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REMEDIES AND COMMITMENTS IN ABUSE CASES – Contribution from Business at OECD (BIAC)

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

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Remedies and Commitments in Abuse Cases

- Contribution from Business at OECD (BIAC) –

1. Introduction

1. *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]

2. 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.

2. Summary of Key BIAC Observations on Remedies and Commitments in Abuse Cases

3. Interim Measures in Antitrust Investigations: Interim measures should be used judiciously, i.e., only when there is a prima facie showing of a potential infringement and the need to prevent a clear and irreparable harm to competition. Such measures should not be used as a convenience to avoid substantive and procedural requirements seen as too high and inconvenient obstacles. Rather, careful balancing should take place to prevent the high

[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.

costs of market intervention prior to a final finding on the merits. Considerations of due process and procedural fairness should be more carefully scrutinized in situations where agencies are empowered, without preliminary review, to impose interim measures.

4. Ex-Ante Regulation and Competition in Digital Markets: While regulation might, in limited circumstances, be appropriate to address well-defined concerns, ex ante regulation if not properly calibrated may give rise to significant static and dynamic inefficiencies. The diverging nature of ex ante regulations proposed in a number of jurisdictions indicates that the debate around ex ante regulation is not settled and has not resulted in globally aligned views on whether and how best to regulate digital platforms. Ex ante regulation tends to implicate a wider set of policy goals—including fairness, contestability of markets, data privacy, or consumer protection—than the predominant consumer welfare standard under relevant competition laws. Best practices for ex ante regulation of digital platforms should be developed.

5. Abuse of Dominance in Digital Markets: Competition authorities should take enforcement and/or remedial action only where a firm has abused its position of dominance and any such actions should be based on sound economic and factual underpinnings that justify intervention. Competition authorities should strive to design proportionate remedies to restore or establish competitive conditions to the impugned market. Competition authorities should balance the impetus to intervene against the interest in legal certainty and predictability of enforcement, which are vital to realizing economic and consumer benefits of new technologies. Where there are legitimate competition concerns, enforcement action should be taken in a manner that is proportionate and effectively addresses that failure, or those concerns, but does not chill innovation or hinder investment, which should remain of paramount concern. Where appropriate, remedial actions should be taken in a timely manner to address anticompetitive abuses.

6. Extraterritorial Reach of Competition Remedies: Businesses should be able to rely on the principle that adherence to the laws of the jurisdictions in which they operate will protect them from legal intrusion into their commercial affairs. Unrestrained extraterritorial enforcement creates the risk that the most restrictive competition laws will dictate business practices on global level. No antitrust authority should impose remedies that dictate commercial outcomes in other jurisdictions absent a full consideration of the principles of jurisdictional limitations, enforcement authority, domestic effects and comity. In competition cases, agencies should recognize that comity must apply to situations that go beyond a true conflict in order to allow foreign sovereigns to regulate their own commerce based on their own economic and commercial standards.

7. Sanctions in Antitrust Cases: For these types of conduct, remedial or injunctive relief may be most appropriate. Fines are not always an appropriate remedy for abuse of dominance, vertical and other non-cartel restraints except in certain circumstances such as where there has been a clearly established intentional failure to comply with a pre-existing order. While there is difficulty in calculating optimal sanctions, competition agencies should avoid imposing penalties at levels that far exceed what would be necessary to deter unlawful behavior as the principle of proportionality must also be respected. Agencies should enforce their antitrust laws over foreign commerce only where there is a direct, substantial, and reasonably foreseeable effect on domestic consumers, and only as to the extent of that effect. Genuine, effective corporate compliance efforts will be strengthened if good faith and reasonable efforts to comply are taken into account as a mitigating factor when sanctions are under consideration.

8. Commitment Decisions in Antitrust Cases: The increased use of commitment procedures raises a number of issues relating to: (1) the enforcement of competition law generally; and (2) the wide discretionary powers of competition agencies to impose

commitment decisions, coupled with concerns relating to transparency, adequate procedural guarantees, due process rights and other safeguards for the parties that are under investigation (as well as affected third parties), as well as the absence of meaningful judicial oversight and review. Suggestions for improvement include: (1) identification of the scope for over-reaching commitment decisions that may bring about unwanted extra-territorial effects in foreign jurisdictions; (2) ex-post evaluation of commitments to build an understanding of the effects of the imposed remedies and their proportionality, without providing agencies the power to revisit those remedies; (3) reflection on the question of how the due process rights of parties can be strengthened, in particular by full access to file rights and by providing full details of the allegations made against them; (4) work towards guidelines that would reduce the scope for divergence among agencies as to the availability of commitment proceedings and the nature of remedies; and (5) enhanced consultation mechanisms among agencies to avoid inconsistent outcomes that may not only give rise to inefficiencies, but also compromise proper and effective competition law enforcement.

9. Remedies in Cross-border Merger Cases: Businesses contemplating cross-border transactions face a real threat of losing efficiencies due to exceedingly broad, inconsistent, and/or contradictory remedies. In addition to harming business, these potential costs inure to the detriment of consumers, subverting the aims of effective competition policy. In order to mitigate these risks, enforcement authorities should adopt remedial approaches in cross-border transactions that are: (1) informed by convergent principles and cooperation early in the merger review process; (2) focused on addressing competitive harm rather than other non-competition policy considerations; (3) narrowly tailored to address such harm; (4) uninfluenced by rigid presumptions and adapted to the facts of each case; and (5) clear and straightforward.

10. Remedies in Merger Cases: There is no "one size fits all" merger remedy policy. Agencies' stated preference for structural remedies should be reassessed given that such relief can, in some cases, be unnecessarily overbroad and needlessly damage the transaction value. Agencies should not act reflexively or dogmatically and should exercise judgment in each case to ensure that the scope of the remedy is able to prevent competitive harm and proportionate to the potential harm.

11. Remedies and Sanctions in Abuse of Dominance Cases: Remedies in abuse cases should be directed toward the promotion of competition, not aiding particular competitors. Remedies should be proportionate and not go beyond provisions necessary to restore competition, having regard to minimization of potential chill on future innovation, promotion of economic efficiency, and respect for a party's fundamental IPRs. When imposing remedies for abuse, behavioral remedies directed toward eliminating barriers to restore competition are preferable to structural remedies, which have not proven effective and risk harming, rather than repairing, competition. 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.

3. Cooperation Between and Among Enforcement Authorities

12. Cooperation is generally highly beneficial in enforcement matters: it helps to stem abuses and lead to more efficient outcomes and reduce risk of conflicting or inconsistent remedial approaches. Cooperation in terms of information sharing is virtually always beneficial and the better informed the agencies are, the better the decisions they make on remedies. Agencies must be careful, of course, to conduct their own independent factual analysis rather than to accept the conclusions of another agency because the facts in one jurisdiction might not always align with the facts in another. Also, the same conduct in one jurisdiction may have quite different effects in another jurisdiction. Lastly, the conduct that

constitutes the offense in one jurisdiction may not be the same conduct employed by the dominant firm in another. Thus, comparing notes is always beneficial, but agencies must compile those notes themselves, rather than making the assumption that information obtained from another agency is meaningful or reliable with respect to their own investigation.

13. A separate question is whether cooperation in abuse cases should include alignment on the remedies imposed (or commitments accepted). By alignment on remedies, we refer to the acceptance by one jurisdiction of the remedial package (or commitments) designed and accepted by another jurisdiction or, alternatively, the joint development by two or more jurisdictions of an identical (or nearly so) package of remedies or commitments. Such action can indeed be efficient and ensure that the remedies are not in conflict. It can save on investigative time and resources and free-up resources that can be used on other enforcement matters. But, in order to avoid sub-optimal market outcomes, it requires an underlying alignment of conditions that should be carefully considered, which we explore below.

14. Here, the agencies should consider several factors to evaluate whether alignment is appropriate. Among these are: (1) whether the relevant markets are the same (particularly geographic markets); (2) whether the market facts are the same; and (3) whether the conduct of the dominant firm are the same across the aligning jurisdictions.

15. Alignment on a remedy is more likely to be appropriate where the relevant geographic markets are unified—that is when the two cooperating jurisdictions are in the same relevant geographic market in which the abuse(s) are occurring. This is important because the relevant geographic market is likely to encompass not only the dominant firm's impact on competition within a market but will also determine the competitive alternatives to the dominant firm. Thus, the remedy will likely facilitate entry, promote new alternative technologies, or create incentives for investment in parallel way when relevant geographic markets are aligned. If there are separate relevant geographic markets, then the adoption of an aligned remedy is likely to have quite different impacts in the two jurisdictions, signifying that the remedy is sub-optimal for (at least) one of the two jurisdictions.

16. Similarly, where the market facts and circumstances within that geographic market are the same, alignment on remedy is more likely to be beneficial. Even where geographic markets are the same, market facts may differ. The impact or influence of a dominant firm, or of an exclusionary practice, can differ among jurisdictions in the same geographic market for a variety of reasons including different market participants, different regulatory structures, different consumer habits or different demand patterns. For example, the market for ice skates might be EEA-wide, but the demand patterns might be quite different in the Netherlands as compared to Spain.

17. Finally, where the abusive conduct by the dominant firm is the same, alignment on remedy is more likely to be beneficial. Dominant firms may adapt their practices to specific jurisdictions for a number of commercial, regulatory, logistical, or cultural reasons. Where the conduct of a firm differs across jurisdictions, alignment on a remedy may not be effective in one or both jurisdictions, particularly as relates to prohibition orders for certain types of exclusionary behavior. A careful review of the abusive conduct is necessary to ensure that a remedy will effectively address the offending conduct as it applies to the individual jurisdiction. Market testing can aid in ensuring that a remedy will solve the problem.

18. In each of these instances, the facts need not necessarily be absolutely *identical* in the jurisdictions aligning their remedies but should have a very strong degree of similarity,

since one of the foundational principles of imposing remedies is that they should be tailored to the underlying harm.

19. Where these conditions do not exist, then alignment on remedy may not be beneficial and may, in fact, be counterproductive. Indeed, adopting the remedial measures of another jurisdiction where the underlying facts differ on the above dimensions—or where a jurisdiction is relying on an assumption that the facts are the same—can lead to inefficiency by imposing measures or burdens on market participants with no apparent benefit. In some cases, it could conceivably also lead to outright conflict, for example when a company is ordered to take affirmative action that is not possible in one of the jurisdictions.

20. Another highly important factor in alignment on remedies is the legal system and law enforcement structure applicable in the two jurisdictions. Jurisdictions with different legal foundations and modes of operation may have more trouble in aligning their remedies. In particular, jurisdictions with an administrative model of enforcement (i.e., where the competition authority has the ability to take a decision that may be appealed) are likely to have a greater scope to align with other such agencies than jurisdictions that utilize a prosecutorial model of enforcement (i.e., where the competition authority must go to a court to seek a determination of wrongdoing and an appropriate remedy). This challenge may be easier to resolve in cases of voluntary commitments, where the distinctions among legal enforcement mechanisms are often not relevant (except in terms of enforcing violations of the commitments).

21. BIAC would also observe that, in cooperating on remedies, whether through alignment or merely through communication and coordination, agencies should avoid the "me too" temptation of pushing for a remedial feature in their jurisdiction because they become aware that another jurisdiction is seeking (or is offered) a certain remedial measure or commitment. We have seen this effect play out in many instances, particularly in the merger review context where agencies hold substantial leverage over companies which cannot close a transaction without agency approvals. Agencies sometimes insist on a remedial feature even though it has no purchase in the competitive effects analysis in that jurisdiction and, at times, no relevance to the jurisdiction at all.

22. BIAC appreciates the source of this "me too" temptation: if an agency imposes remedies or accepts commitments that do not include all of the bells and whistles that exist in another jurisdiction's remedy package, the agency can be perceived as not being "tough enough" or as having not done a thorough job in its investigation. But for the reasons explored above, adding baggage to a remedy where the markets, facts or conduct is different can distort the remedy in a way that makes it less effective, not more effective.

23. Moreover, the risk of this "me too" effect in a situation involving numerous enforcement actions is obvious: the remedial package will be a "least common denominator" approach that absorbs the most stringent features of every remedy imposed by the agencies involved. The most restrictive features of the remedy packages will dominate, and the most "aggressive" agency will effectively dictate the global outcome, irrespective of whether such aggression is good for competition or unduly restricts it.

24. Agencies should therefore conduct a review sufficient to be confident of their findings, confident of their remedies and confident enough to know what they don't need as well as what they do need to stem the abusive behavior.