correctrices nécessaires et suffisantes.

Ensuite, le président fait remarquer qu'en Corée, la sanction infligée par la KFTC dans la plupart des cas d'abus de position dominante prend la forme d'ordonnances de cesser et de s'abstenir ainsi que de surtaxes. Toutefois, la contribution de la Corée porte principalement sur les mesures correctrices dans les industries de haute technologie et en réseau, et notamment dans l'affaire *Microsoft*. Le président demande à la délégation coréenne de présenter cette affaire, en insistant sur le raisonnement de la KFTC et sur le résultat obtenu.

Un délégué de la Corée explique qu'en décembre 2005, la KFTC a décidé d'ordonner à Microsoft Corporation et à Microsoft Korea de séparer Windows Media Service du système d'exploitation Windows Server, Windows Media Player et Instant Messengers du système d'exploitation Windows et d'imposer une surtaxe d'environ 33 milliards wons (environ 31 millions US\$) pour abus de position dominante et pratiques commerciales déloyales. La KFTC a jugé que les pratiques suivantes de Microsoft étaient en infraction avec la loi coréenne sur le commerce équitable : i) lier Windows Media Service au système d'exploitation Windows Server, pour lequel Microsoft détient une part du marché ; ii) lier Windows Media Player au système d'exploitation Windows pour PC, pour lequel Microsoft est en situation de monopole ; et iii) associer un programme de messagerie instantanée au système d'exploitation Windows PC, pour lequel Microsoft est en situation de monopole. La KFTC a estimé que ces pratiques avaient supprimé la concurrence et exacerbé la monopolisation du marché des produits liés. Les ventes liées ont généré des effets en cascade considérables pour Windows Media Service Windows Media Player et MSN Messenger.

Le délégué ajoute que ces pratiques consistant à lier des produits entre eux ont également accru les ventes de Windows Media Player et d'autres applications qui complètent la technologie Windows Media. Cela a érigé des barrières à l'entrée plus élevées pour les concepteurs de serveurs et de systèmes d'exploitation pour PC, renforçant le pouvoir de monopole de Microsoft sur chacun de ces marchés. En

outre, les ventes liées ont privé les consommateurs de la possibilité de choisir des produits sans composant lié ou d'acheter des produits de concurrents ; c'est pourquoi la Commission a jugé que cette pratique violait le droit des consommateurs de choisir des produits en fonction de critères de qualité et de performance et, à terme, portait préjudice au bien-être des consommateurs.

La KFTC a imposé les mesures correctrices suivantes : Microsoft a dû séparer Windows Media Service de son système d'exploitation Windows Server. Il a également dû proposer deux versions du système d'exploitation Windows pour PC, une sans Windows Media Player et Instant Messenger, et l'autre contenant une série de lecteurs multimédia et de systèmes de messagerie instantanée d'autres éditeurs. En outre, concernant les systèmes d'exploitation Windows pour PC déjà vendus et utilisés au moment de la décision, Microsoft a dû fournir aux usagers un « Media Player Centre » et un « Messenger Centre » par CD ou mises à jour sur Internet. Cette mesure restera en vigueur pendant 10 ans ; au terme des cinq premières années, Microsoft pourra demander chaque année à la KFTC de réexaminer la mesure afin de tenir compte des changements sur le marché. Enfin, 27,92 milliards de wons de surtaxes ont été infligés à Microsoft. Lorsque Microsoft aura fait connaître ses chiffres de ventes pour 2005, la KFTC calculera et imposera une surtaxe pour l'année 2005. On estime que la surtaxe totale, année 2005 comprise, avoisinera les 33 milliards de wons.

Un délégué d'Italie prend alors la parole et se dit d'accord avec l'avis général de la délégation américaine, selon lequel les agences ne doivent pas intervenir dans les cas d'exploitation abusive. Il souligne toutefois que la loi Robinson-Patman est largement appliquée dans les procès impliquant des parties privées aux États-Unis. Il souhaite obtenir des informations sur l'importance de son usage. Il formule également une remarque expliquant pourquoi les amendes sont importantes dans les cas d'abus. Bien que, dans certaines affaires, on ne sache pas clairement si l'entreprise incriminée occupait une position dominante ou si c'est son comportement qui constituait un abus, la situation de domination est incontestable dans la plupart des affaires d'abus. Pour ces entreprises et pour les comportements visant clairement à permettre une éviction, il est évident que les agences doivent être en mesure d'infliger des amendes. À défaut, l'effet dissuasif serait nul.

En réponse à la question sur la loi Robinson-Patman, un délégué des États-Unis fait remarquer que le département de la Justice a dans un premier temps demandé l'abrogation de cette loi en 1976. Les deux agences américaines ont périodiquement réitéré cette demande, récemment encore lors des dernières semaines en liaison avec les travaux de la commission chargée de moderniser le dispositif antitrust. Les tribunaux américains sont de plus en plus sensibles au fait que la loi Robinson-Patman a des effets pervers, et si les affaires privées sont probablement plus fréquentes que les agences ne le souhaiteraient, les tribunaux restreignent de plus en plus les dommages et intérêts octroyés aux plaignants privés. La récente décision de la Cour suprême dans l'affaire *Volvo* marque l'étape la plus significative dans cette direction. Le délégué ajoute ne pas être forcément d'avis que la loi Robinson-Patman vise les exploitations abusives. Très souvent, la responsabilité prévue par cette loi joue uniquement lorsqu'il y a un effet préjudiciable sur le marché.

Un autre délégué réagit au commentaire sur les entreprises incriminées dont la situation de domination est avérée et au point de savoir si cela justifie d'être moins circonspect avant d'infliger des sanctions en cas de présomption de violation. Il est d'accord avec la suggestion générale selon laquelle en cas de doute sur l'existence d'une position dominante, il y a d'autant plus lieu d'être prudent. Mais même si l'on admet qu'une entreprise est dominante, il ne faut pas perdre de vue le fait que l'objectif est d'encourager les entreprises, même dominantes, à adopter un comportement concurrentiel.

Un délégué du BIAC fait alors remarquer que l'UE affirme disposer d'une base juridique pour accepter les engagements, tout en précisant qu'il n'y a pas d'engagement possible dans les cas où la Commission a l'intention d'infliger une amende. Cela pose la question du moment où l'amende est infligée. Dans un grand nombre de cas, la Commission a accepté des engagements proposés par les entreprises en prévision de ce qu'elle ferait en l'absence d'accord. Les affaires qui n'ont pas donné lieu à une amende sont aussi nombreuses que celles qui n'en ont pas fait l'objet, ce dont le BIAC se félicite. En second lieu, le document de travail de la Commission préconise une approche plus économique des abus, surtout en ce qui concerne les pratiques qui ont systématiquement été réprimées par une amende depuis l'affaire *Hoffman La Roche* – accords d'exclusivité, rabais et prix d'éviction. Mais si l'on favorise une telle approche, on doit admettre que ces pratiques ne sont pas en soi illicites et ne sont donc pas les meilleures candidates aux amendes. Enfin, si l'on suppose, aux fins de la discussion, que les amendes sont la pierre angulaire de tout système d'interdiction, alors les entreprises dominantes doivent être en mesure de demander des mesures de clémence. Le délégué reconnaît ne pas y être favorable, mais souligne qu'en poussant la logique de l'UE jusqu'au bout, ce serait effectivement la conséquence.

Un délégué de l'UE récuse cette vision en affirmant que la clémence n'a pas pour vocation de permettre aux entreprises d'échapper aux sanctions. La clémence vise à déceler les ententes secrètes qui impliquent plusieurs entreprises et pour lesquelles on souhaite inciter l'une d'entre elles à révéler l'entente. Il est étrange de suggérer qu'il doit y avoir des mesures de clémence pour une entreprise dominante dont la conduite unilatérale est illégale. Ce ne serait pas un système d'interdiction ou de contrôle des abus, mais plutôt une échappatoire. En outre, lier l'approche axée sur les effets que l'UE préconise dans son document de travail à la question des amendes est tout aussi étrange, parce que cela revient à dire que les amendes doivent être infligées uniquement dans les cas impliquant des restrictions par objet et non par effet. Cette approche limiterait les risques que les entreprises courraient en cas d'effet négatif sur les consommateurs. En fin de compte, les consommateurs devraient payer la facture et l'entreprise dominante ne serait pas sanctionnée. Par ailleurs, le délégué ne voit pas en quoi le fait que la Commission ne puisse pas infliger d'amende dans les décisions d'engagement pose problème, car la Commission doit toujours avoir le choix entre remédier à un effet négatif sur le marché à l'avenir et ne pas se focaliser sur des sanctions pour un comportement passé, et punir un comportement passé tout en préparant l'avenir. Elle doit avoir ces deux options à disposition ; sinon, l'agence serait contrainte de recourir systématiquement à la sanction.

Le délégué aborde également le thème de la prudence à adopter concernant les sanctions contre les conduites unilatérales. Citant l'exemple des prix d'éviction, il reconnaît qu'il s'agit d'un abus que les agences doivent sanctionner avec la plus grande prudence. Il serait en effet contreproductif de créer par inadvertance une sorte de protection par les prix pour les concurrents en infligeant des amendes trop élevées. Les entreprises dominantes doivent pouvoir rivaliser en fonction de leurs mérites. Mais leurs concurrents doivent également pouvoir le faire. Si l'entreprise dominante établit ses prix au dessous d'un référentiel de coût approprié, lui permettant d'empêcher systématiquement l'entrée de nouveaux concurrents sur le marché, cela génère un problème et il faut tenir compte de la protection des nouveaux venus. Pour ce faire, il convient de tracer une ligne de partage, ce qui implique d'envoyer un signal clair aux entreprises leur signifiant que si leurs prix sont inférieurs à un certain niveau, elles s'exposent à une amende. C'est indispensable si l'on ne veut pas être systématiquement confronté à ce genre de comportement, sans jamais obtenir l'effet voulu, à savoir protéger les nouveaux venus sur le marché. Certes, il existe un risque d'application excessive de la loi, mais d'autre part le risque est également élevé que les nouveaux venus n'aient pas la possibilité de s'implanter sur le marché, le privant ainsi de la concurrence dynamique liée à ces entrées.

Un délégué de France approuve les remarques du délégué de l'UE, mais n'est pas satisfait de la tournure que prennent les discussions, car il y a selon lui deux débats distincts. Premièrement, se pose la question de savoir comment distinguer les conduites unilatérales abusives des conduites unilatérales licites. Deuxièmement, il s'agit de déterminer quel est l'instrument le plus efficace pour sanctionner ou rectifier

une conduite jugée abusive. La première question est délicate, mais ce serait une erreur philosophique et un mauvais service à rendre aux entreprises pour une autorité de la concurrence que de dire : « Nous ne savons pas si vous avez violé la loi ou non, parce que nous ne savons pas si vous êtes dominante, et même si c'est le cas, nous ne le saurions pas non plus, mais il serait tout de même préférable que vous changiez de comportement. » Si nous agissons ainsi, nous n'indiquons pas clairement à l'entreprise ce qui est licite et ce qui ne l'est pas ; par conséquent, si l'entreprise se trompe dans sa propre évaluation de ce qui est autorisé ou non, nous serons à l'origine de son erreur. La priorité pour une autorité de la concurrence est d'appliquer la loi telle qu'elle est, même si c'est intellectuellement difficile, et de dire à l'entreprise si son comportement est ou non abusif.

Un délégué des États-Unis intervient à nouveau pour exprimer son accord avec le délégué de l'UE sur un certain nombre de points. Premièrement, la clémence s'applique difficilement aux cas d'abus de position dominante, précisément pour les raisons mentionnées par le délégué de l'UE. Deuxièmement, il est important que la Commission soit en mesure de décider de ne pas infliger d'amende ou d'en infliger une. Enfin, il convient d'être extrêmement prudent dans ce domaine. Il existe un risque d'application excessive de la loi. Néanmoins, il faut parfois sanctionner la violation et imposer une mesure correctrice. Pour faire la part des choses, dès lors qu'un abus est décelé, il faut déterminer si l'entreprise incriminée savait au moment d'agir qu'elle allait commettre une violation, ou si elle n'en a pris conscience qu'après la procédure juridique.

Le président conclut provisoirement ce débat en estimant que le BIAC se fourvoie dans son souhait d'étendre les programmes de clémence aux cas d'abus de position dominante ou de comportement unilatéral. Il en vient alors à l'affaire présentée par la Roumanie dans sa contribution. Cette affaire porte sur l'exploitation abusive d'une position dominante par une entreprise de l'industrie du carton en matière de fixation des prix. Le président demande si l'engagement a été pris sous la menace d'une mesure correctrice, et si cet engagement a permis de rétablir la concurrence sur ce marché.

Un délégué de Roumanie répond que juste après que le Conseil de la concurrence eut entamé son enquête dans cette affaire, l'entreprise incriminée proposa des engagements sur sa politique de prix. Le Conseil a tenu compte de ces engagements dans sa décision finale qui comportait plusieurs obligations. L'entreprise en place était tenue de soumettre des états financiers quatre fois par an, accompagnés de calculs de coûts, et de déposer une déclaration concernant les négociations menées avec les bénéficiaires deux fois par an afin de prouver que les prix étaient bien le résultat d'une négociation et n'étaient pas imposés. Le Conseil lui a également infligé une amende d'un million d'euros environ. A la suite de l'intervention du Conseil, les prix ont baissé. Le délégué souligne que le succès de cette intervention s'explique non seulement par les mesures correctrices spécifiques imposées dans cette affaire, mais également par les principes généraux en matière de sanction suivis par le Conseil de la concurrence qui, depuis quelques années, est plus sévère en la matière. En outre, le Conseil n'a pas fait mystère de sa nouvelle politique. Au contraire, il a fait connaître publiquement chaque décision d'imposer des sanctions afin de renforcer l'effet dissuasif.

Un délégué du Royaume-Uni intervient alors, faisant valoir que l'un des cas mentionnés dans la contribution du Royaume-Uni, l'affaire *LRC Products*, impliquait également des engagements sur les prix. Ces engagements, imposés dans les années 80, comprenaient une mesure contre la fixation de prix excessifs. Lorsque la Monopolies and Mergers Commission a examiné ces engagements, elle a découvert que la mesure en question était un obstacle à l'entrée. Les nouveaux engagements ont donc supprimé la mesure relative aux prix et portaient uniquement sur le comportement stratégique susceptible d'empêcher l'entrée. L'OFT a récemment préconisé que ces engagements soient entièrement supprimés parce que de nouveaux venus s'étaient implantés sur le marché, qui était désormais plus concurrentiel, de sorte que même les engagements portant uniquement sur les comportements stratégiques n'étaient plus appropriés.

Le président aborde alors un sujet différent, suggérant que les mesures correctrices visant à changer les comportements peuvent exiger des activités de suivi considérables et donc être très coûteuses. Il fait observer que la contribution de la Suisse explique que, d'une part, l'autorité de la concurrence n'a pas encore exercé son pouvoir de sanction des entreprises qui abusent de leur position dominante, mais que d'autre part elle a souvent prononcé des injonctions. Lorsque des injonctions sont prononcées dans les cas d'abus, les entreprises incriminées doivent souvent fournir des informations au Secrétariat de la Commission pour lui permettre de s'assurer que les injonctions sont bien suivies d'effet. Le président demande si la Commission mobilise de nombreuses ressources pour vérifier le respect des injonctions. Il demande également si, sur un plan général, les entreprises obtempèrent aux injonctions.

Un délégué de Suisse cite l'exemple de l'affaire *ETA/Swatch*. ETA, une entreprise en situation de quasi monopole, avait décidé de cesser la livraison d'*ébauches*, les épreuves utilisées dans la fabrication de montres. Suite aux plaintes de certains clients, la Commission de la concurrence est intervenue et a pris des mesures provisoires obligeant ETA à accorder à ses clients une période de suppression graduelle de cinq ans. Cette décision a été confirmée par l'instance juridictionnelle suprême, le Tribunal fédéral. Elle est remarquable de par la durée de la période de suppression graduelle et la charge considérable qu'implique le suivi de la mise en œuvre. La Commission a mis en place un système d'arbitrage qui a convaincu ETA de se soumettre à un tribunal d'arbitrage et de respecter ses décisions. Ce modèle est efficace. Le système d'arbitrage produit un effet disciplinaire, car aucun nouveau cas n'a été enregistré à ce jour. Depuis lors, d'autres entreprises ont développé leurs productions d'*ébauches*. Les coûts de suivi ont donc été compensés par le succès des mesures prises.

Le président fait observer que les autorités de la concurrence ont tendance à suivre de très près le respect des mesures correctrices qu'elles imposent, mais pas leur efficacité. La contribution de la Turquie mentionne quelques exceptions. Elle indique que les mesures correctrices imposées dans l'affaire *Turkcell*, par exemple, ont été très utiles. Elle mentionne également l'affaire *Digiturk*, dans laquelle « la mesure correctrice a permis de rétablir la concurrence sur le marché de la diffusion gratuite. » Le président demande si la Turquie dispose d'un système de suivi systématique des effets des mesures correctrices sur la concurrence. À défaut, les commentaires figurant dans la contribution s'appliquent-ils uniquement à ces affaires en particulier, ou également dans le contexte d'un examen systématique de l'efficacité des mesures correctrices ?

Un délégué de Turquie répond que l'efficacité des mesures correctrices fait l'objet d'un suivi systématique, même si la loi ne l'exige pas. Concernant les affaires mentionnées par le président, le délégué fait remarquer qu'avant la décision *Turkcell*, les téléphones mobiles étaient proposés exclusivement avec des cartes SIM Turkcell. Après les mesures correctrices imposées par le Conseil turc de la concurrence, les distributeurs ont pu organiser des campagnes de ventes avec d'autres opérateurs GSM. Aujourd'hui, tous les distributeurs peuvent vendre leurs produits à n'importe quel opérateur ou client qui souhaite les acheter. Il n'y a plus d'exclusivité sur les téléphones mobiles résultant des opérateurs GSM. Le Conseil a examiné le marché après sa décision et infligé des amendes supplémentaires au besoin pour préserver la concurrence. Il s'est finalement aperçu qu'il n'était plus nécessaire d'imposer des amendes ou d'adopter des règlements supplémentaires parce que le marché était devenu concurrentiel. Le Conseil a donc modifié les règlements applicables à Turkcell et accordé des exemptions sur les contrats entre Turkcell et ses fournisseurs. Dans l'affaire *Digiturk*, Digiturk et TCS digital ont dû soumettre leurs conditions de vente, accompagnées de documents tels que factures et actes notariés attestant l'exactitude de leurs réponses. Les autorités de la concurrence ont jugé que la mesure était efficace parce que les organismes de radiodiffusion bénéficiaient de conditions et de modalités comparables à celles imposées par une mesure provisoire.

Le président revient alors à la contribution britannique et à la préoccupation relative à la proportionnalité exprimée par le Royaume-Uni. Selon cette contribution, un examen systématique a été mené pour déterminer si les mesures correctrices imposées par la loi sur le commerce loyal ont été efficaces. Dans quelques cas, il s'est avéré que ces mesures étaient inefficaces ou ont été suspendues parce qu'elles risquaient avoir un effet anticoncurrentiel. Le président demande à la délégation britannique de décrire le fonctionnement du processus d'examen de l'efficacité des mesures correctrices – par opposition au respect de ces mêmes mesures.

Un délégué du Royaume-Uni fait tout d'abord remarquer que l'OFT a pour mission d'examiner les mesures correctrices imposées en vertu de la loi sur le commerce loyal, mais qu'il ne s'y est pas employé de façon systématique jusqu'à une date récente, considérant que ce n'était pas une priorité. Une des raisons pour lesquelles cette tâche est aujourd'hui jugée plus prioritaire est la multiplication du nombre d'engagements. Les conditions sur de nombreux marchés ont considérablement évolué au fil du temps, ce qui rend un réexamen nécessaire pour déterminer si certains engagements sont devenus inefficaces ou si certaines entreprises incriminées existent encore. Une autre raison est que la loi sur le commerce loyal a été remplacée par la loi sur la concurrence, qui est similaire aux articles 81 et 82 et qui constitue donc un instrument très différent et plus efficace. Par conséquent, la nécessité d'engagements sous l'ancien système n'était peut-être pas la même dans le cadre de l'ancien système que dans celui du système actuel. Le processus de révision est très simple : le marché est réexaminé en cherchant à déterminer s'il est différent de ce qu'il était au moment où les engagements ont été souscrits. Pour ce faire, on s'appuie essentiellement sur les données fournies par les clients.

Le président demande alors de citer quelques exemples de cas dans lesquels le processus de révision a révélé que les circonstances avaient changé et qu'une révision était nécessaire.

Le délégué du Royaume-Uni évoque en premier lieu l'affaire *LRC*, mentionnée plus haut, qui impliquait un fournisseur dominant de préservatifs dont le comportement a eu pour effet de segmenter le marché. Au départ, les engagements portaient sur les contrôles des prix, mais ils ont été revus par la suite parce que la dynamique du marché ne s'en trouvait pas renforcée. Le marché s'est radicalement transformé, en partie du fait de l'arrivée de nouveaux acteurs, et en partie du fait que les distributeurs sont beaucoup plus puissants et détiennent un pouvoir de négociation accru avec les fournisseurs. En raison de l'élargissement de l'offre, les prix ont chuté et les conditions en vigueur dans les années 80 n'existent plus. Une autre affaire impliquait une entreprise dominante dans le secteur de la lutte contre les insectes nuisibles, qui pratiquait des prix d'éviction. Ce marché a lui aussi beaucoup changé, il compte plus d'acteurs et la concurrence s'y est considérablement renforcée. En outre, la loi sur la concurrence est désormais en vigueur, et est susceptible d'être utilisée à l'avenir si l'entreprise fixait à nouveau des prix d'éviction. Un autre cas concernait les dérivés d'opium contenus dans les analgésiques. Une entreprise domine ce marché, situation qui s'explique par la manière dont les pouvoirs publics restreignent l'accès au marché britannique aux autres fournisseurs de ce médicament. Des discussions sont en cours avec le ministère de la Santé, le *Home Office* et les *Security Services* pour tenter de lever cette interdiction.

Un autre délégué britannique ajoute que le régime instauré par la loi sur la concurrence est basé sur l'interdiction et que la dissuasion est extrêmement importante. En réalité, dans tous les cas d'abus de position dominante dans lesquels une violation a été constatée, des amendes ont été infligées et le processus d'appel a montré que le montant de ces amendes avait tendance à être trop élevé plutôt que pas assez. Le régime d'engagements du Royaume-Uni prévoit une mesure formelle et négociée, mais les directives stipulent que les engagements doivent être évités s'ils risquent de compromettre la dissuasion. Le délégué explique également que le Royaume-Uni ne dispose pas d'un recul suffisant sur les affaires relevant de la loi sur la concurrence, puisqu'une mesure correctrice n'a été décidée que dans une seule affaire. Par exemple, dans les affaires de prix d'éviction, aucun remède n'a été imposé, selon le principe - qui s'est avéré correct - que la décision elle-même était un recours suffisant et qu'il n'était pas opportun de

prescrire à l'entreprise la politique de prix qu'elle devait adopter. Enfin, concernant les questions du suivi du respect des mesures correctrices et de leur efficacité dans les affaires relevant de la loi sur la concurrence, les deux volets reviennent finalement au même, puisque si la mesure visant à corriger le problème de concurrence n'est pas respectée et que la concurrence n'est pas rétablie, on peut s'attendre à ce que les concurrents ou les clients nous en avertissent. Aussi, la plupart des mesures correctrices qui seront adoptées à l'avenir devraient être fondées sur l'autosurveillance.

Un délégué du Canada intervient pour souligner que le suivi de l'efficacité des mesures correctrices applicables au marché dans le règlement d'un problème donné mobilise beaucoup de ressources. Une façon d'atténuer ces coûts est de mettre en place un mécanisme permettant aux parties concernées par une mesure correctrice de demander à l'agence de la concurrence de la réviser et de la modifier. Cela s'est produit à plusieurs reprises au Canada, lorsque les conditions du marché avaient changé et qu'il n'était plus nécessaire de conserver une mesure correctrice.

### **3. Engagements et mesures provisoires**

Le président aborde alors plus directement la question des engagements et des mesures provisoires. Il fait tout d'abord valoir que la contribution de la France indique qu'elle dispose d'un éventail d'instruments activement utilisés par le Conseil de la concurrence. L'un des sujets évoqués par la délégation française est celui des mesures provisoires. Dans un grand nombre de cas d'abus de position dominante, le Conseil prend des mesures avant que l'affaire ne soit close. Le président demande si le fait d'imposer des mesures avant que la réalité de la violation ne soit établie ne comporte pas un risque. Deuxièmement, si des mesures provisoires sont utilisées, que se passe-t-il s'il s'avère par la suite qu'il n'y a pas eu de violation ?

Un délégué de France confirme que le Conseil de la concurrence peut forcer une entreprise incriminée à prendre un certain nombre de mesures qui permettent de remédier aux effets d'exclusion et d'obstacles à l'entrée. Cette faculté est exercée le plus souvent dans le domaine des télécommunications qui compte des marchés émergents où le facteur temps est très important. Le marché de l'Internet haut débit en est un bon exemple. Le marché français compte parmi ceux les plus ouverts à la concurrence pour l'accès à l'Internet haut débit, grâce au dégroupage des lignes France Telecom. Cette situation est en grande partie le résultat d'une série de mesures provisoires imposées par le Conseil de la concurrence. Trois conditions sont requises avant de pouvoir appliquer des mesures provisoires : 1) le comportement doit, selon toute probabilité, relever d'un abus de position dominante ; 2) il doit y avoir un préjudice grave et immédiat pour le secteur d'activité concerné, le bien-être des consommateurs ou les intérêts de l'entreprise plaignante ; et 3) le comportement en question doit être la cause immédiate et certaine de ce préjudice.

Le délégué poursuit en abordant les questions du président, et s'interroge sur le point de savoir s'il n'y a pas également un risque à ne pas intervenir et à ne pas infliger d'amende et de s'apercevoir ensuite qu'il y avait effectivement un abus si flagrant que le marché était monopolisé et que les nouveaux venus ne pouvaient plus s'y implanter. Il est risqué d'agir trop vite, mais il est également risqué d'attendre trop longtemps, de sorte que l'intervention arrive trop tard pour être efficace. Le juge qui contrôle le Conseil de la concurrence a reconnu ce dernier risque en réduisant la charge de la preuve, n'exigeant pas que l'existence d'un abus soit démontrée, mais simplement que la probabilité du comportement soit établie.

Depuis novembre 2004, le Conseil de la concurrence dispose d'un deuxième instrument, calqué sur le modèle de l'article 9 du Règlement 1-2003 utilisé par l'UE : la possibilité d'accepter les engagements pour le compte des entreprises – et notamment les engagements de modifier leur comportement ou leur structure afin de mettre un terme à une conduite qui peut être qualifiée d'abusives. Il s'agit d'un outil très intéressant et l'on constate que ces engagements peuvent être assez rapides. Ils ont de plus en plus tendance à remplacer les mesures provisoires.

Le processus d'engagements présente un certain nombre d'avantages. Premièrement, il garantit que le changement est réalisable puisque c'est l'entreprise elle-même qui le propose. Deuxièmement, on peut supposer que si c'est l'entreprise qui est à l'origine de la proposition, elle agira en toute bonne foi. Troisièmement, du point de vue de la culture de la concurrence, l'avantage des engagements par rapport aux injonctions unilatérales est que l'entreprise sera incitée à endosser le diagnostic posé par l'autorité de la concurrence et à en discuter en interne, non seulement avec les avocats, mais aussi avec les responsables des ventes et le personnel opérationnel. Le délégué ajoute que si, de toute évidence, l'entreprise incriminée ne craint pas la sanction, elle n'est pas incitée à proposer des engagements. C'est pourquoi ces procédures d'engagements sont complémentaires des mesures provisoires et sont efficaces uniquement si elles sont relayées par une politique de dissuasion qui soit largement diffusée, compréhensible et transparente.

Le président explique que la contribution de l'EU s'interroge sur le fait de savoir si les engagements sont toujours fiables, parce que les entreprises qui les formulent peuvent y voir un intérêt stratégique. On pourrait certainement imaginer des cas dans lesquels une entreprise s'engagerait à augmenter ses prix à un très haut niveau, donnant ainsi satisfaction à tous ses concurrents puisque tous bénéficieraient ainsi d'une rente de monopole. Il n'y aurait plus de réclamation mais l'engagement pourrait s'avérer anticoncurrentiel. Le président demande à l'UE comment minimiser le risque d'un tel scénario. Il lui demande également de décrire l'expérience de la Commission européenne dans le recours à des fiduciaires pour vérifier la qualité et le respect des engagements.

Un délégué de l'UE fait savoir que la Commission travaille actuellement à une révision de sa politique en matière de mesures correctrices. Il reformule ensuite la question du président différemment : quel est l'outil le plus efficace : une mesure correctrice selon l'article 7 ou un engagement selon l'article 9 ? Mais il faut alors s'interroger sur la signification de « plus efficace ». L'efficacité peut se mesurer en termes de temps, de qualité, de ressources ou de coûts. Les décisions d'engagement comportent un élément d'asymétrie de l'information qui peut autoriser des mesures correctrices plus spécifiques, sachant qu'elles sont proposées par les parties. Il faut également s'inquiéter de la transmission des informations à l'autorité de la concurrence. Il existe bien évidemment des incitations stratégiques à ne pas fournir les informations. À cela s'ajoutent les problèmes de contournement, d'entreprises qui proposent des solutions qui en fait ne sont pas efficaces, et la possibilité que le processus d'engagement soit utilisé pour promouvoir la coordination.

Le point essentiel concernant les mesures comportementales est qu'elles soulèvent des aspects dynamiques qui sont absents des mesures correctrices structurelles. Le suivi est l'un des principaux points à traiter, et les agents fiduciaires ont à l'évidence un rôle possible à jouer. Il existe un lien entre les mesures structurelles et les mesures d'application des décisions en matière de fusion, pour lesquelles les agences ont une longue expérience du recours aux fiduciaires. Mais le suivi ne se résume pas aux questions de respect des obligations, qui peuvent même revêtir une importance secondaire par rapport à l'efficacité de la mesure dans le temps. Les mesures fondées sur les changements de comportement sont par essence des processus d'essai et erreur qui peuvent nécessiter une adaptation dynamique. En théorie, ces mesures doivent évoluer au même rythme que les transformations du marché. Dans une certaine mesure, il semble inévitable de devoir partager le pessimisme qui ressort de certaines soumissions concernant les mesures correctrices fondées sur les performances, peut-être moins concernant les mesures fondées sur les comportements et certainement moins pour les mesures structurelles. Le délégué mentionne le fait que la Commission partage la position norvégienne concernant les avantages des mesures structurelles. Mais il souligne également que les mesures correctrices parfaites n'existent pas, et qu'il faut admettre que même des mesures imparfaites peuvent être préférables à l'absence de mesures dans certains cas.

Enfin, le délégué de l'UE fait valoir que, dans le contexte des fusions, l'expérience des fiduciaires a été très positive. Le rôle d'un fiduciaire dans les affaires de fusion est souvent différent de celui qu'il est susceptible de jouer dans les mesures correctrices pour abus de position dominante, surtout si l'on songe aux mesures correctrices d'ordre comportemental par opposition à celles qui sont structurelles.

La contribution de la République tchèque fait observer que l'un des inconvénients possibles de l'acceptation d'engagements tient au fait qu'ils peuvent priver les victimes de la capacité d'engager une procédure civile, car un engagement s'accompagne souvent d'une absence de décision finale sur le point de savoir si la loi a été violée. Le président demande si cela constitue un problème en République tchèque.

Un délégué de la République tchèque explique que le Bureau tchèque de la concurrence s'efforce désormais beaucoup plus souvent de régler les affaires par l'adoption d'engagements. Les engagements sont utilisés dans les cas où un abus de position dominante est la conséquence d'une négligence, ne dure pas et n'entraîne pas de changements substantiels sur le marché. En revanche, les sanctions et les mesures correctrices sont ordonnées par l'Autorité de la concurrence uniquement dans les cas de violation grave ayant un impact négatif et durable sur un grand nombre d'entités, ou dans les cas de violations répétées par la même entité. Les sanctions sont particulièrement appropriées dans deux cas : 1) dans les cas d'abus intentionnel de position dominante comportant des effets graves ou irrémédiables sur la concurrence ; et 2) dans les cas où une partie impliquée dans la procédure n'accepte pas les objections formulées par l'autorité de la concurrence et poursuit son comportement illicite. Cette dernière catégorie inclut les cas dans lesquels une partie fait semblant de coopérer avec l'autorité de la concurrence, son véritable objectif étant de retarder la décision finale. Pour illustrer ce point, le délégué mentionne deux affaires. La première concerne une très grande entreprise qui distribue 99 % du gaz naturel en République tchèque. La seconde concerne le propriétaire d'un petit espace autour d'un arrêt d'autobus dans une petite ville. Les deux parties ont abusé de leur position dominante, mais à l'évidence il était nécessaire d'infliger une amende très lourde ou d'être très sévère dans le premier cas, tandis que dans le second, il suffisait de négocier et de mettre fin au comportement illicite, plutôt que d'imposer une lourde pénalité.

Revenant à la question précise du président, le délégué explique que la situation pour les tierces parties est difficile en République tchèque. Prouver l'existence d'une position dominante et la nature abusive du comportement exige beaucoup de ressources et d'expertise. D'un autre côté, les procédures civiles prévoient que le tribunal qui fixe les indemnités est tenu par la décision de l'autorité de la concurrence sur la réalité du comportement anticoncurrentiel et sur son auteur. Pour qu'il y ait un engagement, la tierce partie doit prouver que l'entreprise est en position dominante et qu'elle en abuse, et elle doit également calculer et justifier les indemnités.

#### **4. Discussion générale**

Le président exprime ses remerciements pour la discussion sur le point de savoir si les amendes sont utiles au moins dans certaines circonstances, et conclut qu'un certain consensus se dégage pour répondre par l'affirmative, notamment s'il est clair de prime abord qu'il y a position dominante et violation. Concernant les mesures correctrices, les participants estiment qu'elles peuvent être difficiles à utiliser, mais qu'elles sont souvent efficaces pour rétablir la concurrence. La discussion a également porté sur l'opportunité d'examiner de plus près l'efficacité des mesures correctrices, à savoir dans quelle mesure elles atteignent leur objectif. Ce serait un moyen d'éviter le risque de réglementation excessive ou défectueuse, tant en conservant la possibilité d'intervenir à temps. Il convient de mettre en place un processus plus systématique d'examen de l'efficacité des mesures correctrices passées. Pour ce qui est des engagements, une tendance naturelle semble se dégager en leur faveur. Toutefois, au moins deux contributions estiment qu'avant de recourir aux engagements, il faut déterminer s'ils sont appropriés et si les entreprises qui les proposent ne poursuivent pas des objectifs stratégiques. Recourir trop tôt aux

engagements risque aussi d'amoindrir l'effet dissuasif des actions civiles. Le président donne alors la parole à la Suède.

Un délégué de Suède fait observer que les amendes sont perçues comme ayant un effet dissuasif plus fort que les mesures correctrices (d'ordre structurel ou comportemental), qui sont limitées à certaines affaires ou à certains secteurs, alors que les amendes ont un effet sur les entreprises qui occupent une position dominante sur d'autres marchés. Le délégué précise également que lorsqu'on évoque des mesures correctrices « modérées », cela signifie que la gravité de la violation doit déterminer l'action engagée par l'autorité de la concurrence. Il est donc peu probable qu'une autorité de la concurrence soit disposée à accepter des engagements dans les affaires impliquant une violation très grave. Il ajoute que les mesures provisoires peuvent être un instrument efficace, comme l'illustre la contribution française, mais l'expérience suédoise montre que, sur les marchés très concentrés, le plaignant peut solliciter une mesure provisoire à l'autorité de la concurrence en tant qu'instrument concurrentiel. L'autorité doit donc faire preuve de prudence. Enfin, le délégué fait remarquer que les mesures correctrices structurelles et comportementales, sur les marchés réglementés par des organismes sectoriels, risquent de faire double emploi avec la tâche de l'organisme de réglementation. Une coopération très étroite entre cet organisme et l'autorité de la concurrence peut être nécessaire.

Un délégué du Brésil fait observer qu'en matière d'amendes, le Brésil ne fait pas la différence entre les ententes et les conduites unilatérales. Les entreprises dominantes comme les ententes peuvent être soumises à des amendes qui représentent 1 % à 30 % de leur chiffre d'affaires. Toutefois, dans la pratique, les amendes les plus élevées ont été infligées aux seules ententes, ce qui montre que le Brésil fait preuve de plus de circonspection pour les conduites unilatérales. Dans ce pays, la plupart des affaires de conduite unilatérale impliquent des entreprises verticalement intégrées qui se livrent à des pratiques d'éviction sur un marché en aval. Les mesures correctrices s'avèrent très difficiles à concevoir – beaucoup plus que les amendes –, mais elles sont plus efficaces. Pourtant, les autorités brésiliennes considèrent que l'effet dissuasif des amendes est une nécessité. Une décision est parfois plus efficace et plus rapide lorsqu'il y a un engagement. Les discussions au niveau judiciaire sont nombreuses au Brésil, aussi l'application des décisions des tribunaux peut prendre des années, tandis que les engagements sont mis en œuvre plus rapidement et plus efficacement.

Un délégué du BIAC plaide en faveur de l'adoption systématique de mesures correctrices modérées, adjectif qui doit être interprété comme qualifiant une mesure qui ne paralyse pas l'innovation ou l'efficacité économique, tout en permettant de rétablir et de maintenir une concurrence adéquate et efficace sur le marché. Il ajoute que les mesures comportementales sont généralement préférables aux mesures structurelles, pour les raisons évoquées dans la soumission du BIAC et dans la note du Secrétariat.

Un délégué du Canada souligne que la législation soumise à la Chambre des communes n'a pas pour objet d'instaurer des amendes punitives, mais entend bien introduire un effet dissuasif ou une incitation à respecter la loi. La manière dont les États-Unis abordent la question de la restitution des bénéfices indus jette un éclairage intéressant sur la problématique des amendes. Les agences américaines n'imposent pas d'amendes civiles, mais la FTC a réussi à obtenir des sanctions monétaires qui privent les entreprises qui abusent de leur position dominante des bénéfices qu'elles réalisent par leurs actions illicites. On pourrait établir un parallèle utile entre le régime américain qui associe la possibilité d'actions privées et d'ordonnances de restitution de bénéfices, et un système qui souhaite imposer des amendes ayant pour vocation d'obtenir cette forme de réparation sur le marché.

Le président demande si la FTC américaine a cherché à obtenir une restitution des bénéfices indus dans de nombreuses affaires de conduite unilatérale, et si ces affaires ont été suffisamment dissuasives.

Un délégué des États-Unis répond que la FTC n'a pas fréquemment recours à des ordonnances de restitution de bénéfices. Seuls quelques dossiers sont concernés, et la FTC examine toujours si de telles ordonnances pourraient être utiles dans les affaires futures. Périodiquement et pour un nombre très limité de dossiers, la réponse peut être positive. Il y a quelques années, l'agence a pris grand soin de formuler une déclaration qui restreint considérablement les circonstances dans lesquelles la restitution des bénéfices est utilisée comme mesure correctrice. La FTC continue de s'y tenir. Rien n'autorise à penser que cette mesure sera fréquemment employée à l'avenir.

Le président clôt la table ronde en soulignant la fréquence avec laquelle il a été dit que les autorités de la concurrence doivent faire preuve de prudence dans les affaires d'abus de position dominante et en matière de mesures correctrices. À moins d'être capable de citer un domaine dans lequel une telle prudence ne serait pas de mise, une telle déclaration est creuse. La prudence doit présider à toutes les actions engagées par les agences. L'appel à la prudence n'apporte pas de réponse sur ce qu'il y a lieu de faire et de ne pas faire. L'enjeu n'est pas tant d'être prudent que de trouver le juste équilibre entre une dissuasion suffisante et un excès de réglementation utilisé par les concurrents à des fins stratégiques, et la discussion d'aujourd'hui a permis de répondre à un certain nombre de ces questions.