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REMEDIES AND COMMITMENTS IN ABUSE CASES

- Executive Summary -

2 December 2022

This executive summary by the OECD Secretariat contains the key findings from the discussion held during Session IV of the 21st meeting of the Global Forum on Competition on 1 – 2 December 2022.

More documents related to this discussion can be found at oe.cd/rcac.

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Executive Summary

By the Secretariat[1]

On 2 December 2022, the OECD held a roundtable on remedies and commitments in abuse of dominance cases as part of the Global Forum on Competition. Considering the background note prepared by the OECD Secretariat, the written contributions, and the discussion by delegates and the expert panellists, the following key points emerged:

1. *The use of remedies and commitments in abuse of dominance cases has become quite common, but as their design and implementation continues to be a complex task, understanding the challenges they raise and when their use is optimal becomes of vital importance.*

As the number of competition authorities with the power to impose remedies and accept commitments continues to increase, the use of such tools in abuse of dominance cases has become widespread. According to OECD Competition Trends 2022, between 2015 and 2020, 21.7% of cases overall were resolved this way, with the percentage reaching 40.7% in OECD countries and nearly 11% in non-OECD countries. While resolving abuse cases through negotiated commitment decisions offer various benefits and may seem attractive, relying excessively on this procedure can result in suboptimal outcomes for both markets and the legal system. The alleged overuse of commitment decisions has faced criticism due to their failure to provide the necessary legal and policy guidance, particularly in the rapidly evolving digital economy where new and intricate theories of harm emerge. Also, the complex task of designing and enforcing appropriate remedies or commitments can become even more demanding for young or less experienced competition authorities, which may face additional institutional constraints, such as insufficient financial or human resources, lack of expertise, lack of widespread awareness about and acceptance of the benefits of competition law and policy.

The decision whether to accept commitments or not typically rests within the discretion of the competition authority. However, some jurisdictions specify circumstances in which they exclude the possibility to accept commitments (i.e. cases in which the very nature of the infringement calls for a fine, cases concerning serious abuses of dominance, recidivism, or when it would be either difficult to ascertain compliance with and the effectiveness of the commitments or where commitments could undermine deterrence).

2. *Both remedies and commitments aim to address a particular competitive concern that can arise from the abuse of a dominant position. While the terms "remedy" and "commitments" are sometimes used interchangeably in the context of competition policy, their precise meaning might differ among jurisdictions.*

Commitments refer to measures that firms voluntarily offer during an ongoing investigation, while remedies are measures that competition authorities can impose on their own initiative to put an end to an infringement regardless of whether the investigated firm has offered any commitments. In most jurisdictions, however, a single, including an altogether different term, can be used, and if there is any distinction between the different origins of the final remedy, it is often implicit. Nonetheless, distinction between remedies and commitments can be useful as it allows for differentiation based not on their content,

[1] This executive summary does not necessarily represent the consensus view of the Global Forum participants. It does however identify key points that emerged from the Roundtable discussion, including the views of the expert panellists and the participants' oral and written contributions.

which in practice may be similar, or the same, but on the applicable procedures and the potential challenges that those procedures may raise.

3. *Despite the variety of legal terms and frameworks across the jurisdictions that govern the use of commitments and remedies in abuse of dominance cases, remedies and commitments must typically comply with two basic principles: effectiveness and proportionality.*

Effectiveness refers to a remedy's ability to bring an infringement to an end and to restore competitive conditions in the market. However, effectiveness may also include parameters that concern the ability of the competition agency to implement the remedy highlighting the significance of adequate resources and expertise. Proportionality, is a core principle of law in most jurisdictions, even if it is not explicitly mentioned in competition law provisions. Proportionality applies to various aspects of a remedy, including its type, duration, and monitoring mechanism. It also implies that remedies should not be used to improve the market situation in comparison to how it functioned prior to the abuse in an attempt to prescribe a specific market outcome. Rather, their purpose should be solely to restore the situation to its pre-abuse state. This consideration is particularly pertinent in regulated industries.

Proportionality also impacts the powers of the competition authority, as to remain proportionate throughout the period necessary to resolve identified competition concerns, remedies might need to be modified or withdrawn if the expected competitive conditions are restored earlier than anticipated, ensuring proportionality throughout the entire process of resolving identified competition concerns.

4. *Structural and behavioural measures that competition agencies can impose in the form of remedies or commitments in abuse of dominance cases present each its own set of challenges. As the effectiveness of remedies used in cases involving digital platforms is being questioned, the debate continuous about whether behavourial or structural remedies should be used and when, reflecting the importance of correctly identifying the theory of harm.*

Structural remedies focus on changing the market structure to promote competition and prevent future abuses by removing the source of the dominant's firm's ability and incentive to engage in the abuse of dominant position in the first place. While structural remedies are one-off, they can nonetheless be complex and time-consuming to implement, and may pose challenges relating to finding a suitable buyer for divested assets. Behavioural remedies, on the other hand, are designed to modify the conduct of the dominant firm. While they may offer more flexible and immediate solutions, their effectiveness may depend on ongoing and resource-intensive monitoring necessary to ensure compliance.

The presence of dominant firms with entrenched market power has questioned the effectiveness of behavioural remedies in abuse of dominance cases, which have been typically preferred, calling for the re-evaluation of traditionally sceptical positions towards the use of structural remedies in such cases. While in many jurisdictions, structural remedies tend to be preferred in merger cases while behavioural remedies in abuse of dominance cases, there is no inherent reason to favour either structural or behavioural remedies without considering the specific circumstances of the case.

The choice between structural and behavioural remedies depends on the nature of the abuse, the market dynamics, and the overall goals of competition authorities. A solid theory of harm in abuse of dominance cases is crucial, as it provides a strong foundation for imposing remedies, regardless of their complexity. As competition authorities need to focus on ending the anti-competitive conduct and its effects, they should start thinking about

potential remedies as soon as they formulate the theory of harm, ensuring that the two are not dissociated.

5. *The design and market testing of consumer-facing remedies require further attention.*

While competition authorities often focus their interventions on the supply-side of markets, they can also address competition issues on the demand-side by imposing consumer-facing (demand-driven) remedies. To be effective and to help overcome the dissonance between consumers' expressed preferences and their actual choices, such remedies must address consumers' heuristics and cognitive biases that affect their decision-making process and reflect existing information asymmetries. To improve effective design of consumer-facing remedies, competition authorities need to understand how consumers are likely to react to a remedy, which requires market testing before the remedies are finalised. While countries tend to foresee a possibility to gather feedback from third parties about the planned remedies, market testing of proposed remedies does not seem to be a universally adopted approach. Also, transparency and market testing of commitments may be limited due to confidentiality obligations, hindering monitoring and reporting of deviations by third parties.

6. *Effective enforcement and monitoring play a vital role in ensuring the success of any remedy.*

Even if a remedy appears effective in theory, it may perform poorly if firms find ways to circumvent or distort it, or they choose not to comply at all due to a perception that the competition authority will not thoroughly monitor the implementation process. If non-compliant firms believe that the risk of punishment, such as fines or stricter remedies, is low, the credibility of the remedy or commitment procedure becomes questionable. This means that effective enforcement requires competition authorities to put in place robust monitoring mechanisms, to have adequate human and financial resources, enforcement powers in case of non-compliance, and to cooperate with regulatory authorities in regulated markets. Of course, a trade-off exists between the effectiveness of the monitoring system and its implementation costs.

Competition authorities typically employ reporting obligations and appoint monitoring trustees, especially for complex and monitoring-intensive remedies. Monitoring trustees are approved by the competition authority and are appointed by the company. While trustees can alleviate the resource-constraints often faced by competition authorities, they may be more susceptible to potential biases. Also, as the experience of Korea, which has opted to empower the Korean Fair Trade Mediation Agency to monitor compliance rather than to rely on private trustees reveals, entrusting monitoring to the competition authority may be preferable as the authority is deemed as more accountable, with its expenditures subject to appropriate scrutiny, and its performance measured and evaluated annually. This approach ensures greater consistency and objectivity in compliance monitoring.

7. *While ex-post evaluations in abuse of dominance cases are sporadic, they can offer valuable insights to competition authorities about the effectiveness of imposed remedies, enabling the improvement of designing remedies in future cases.*

In an ideal scenario, competition authorities would not only monitor a company's compliance with imposed remedies but also evaluate their effectiveness. Ex-post evaluations, which seek to examine the effects of the enforcement decision on the market and assess whether the competition authority's intervention was correct, are more frequent in the context of mergers than abuse of dominance cases. Evaluating abuse cases is more intricate as determining the appropriate counterfactual, which represents the market situation without the abuse, can be challenging and requires careful consideration. While sporadic in the context of abuse of dominance cases, such evaluations still allow competition authorities to draw valuable lessons for designing more effective remedies in the future.