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REMEDIES AND COMMITMENTS IN ABUSE CASES – Summary of contributions

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These contributions are submitted under Session IV of the Global Forum on Competition to be held on 1-2 December 2022.

More documentation related to this discussion can be found at: oe.cd/sctr.

Please contact Ms. Lynn Robertson [E-mail: Lynn.Robertson@oecd.org], if you have any questions regarding this document.

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Remedies and Commitments in Abuse Cases

- Summary of contributions –

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Argentina

Argentina's Act N° 27.442 on Defence of Competition (LDC, for its acronym in Spanish) provides for the imposition of remedies on the infringing company or person, as well as the acceptance of commitments from the responsible party, in the context of the investigation of all types of anti-competitive conducts, including cases of abuse of dominance.

The abuse of a dominant position is a type of infringement that, like other practices prohibited by the LDC, is a concern for the Argentine authority −the National Commission for the Defence of Competition (CNDC, for its acronym in Spanish)−, as it limits, restricts or distorts competition or access to a market, but also because it is detrimental to the General Economic Interest.

The CNDC has a "case-by-case" approach to decide whether, upon evidence of an abuse of a dominant position, it shall impose a sanction, a remedy, or both. In all cases, however, the authority issues an order to cease the conduct under investigation.

If remedies are ordered or commitments are accepted during an investigation of an abuse of dominance, they are usually of a behavioural nature.

Finally, monitoring compliance with a commitment or, in specific cases, with remedies imposed by the authority, tends to be a highly complex process. The CNDC is working on introducing procedural improvements in order to gather more complete information on the post-commitment scenario of the market affected by the abusive practices committed.

Brazil[1]

This contribution introduces CADE's experience with remedies and commitments in abuse cases. CADE has imposed remedies and signed numerous cease and desist agreements[2] in the scope of unilateral conduct probes, including in regulated sectors, especially after Law 12.529/2011 (Brazilian Competition Law) came into force. In this regard, it is worth mentioning that, during the first 10 years of the current Competition Law (2012–2022), the Brazilian antitrust authority dealt with more than 80 abuse cases resolved with remedies or commitments, or both.

This paper examines CADE's experience with deciding cases through remedies or voluntary commitments instead of or in addition to sanctions; moreover, we will study the requirements and principles involved in making such decisions.

Below, we present CADE's approach to remedies and commitments, including the general rules and principles behind designing and enforcing antitrust remedies—which also apply to regulated markets. We also discuss the main guidelines and best practices for agreements signed in unilateral conduct probes. Subsequently, we illustrate the theory and practice presented in the previous sections with a summary of the Guiabolso-Bradesco case, which saw the execution of a cease and desist agreement to solve potential competition issues arising from an abuse of a dominant position in the financial sector. Lastly, we present the final considerations.

[1] This document was jointly prepared by Carolina Helena Coelho Antunes Fontes and Marcus Vinicius Silveira de Sá, the Head of the Unilateral Conduct Unit and a Coordinator of Antitrust Analysis, respectively. It was translated from Portuguese into English by Arianne Mesquita, Ariel Menezes and Bruna Assunção, in-house translators at CADE's International Unit.

[2] In addition to these instruments, the Brazilian antitrust authority issues interim measures to immediately stop abuses of a dominant position with evident anti-competitive effects. Interim measures, however, are not the focus of this contribution.

BEUC

This contribution considers remedies and commitments in abuse cases in the EU, in particular in consumer-facing markets. It looks at where they have sometimes fallen short and how they could be made more effective.

Since the entry into force of Regulation 1/2003, the European Commission has made ample use of its discretion and power to pursue prohibition/remedy and commitment decisions in abuse cases. Several of these proceedings have concerned consumer-facing markets and thus consumer-facing remedies and commitments. As this contribution explains, it is essential that when imposing remedies or commitments in such markets, their design is carefully thought through. This requires inter alia that the behaviour of consumers is carefully considered not only at the infringement stage but also in the design of remedies and commitments. It also requires effective and timely consultation of third parties who will be impacted by the remedies or commitments - market actors and, in consumer-facing markets, consumers through the involvement of consumer organisations.

Some past cases show that where this has not been the case, remedies or commitments can be ill-designed or ill-implemented and ultimately fail to bring the abuse effectively to an end. The 2004 *Windows Media Player* case, the 2017 *Google Shopping* case, and the 2018 *Google Android* case illustrate how remedies can be sub-optimal. The recent *Apple App Store* case in the Netherlands furthermore underlines the importance for competition authorities to be able to sanction the failure to provide acceptable remedies (or commitments).

Future remedies and commitments could benefit from more clarity on review and revision, as well as from more systematic ex-post evaluation of their effectiveness.

Finally, commitment and settlement decisions could be made subject to the inclusion of a mechanism offering some form of compensation to consumers who have suffered harm as a result of the abuse concerned.

BIAC

Business at OECD (BIAC) has provided input on remedies, commitments, and abuse of dominance on a number of occasions at past OECD sessions including the following contributions: Interim Measures in Antitrust Investigations;[1]

Ex Ante Regulation and Competition in Digital Markets;[2] Abuse of Dominance in Digital Markets;[3] Extraterritorial Reach of Competition Remedies;[4] Sanctions in Antitrust Cases;[5] Commitment Decisions in Antitrust Cases;[6] Remedies in Cross-border Merger Cases;[7] Remedies in Merger Cases;[8] and Remedies and Sanctions in Abuse of Dominance Cases.[9]

The points raised by BIAC in those contributions are relevant here as well. Rather than repeat those points, we summarize them below. We then draw further observations on a salient issue: the scope for cooperation among enforcement authorities with respect to remedies and commitments in abuse cases.

[1] OECD, Interim Measures in Antitrust Investigations – Note by BIAC, DAF/COMP/WP3/WD(2022)17 (June 9, 2022), https://one.oecd.org/document/DAF/COMP/WP3/WD(2022)17/en/pdf.

[2] OECD, Ex-Ante Regulation and Competition in Digital Markets – Note by BIAC, DAF/COMP/WD(2021)79 (Nov. 24, 2021), https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2021)79&docLanguage=En.

[3] OECD, Abuse of Dominance in Digital Markets – Contribution from BIAC, DAF/COMP/GF/WD(2020)38 (Nov. 25, 2020), https://one.oecd.org/document/DAF/COMP/GF/WD(2020)38/en/pdf.

[4] OECD, Roundtable on the Extraterritorial Reach of Competition Remedies – Note by BIAC, DAF/COMP/WP3/WD(2017)46 (Nov. 17, 2017), https://one.oecd.org/document/DAF/COMP/WP3/WD(2017)46/en/pdf.

[5] OECD, Sanctions in Antitrust Cases – Contribution by BIAC, DAF/COMP/GF/WD(2016)54 (Nov. 16, 2016), https://one.oecd.org/document/DAF/COMP/GF/WD(2016)54/en/pdf.

[6] OECD, Commitment Decisions in Antitrust Cases – Note by the BIAC, DAF/COMP/WD(2016)31 (June 8, 2016), https://one.oecd.org/document/DAF/COMP/WD(2016)31/en/pdf.

[7] OECD, Remedies in Cross-Border Merger Cases, DAF/COMP(2013)28, at 99-111 (Jan. 27, 2015), https://www.oecd.org/daf/competition/Remedies_Merger_Cases_2013.pdf.

[8] OECD, Remedies in Merger Cases, DAF/COMP(2011)13, at 279-288 (July 30, 2012), https://www.oecd.org/daf/competition/RemediesinMergerCases2011.pdf.

[9] OECD, Remedies and Sanctions in Abuse of Dominance Cases, DAF/COMP(2006)19, at 205-210 (May 15, 2007), https://www.oecd.org/daf/competition/38623413.pdf.

Bulgaria

In accordance with Art. 75 of the Law on Protection of Competition (LPC) the Bulgarian Commission on Protection of Competition (CPC) has the power to approve the undertaking of commitments by the defendant party under initiated proceedings for establishment of prohibited agreements or abuse of dominant position. The criteria and the procedure on considering proposals for undertaking of commitments under the Law on Protection of Competition are regulated in detail in Rules.

The law forbids the CPC to approve commitments where the alleged in the SO infringement has been qualified as grave. As regards the abuses of dominant position in accordance with the Rules these are the exclusionary abuses, where the competition on an appreciable part of the market is affected.

The LPC leaves the appraisal of the proposed commitments against the circumstances of the case at the full discretion of the CPC. The Rules on Commitments provide further guidelines to the Commission on the principles against which the commitments need to be assessed. Those principles require, inter alia, that the commitments, in order to be approved by the Commission, be proportionate to the gravity and duration of the infringement, lead to the immediate recovery of the competition and not only to the termination of the unlawful conduct, be relevant to the essence of the infringement, be unconditional, adequate and sufficient in order to guarantee the effective resolution of the competitive problems as well as to allow the CPC to control their fulfillment.

As part of the procedure, the CPC, once it has ruled further review of the commitments, informs all the parties to the proceedings inviting them to present their comments and/or objections within a deadline of no more than 30 days. The CPC also publishes a summary of the proposal for commitments in its register and a press release on its website containing the information regarding the consultation with the market participants. Within the term determined by the Commission which may not be longer than 30 days, all participants in the market may present information and opinions in relation to the proposed commitments.

The procedure ends with either a closed sitting decision of the CPC that approves the commitments or the resumption of the proceedings in case the CPC has not approved the proposed commitments. The decision sets also the deadline for the fulfillment of each commitment and it states that there are no further grounds for the continuation of the initiated proceedings.

The CPC exercises control of the full, exact and timely fulfilment of the undertaken commitments as it may, in its own opinion, at any time after the delivery of the decision for undertaking of commitments exercise all its investigative powers and has the power to impose periodic pecuniary sanctions for failure to fulfil a decision of the CPC approving commitments.

With regard to alleged abuse of dominant position by the Central Depository JSC expressed in imposing prices on management companies for different services which are due even if the respective service was not provided and that some of the fees are not proportionate to the volume of services actually provided, with Decision No 1629/2010 the CPC approved commitments by the Central Depository JSC to amend significantly its Tariff of Fees, substantiating the fees due per services provided.

Colombia

This contribution seeks to make a brief account of the latest Colombia's development regarding remedies and commitments in abuse of dominant position cases.

For this purpose, it is important to note that the national competition regime in Colombia stipulates as an anticompetitive conduct the abuse of dominant position in a relevant market[10]. In this sense, the Competition Authority, the Superintendence of Industry and Commerce, has the possibility of, in addition to imposing a monetary sanction, ordering the implementation of remedies that may be considered useful to improve the market conditions[11]. Likewise, the Superintendence of Industry and Commerce has the possibility of accepting commitments from the dominant agent, provided that certain requirements are met, to file the investigation without having to impose a sanction[12].

Hence, this document will explain the regulatory framework regarding the figure of abuse of dominant position in Colombian legislation.

It will also outline the procedure established by the Colombian competition law regarding the submission of commitments by the investigated parties in order to close the administrative procedure for abuse of dominant position, as well as the requirements that the competition authority has determined must be met so that said commitments are considered enough to file the investigation. In this regard, two cases that took place in recent years will be explained. Then, this paper will describe the regulatory framework that allows the Superintendence of Industry and Commerce to impose the obligation for the dominant party to comply with some remedies to improve the competitive conditions in the relevant market. Likewise, some practical cases will be presented.

Besides, the contribution will emphasize on the importance of economic analysis in anticompetitive conducts analysis, particularly, in abuse of dominance cases. Finally, one of the latest reforms that the Colombian legal regime has undergone will be presented, consisting on the incorporation of a compliance directorate that will be in charge of monitoring compliance with both the remedies and the commitments that are imposed and accepted in the framework of investigations for abuse of dominant position.

10 Article 50 Decree 2153 de 1992.

11 Articles 1 and 3 Decree 4886 of 2011

12 Article 16 Law 1340 of 2009.

Costa Rica

Costa Rican competition law allows for the "early termination" of an ongoing enforcement procedure for investigating relative monopolistic practices, that include vertical restraints and abuse of dominant position. Early termination enables the conclusion of the procedure without requiring the competition authorities to follow all procedural steps and rules of the special competition procedure. One of the forms early terminations can take place is referred to the offering of commitments, this requires the commitment from the economic agent to suppress the conduct and counteract its anticompetitive effects, by complying with the conditions offered by the economic agent and accepted by the Authority.

The application may be submitted by the economic agent at any time, from the time the agent is informed of the state of objections until before the beginning of the oral and private hearing before the Superior Body of the corresponding competition authority.

As established by law, the application does not imply that the party accepts that it engaged in illegal conduct.

Assessing the proposal requires consideration of possible anti-competitive effects attributed to the conduct under investigation and the possibility of re-establishing competition conditions in the market. Furthermore, it must also be assessed if:

a) The proposal eliminates the conduct under investigation and its possible anti-competitive effects.

b) The commitments offered may be implemented quickly and effectively.

c) Monitoring compliance and the effectiveness of commitments is feasible and effective.

COPROCOM has legal power to apply this legal faculty since 2013, in such period it has been received six early termination applications with an offer of commitments. Three of these cases relate to proceedings brought by alleged collusive agreements, and the remaining three applications related to relative monopolistic practices, of which two were approved, and one was rejected. Since Competition Reform Act entered into force in 2019, SUTEL has received two applications for early termination of the procedure with an offer of commitments, both related with vertical restraints, said applications were approved.

Finally, for smaller authorities, early termination of an enforcement procedure is an opportunity to eliminate market distortions more efficiently, as they do not need to wait for a process that could take a long time and could be appealed in Judicial Court. However, the difficulty in using this instrument, lies in the proper selection of conditions, which depend on the alleged conduct, its effects on the market, the industry concerned, and the measures taken to ensure compliance with the agreement. If not carried out properly, early termination will promote the impunity of anti-competitive behaviors.

Croatia

The commitment decisions contribute to fast eliminating the negative effects on competition due to undertaking's actions or a failure to act. The remedies, structural and behavioural, ensure that the competition on the market is again restored and ensured. In order for undertakings to be aware of their possibilities and procedure, the competition law should provide for precise provisions describing the relevant procedural elements like the moment until the commitments can be proposed, the criteria used by the competition authority when considering the appropriateness of the commitments proposed market test or period of time for complying with set measures.

In practice of the Croatian Competition Agency (CCA) the commitment decisions were frequently used in alleged abuse of a dominant position cases. The structural measures prevailed but in many cases, they were accompanied with behavioural measures in the form of regular reporting to the competition authority by the undertaking or by an independent trustee.

Types of commitments and remedies most frequently offered and accepted by the CCA include modifications and amendments of the provisions of agreements or general terms of business, change of price lists or application of new price lists to make it more transparent and equally applied for the same categories of buyers, publishing on the website notices for buyers, adoption of compliance programs and training programs. However, the implementation of all proposed measures has to be confirmed by the evidence submitted to the CCA. The proceeding against the undertaking can be reopened in the case of non-compliance and then the fine can be imposed.

There are several positive effects of the use of remedies and commitments, no infringement is established and no fine imposed, the effective competition on the market is quickly restored and the competition authority can complete the proceeding fast and use its resources for other pending or new cases. In the context of new type of cases in digital markets, revision of some traditional measures and remedies could be useful as well as commitments combined with interim measures.

Ecuador

The Ecuadorian regime of Competition Law is relatively young, the Organic Law of Regulation and Control of Market Power (LORCPM, hereinafter) is only 11 years old and the Superintendence of Market Power Control (SCPM, hereinafter) just turned 10 years old last October. Nevertheless, taking into consideration the complexity of abuse of dominance, the experience of the SCPM with such cases is meaningful. Thus, there is important experience to be shared regarding commitments and remedies.

This paper will be divided in the following sections: first, it will explore commitments, where we will describe its rules, main particularities, and the criteria used by the SCPM in order to assess and accept them; the frequency of commitments in abuse of dominance cases; their guidelines; and, its compliance. Second, we will explore remedies their difference with commitments; the criteria for their application; its rules; their frequency; and their compliance, in order to conclude with the most important aspects of both.

European Union

Under EU competition law, the Commission can impose remedies pursuant to Article 7(1) of Regulation 1/2003 or make commitments binding on undertakings, pursuant to Article 9(1) of Regulation 1/2003. Remedies are imposed in a decision finding an infringement, whereas when accepting commitments, the Commission does not conclude on the existence of an infringement. In terms of procedure, the main difference between remedies and commitments is that only the latter are market tested and therefore subject to the views of third parties.

The Commission has discretion in the choice between a prohibition decision and a commitments decision. The choice depends on the specific features of each case and the objectives pursued by the Commission: deterrence, punishment and precedent value on the one hand, efficient and swift solving of competition concerns on the other. The choice of a specific type of remedy/commitment is subject to the requirements of necessity and proportionality and always based on the facts and circumstances of each individual case.

In its practice as regards abuse cases, the Commission uses both prohibition and commitment decisions. The figures for the past years do not show any discernible trend towards adopting more decisions of one type versus another for abuse cases. As regards the type of remedies/commitments, the Commission has so far tended to choose behavioural remedies more often than structural remedies in the context of both prohibition and commitment decisions. The design of remedies/commitments being inherently linked to the type of infringement, it naturally follows that cases targeting novel theories of harm may require imposing or accepting new forms of remedies/commitments (as was the case in the Google Android decision).

In addition to the structural/behavioural remedies/commitments, the Commission usually also imposes obligations on the undertakings that are meant to facilitate the monitoring of the remedies/commitments and ensure compliance, such as reporting obligations or the appointment of a monitoring trustee. In case of non-compliance, the Commission can impose a fine on the infringing undertakings. In practice, however, the Commission has only done this in one instance.

The Commission does not shy away from intervening in regulated sectors and imposing remedies/commitments when warranted. When intervening in regulated sectors, cooperation with sector regulators is an effective tool to avoid contradicting outcomes. It can also be useful for the competitive assessment and for the design of effective remedies.

The ex-post evaluation of adopted remedies/commitments can provide important lessons that the Commission can use to improve the design and implementation of future remedies/commitments. The Commission recognizes the importance of this type of evaluation and in this context, has recently launched a call for tenders for a study of its remedies imposed in non-cartel antitrust cases. The study aims, inter alia, at drawing broader policy conclusions and making recommendations for improving enforcement practice.

Remedies and commitments are a very important tool in antitrust cases in general, including abuse cases. While the identification and design of effective remedies/commitments is a complex exercise, they are an important tool to preserve the competitive process. The Commission is therefore committed to make full use of its broad powers in this area.

Hungary

The Hungarian Competition Authority (hereinafter: GVH or the Authority) puts great emphasis on alternative outcomes of its competition proceedings. The Authority considers that it is important to open the door for remedies and commitments not only in abuse cases but also in general. This may greatly serve the interests of consumers. The legal framework for these issues is laid down in the Hungarian Competition Act. There is a significant difference between the acceptance of commitments and the imposition of remedies. In a proceeding closed by a commitment, the Authority does not completely clarify the facts of the case and does not carry out the substantive assessment of the conduct in detail. The Authority can order the fulfilment of a commitment pursuant to Article 75 of the Competition Act without establishing the infringement and the imposition of a fine. By contrast, the imposition of remedies comes with the establishment of the infringement, and the Authority prescribes certain obligations, including behavioural or structural remedies. In the last five years, the Authority closed four abuse cases, and mainly applied behavioural remedies. Nevertheless, in another case, a structural remedy also came to the fore.

Japan

Regulation against single-firm conduct based on the Antimonopoly Act (AMA) is enforced by the Japan Fair Trade Commission (JFTC) in most cases, primarily through cease-and-desist orders ordering remedies. The JFTC has also been handled single-firm conduct cases following the commitment procedure, since the procedure was introduced by the amendment of the AMA, which was made in 2016 and came into effect at the end of 2018. In addition, when a suspected violator voluntarily offers to take remedies during the case investigation, the JFTC may terminate the investigation on the condition that the remedies are implemented.

In most cases, remedies include termination and non-repetition of the violation or suspected violation, dissemination of the remedies to relevant players including consumers and business partners, establishment of a system to prevent recurrence such as formulating guidelines for compliance with the AMA, and periodic reporting to the JFTC on the status of the implementation of the measures, but, in general, remedies may be designed on a case-by-case basis. For example, in the commitment case of Amazon Japan G.K. in 2020, the approved remedies included payment by Amazon Japan to its suppliers of money to recover the disadvantages caused by the suspected violation. In the commitment case of BMW Japan Corp. in 2021, the remedies included establishment of a contact point outside BMW for dealers to report suspected violations of the AMA in the future.

The basic policy of the JFTC is to strictly enforce the AMA, by cease-and-desist orders and other tools, with respect to single-firm conduct. On the other hand, commitment procedures and closing of investigation with remedies have the advantages that the investigation may be terminated earlier and remedies may be taken more quickly. In Japan, procedures for single-firm cases are selected depending on the characteristics of individual cases while taking the advantages of each procedure into consideration.

The number of single-firm cases handled by the JFTC in recent years is larger than before. Utilizing commitment procedure and closing investigation with remedies appears to have boosted the number of cases.

Korea

When a market dominant business has been detected abusing its power, it is necessary to stop the violation and prevent a recurrence. The Korea Fair Trade Commission (hereinafter referred to as the "KFTC") rectifies the violations to restore the competitive order of the market in two ways: remedies and commitments.

The KFTC conducts reviews according to a quasi-judicial procedure, but the legal nature of a remedy imposed by a commitment is an administrative disposition. The KFTC can impose a remedy by accepting a commitment. But to enhance the effectiveness and ensure the consistency of the remedy, the agency has established the "KFTC's Guidelines for Imposing Remedies." The Guidelines stipulate that remedies shall be imposed by considering effectiveness, relevance, clarity, feasibility, and proportionality. Structural remedies are not, in principle, impossible under the current Monopoly Regulation and Fair Trade Act (hereinafter referred to as the "MRFTA"). But the general view is that even if possible, they should be imposed in exceptional cases when it is difficult to guarantee the effectiveness and feasibility of behavioral remedies. However, in the digital economy, the status of a dominant platform is transferred to and consolidated in adjacent markets, which deepens concerns over whether to adopt structural remedies.

The KFTC may decide whether or not to accept a commitment instead of a remedy if a business entity requests a commitment decision. Whether to accept the commitment is decided based on whether the remedies are balanced with sanctions and are appropriate as protective measures. However, the commitment is not implemented if the violation is serious and the scale of unjust enrichment or harm is substantial. When the commitment decision is implemented, the KFTC decides whether to admit the final commitment after collecting stakeholders' opinions. The decision on whether to implement the commitment procedures is not subject to litigation, but a lawsuit may be filed if there is a third party whose legal interests are infringed upon after the commitment decision is finalized.

Commitments have an advantage over remedies since they allow quicker and more direct compensation to harm. However, we should keep in mind that there are growing concerns that the commitments may be an acquittal for businesses and pay more attention to managing the implementation of the commitments. It is important to keep the balance between remedies and commitments as they each have merits and demerits.

Latvia

The goal of this paper was to give an overview of the CC's practice in abuse of dominant position cases. We gave a general outline of the framework on the application, imposition, and evaluation of corrective measures in abuse of dominant position cases. This paper focused exclusively on the rules governing the choice between a commitment or a settlement bundled with remedies. It also provides an insight into CC practices to ensure compliance of the remedies and their ex-post evaluation.

Although there are no formal guidelines on the application of these measures, the CC follows a general structure when deciding the appropriate measure in the abuse of dominant position cases. A prerequisite for the application of the remedy is that the CC should be able to clearly define the infringement before selecting the appropriate measure to the relevant situation. Generally, when deciding on the best fitting corrective measure, the CC follows the principles of necessity, suitability, and proportionality. It also considers the efficiency objectives and the length and the financial cost of a potential lawsuit. That is why, the CC prefers a cooperative approach with the undertaking rather than unilateral imposition of the remedy.

Although the CC is willing to cooperate with the undertakings, commitment initiatives are very rare. There is no set time limit within the national legislation that sets a strict deadline until which the undertakings must propose the commitments, however, in case they do, the CC considers the prior cooperation between the undertaking, for instance, whether it was willing to exchange information or to maintain communication with the CC in a timely manner. The CC closely evaluates whether the proposed commitment alleviates the violation entirely. There have been cases when the proposed remedy is rejected, however, if the undertaking is still willing to cooperate, it can propose a settlement with the CC. A settlement is usually bundled together with a remedy.

In most cases, the CC resorts to behavioural remedies, however, in one case, a structural remedy was applied. It was imposed on an undertaking fulfilling public functions and, in the meantime, also acting as private commercial business in the same sector. The main reason for this measure was the non-compliance with the previously imposed behavioural remedy. Despite this example, the undertakings are complying with the remedies. The CC may use various tools to encourage the compliance, such as, a fine or re-investigation with an imposition of a stricter remedy and fine.

The monitoring of compliance depends on two factors, first, the wording of the remedy, and second, whether the remedy is for a definitive or an indefinite period. The vaguer and generalised the remedy is, the more challenging and time consuming it is to monitor the behaviour.

Mexico[*]

The Federal Economic Competition Law (LFCE) provides that any economic agent subject to an investigation for a relative monopolistic practice (abuse of dominance) or unlawful concentration may be benefited with an exemption or reduction of fines (and an early termination of the investigation procedure) in exchange for commitments presented to and approved by the Mexican Federal Economic Competition Commission (COFECE or Commission) that suspend, suppress or correct the illegal conduct and restore the process of competition and free market access. This contribution i) provides a brief explanation of the exemption or reduction of fines established in the LFCE, describing the stages for the presentation of commitments during the investigation and the corresponding resolution by the Board of COFECE; ii) present a relevant case; and iii) briefly describes some of the challenges of the early termination procedure.

[*] Contribution by the Mexican Federal Economic Competition Commission

Slovenia

1. In the past 10 years or so, Slovenian Competition Protection Agency (CPA) has had relevant experience in accepting commitments, as well as imposing remedies. Commitments are prevalent in CPA's practice, since there has been four commitment decisions as opposed to one remedies decision adopted in the relevant period. There have been commitment decisions in 2011, 2017, 2018, and 2020, which indicates a growing trend and the remedies decision in 2011.

2. Deciding or either remedy or commitment is guided mostly by EU soft law and case law of the European Commission and European courts. National law does not include any specific criteria on when and how to apply either. The general guiding rule is the principle of proportionality which requires the applied measures to be appropriate and necessary for achieving the goal of eliminating the infringement or a competition concern, and not any stricter. Other factors considered are in particular the nature of a suspected infringement, nature of the commitments and their ability to quickly and effectively solve particular competition concerns, and the need to ensure deterrence.

3. An undertaking can propose commitments at any point between the procedural decision on the initiation of infringement procedures and up until the expiry of the deadline for a reply to Statement of Objections. The CPA can impose remedies at any point after initiating the procedure, as they represent another form of penalty, besides monetary. In our view, a competition authority should be open to the possibility of accepting commitments throughout the procedure (until procedurally possible), but should consider remedies especially in the penalty setting stage.

4. Commitments are subject to market test based on EU legislation and soft law, however there are no national rules outlining the features of a market test. It is usually done in a form of public call on the CPA's website; interested parties offer comments. Given the coercive nature of remedies, it is unlikely that the CPA would perform a market test; we have not done it in the remedies case so far. We would however inform the parties of intended remedies and require their feedback.

5. Commitment and remedies decisions are subject to direct judicial review. Given the nature of the commitments, it is however very unlikely that a commitment decision would be appealed. Commitments are proposed by the parties and finalised in highest possible consensus with the CPA. In these circumstances, it is questionable if the party would even be able to show legal interest upon appeal. If there would be an intervening party in a specific case however, they would have legal interest for appeal. Remedies decisions are also subjected to direct judicial review and the appellate procedure can be as vigorous as in any infringement decision.

6. When deciding on behavioural versus structural measures, we are furthermore relying on the principle of proportionality according to which structural measures are used when there are no equally effective behavioural measures available.

7. The CPA detects a very high level of compliance with the commitments. There was no instance of rescinding the commitments or issuing non-compliance penalties. Parties are required to periodically report on compliance to the CPA. There is also a valuable element of reporting from other interested market actors, which are eager to report to CPA any case of (perceived) non-compliance. The same goes for ex-post evaluations. While we do not have a dedicated ex-post evaluation unit dedicated to commitments and remedies only,

there is valuable feedback often received from other market actors. Furthermore, the CPA issues yearly reports that touch upon specific

Chinese Taipei

Administrative decisions attaching conditions or undertakings are normally made in merger cases. The purpose is to eliminate concerns regarding the creation of competition restraints to ensure that the overall economic benefit outweighs the disadvantages from competition restraints. In the case involving PX Mart's intended merger with RT-Mart, the CTFTC attached the undertaking that the applicant promised not to increase prices arbitrarily after the merger in order to alleviate concerns about the creation of unilateral effects and the elimination of countervailing power.

The CTFTC made the administrative decision to attach conditions or undertakings in a case associated with the abuse of market position by an enterprise. The Taiwan Stock Exchange Corporation concealed cost information from information vendors. In addition to requesting that they transmit "fixed fees," the corporation also charged additional "variable fees" in violation of the Fair Trade Act ("CTFTA"). As a result of the violation, the CTFTC requested that the corporation take corrective measures to cancel the practice of charging fixed and variable fees separately for the use of information.

Other cases in which the CTFTC requested that enterprises abusing their market position adopt concrete measures and make commitments to correcting their unlawful acts include Microsoft Taiwan taking advantage of its monopolistic position in the domestic software market in violation of the CTFTA and asking for administrative settlement by presenting an administrative settlement offer letter; Y Game Credits Company (Y not the real name of the company) signing exclusive dealing clauses with brick and mortar stores in violation of the CTFTA and offering to stop and correct the unlawful act by making a commitment according to investigation suspension regulations; and Qualcomm Semiconductor Corporation violating the CTFTA by using its monopolistic position in the baseband processor market and refusing to license patented technologies to competitors but eventually reaching a settlement with the CTFTC in accordance with the Administrative Litigation Act and making the commitment to stop and correct the unlawful act in accordance with the content of the settlement.

Türkiye

In 2020, a new mechanism aiming at terminating investigations has been adopted in the Turkish competition law regime. Therefore, the commitment mechanism has been introduced to Article 43 of Act no. 4054 on the protection of competition (Act no. 4054) by an amendment consisting of two new paragraphs. In 2021, a Communiqué on commitment procedure has been issued in order to explain the main principles of the new mechanism.

Commitments shall be accepted to eliminate the competition problems arising under the scope of Article 4 or 6 of Act no. 4054. Within this context, parties to two categories of anticompetitive agreements cannot benefit from the commitment procedure:

1) Agreements among competitors with respect to price fixing, sharing customers, suppliers, territories or trade channels, restriction of supply or imposing quotas, bid rigging, sharing competitively sensitive information such as price, production or sales volumes planned for the future between competitors (hardcore horizontal restrictions)

2) Agreements concluded in a relationship between undertakings operating at different levels of the production or distribution chain, in order to determine the fixed or minimum price for the buyer (vertical resale price maintenance).

When accepting commitments, the Board does not observe any violation of competition law. It confirms that commitments offered by parties are likely to eliminate competition problems caused by investigated parties' practices.

Parties to an investigation can submit behavioral or/and structural commitments. Behavioral commitments are defined "commitments for regulating market behavior of the party concerned without changing the structure of the market". Commitments leading to a change in the market structure and imposing obligations on the party concerned such as transferring certain activities or partnership shares or assets are classified as structural commitments.

The Board can monitor compliance by the parties with the commitments by different means:

- The Board can demand parties to regularly prepare and submit reports as to the points referred by the Board in its decision.
- The Board can assign a third party to supervise the party's behaviors performed within the scope of accepted commitments.
- The Board can order the relevant party to make a cooperation with professional associations or relevant public authorities and institutions.

The Board can launch an *ex officio* examination procedure at any time with regard to commitments' monitoring.

When the parties entirely perform the commitments, they shall submit an attestation document to the Authority. Thereupon, the Board shall take a decision establishing that the parties have fulfilled the commitments.

The new mechanism provides a serious procedural economy to the involved parties as well as to the labor force of the TCA and it can be said that the commitments mechanism will continue to be one of the most efficient means to eliminate competition problems observed in the markets.

United States

The Federal Trade Commission (FTC) and the Antitrust Division of the United States Department of Justice (DOJ) (collectively, the Agencies), the two federal agencies charged with enforcing competition law in the United States, face an economy marked by concentration. Dominant firms are controlling key arteries of commerce, which provides them with the ability to pick winners and losers and shape the trajectory of innovation. The Agencies are committed to addressing these concerns at their core by focusing on both structural conditions giving rise to dominance as well as the incentives driving the anticompetitive conduct. Implementing successful remedies to address harms from monopolization offenses and restore competition is central to this effort.

Remedies in monopolization cases typically involve either structural relief (e.g., divestitures and breakups) or behavioral relief. This paper focuses on occasions when the Agencies have sought, and courts have ordered, remedies that include divestitures as relief for illegal monopolization. It also addresses situations where, when structural relief is unavailable or would be incomplete, the Agencies have focused their remedies on not only preventing the illegal actions and strategies going forward, but also to denying the wrongdoer the benefits of its illegal actions. Examples of such actions can include, inter alia, disgorgement and equitable monetary relief for victims, actions that address executive responsibility, and bans on executive participation in the relevant sector.