

OECD-GVH RCC Newsletter

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Foreword

Dear Readers,

We are happy to provide you with the 2018 RCC programme in this Newsletter. The OECD-GVH Regional Centre for Competition in Budapest has now entered into its 14th year! As always, we cover a wide range of topics and we hope that they will prove to be useful to the beneficiary agencies. You will all receive invitations to send participants to the regular seminars in due course.

The articles in this Newsletter focus on one special topic again – remedies in abuse of dominance cases. Not only is it difficult to conduct abuse of dominance proceedings, but finding remedies for the abuse observed is often even harder. We asked a wide range of jurisdictions to provide us with their experience and are most grateful to Albania, Brazil, the European Commission, Hungary and Turkey for their insights.

For the next Newsletter, please send us articles on your experience with competition restraints in the online world. The deadline for handing in contributions will be 13 April 2018.

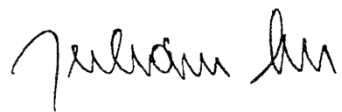
The “Literature Digest” at the end of this Newsletter provides an introduction to three articles dealing with the hot topic of mergers and innovation. It shall provide you with some inspiration for your reading list.

As always, you will find summaries of the OECD Competition Committee meetings and the Global Forum for Competition in December 2017, with links to all the documents you might find interesting. Use them to benefit from the work and experiences of peer competition authorities and from the work products of the OECD

We are happy to receive your comments and contributions! Please contact Sabine Zigelski (OECD – sabine.zigelski@oecd.org) and Andrea Dalmay (RCC – dalmay.andrea@gvh.hu).



Sabine Zigelski
OECD



Miklós Juhász
President of the GVH

Reminder

Since 1 September 2017 a new tool has been available for the exchange of information between the RCC beneficiary agencies, namely the RCC Request for Information. You can find a description in the previous Newsletter <http://www.oecd.org/daf/competition/oecd-gvh-newsletter9-july2017-en.pdf>. So far we have had six requests. Please make use of this instrument – send requests but also provide answers to the requests you receive.

Events July – December 2017

September 12 – 14

Outside Seminar in Bosnia and Herzegovina – Competition Assessment of Laws and Regulations

Sometimes competition problems in markets are caused by restrictive rules and regulations. The enforcement of competition rules will often not be very efficient on these markets and will not tackle the root causes of the competition problems. The OECD Competition Assessment Toolkit provides a hands-on tool for a systematic review of new and existing laws and regulations and demonstrates ways to analyse and evaluate laws, and to suggest alternatives. We introduced the Toolkit, gave examples and showed the impressive benefits from its application in a number of countries. With the help of experienced experts from Lithuania, Greece, Italy and the OECD we also explained the role of competition assessment in the advocacy efforts of a competition authority and how it can greatly leverage the role of a competition authority vis-à-vis its government, line ministries, regulators etc. Participants contributed their experiences and worked on hypothetical case exercises.



October 17 – 19

Seminar on Best Practices in Cartel Procedures

Procedural laws that govern cartel cases vary from jurisdiction to jurisdiction. We can, however, identify best practices that experienced jurisdictions have developed when handling cartel cases and these will often fit different procedural frameworks. The seminar provided insights and ideas on the preparation and execution of dawn raids, the handling of evidence, forensic IT techniques and team work in complex cartel case investigations. Experts from Canada, Lithuania, Hungary and Austria explored these topics together

with the participants and we illustrated the topics with hypothetical exercises.



December 12 - 14

Sector Event: Competition Rules and the Pharmaceutical Sector

This event analysed the role of competition law in the pharmaceutical sector by looking at cases that dealt with merger control, distribution agreements and pay for delay agreements. We also examined the role of intellectual property rights and regulation and discussed relationships with the government and other regulators.



Programme 2018

23 – 24 February

Seminar on European Competition Law for National Judges on National Judges and Damages Litigation

This seminar will provide advanced knowledge and practice in the field of antitrust damage litigation. We will discuss jurisdiction, disclosure of evidence and quantification of harm and the passing-on of overcharges. In addition, we will cover issues such as joint and several liability, consensual settlements, limitation periods and effects of national decisions. Experienced practitioners will guide the participants through the topics organized around a continued hypothetical exercise, to provide national judges with an opportunity to analyse all main aspects of antitrust damage litigation in the context of a real situation.

06 – 08 March

Cartel Detection Tools

We discuss sources of cartel detection and investigate what it needs to have an effective leniency system. Which alternatives exist if leniency is not working in a country? This can include whistle-blower or anonymous informant systems, informant reward schemes, systematic screening and also market studies. Parallel pricing observations will be discussed. Another source to be tapped systematically can be attentive public procurement officials and systematic monitoring of e-procurement data. We will introduce the OECD Guidelines for Fighting Bid Rigging in Public Procurement and look at relevant case examples. Experts from OECD countries will introduce their cases and will exchange experiences with the participants. Practical exercises will complement the discussions.

17 – 18 April

GVH Staff Training

Day 1 - Review of 2017 and Selected Competition Problems

After a review of the developments in EU competition law in 2017 we will have a closer look at selected competition law topics. This will cover trends in consumer protection, vertical restraints in the online world, the implementation of the Damages Directive and algorithms and collusion. Experienced practitioners from competition authorities and academia will discuss the topics with the GVH staff.

Day 2 – Trainings for Special Groups of Staff

In separate sessions we will provide dedicated trainings and lectures for the merger section, the antitrust section, the economics section, the consumer protection section and the Competition Council of the GVH.

15 – 18 May

Introductory Level Seminar - Basic Concepts and Procedures in Competition Law for Young Authority Staff

This beginner level seminar will give young authority staff the chance to get

more familiar with basic competition law concepts. We will highlight cartels, mergers and abuse of dominance and will address basic legal and economic theories as well as procedural requirements and the relevant case law. The international component of competition law enforcement will also be presented. The participants will have a chance to apply and deepen their knowledge in practical exercises and to become more familiar with new areas of competition law. Experienced practitioners from OECD countries will share their knowledge and engage in a lively exchange with the participants.

19 - 21 June

Outside Seminar in Albania – Merger Control Investigations

Merger investigations require a complex skill set. In this seminar, we will look at theories of harm for merger cases, basic economic methods to be applied and at effective merger remedies. At the same time we will discuss effective procedures for merger investigations, investigation methods and will exchange experiences on the drafting of decisions. Merger control experts from OECD countries will present case studies and the participants will practise their merger skills in hypothetical exercises.

02 – 04 October

RCC – FAS Seminar in Russia – Effective Cartel Enforcement

How can cartels be detected effectively and what are the first steps when a suspicion arises? We will look at leniency but also pro-active detection tools like the analysis of public procurement data. Next steps will involve covert market investigations and dawn raids and what kind of evidence to look for, as well as how to organise it in order to convince appeal courts. Lastly, we will also discuss the relevance of monetary fines. Experts from OECD countries together with FAS experts will present their best practices and insights and will address problems and questions raised by the participants.

16 – 17 November

Seminar on European Competition Law for National Judges on Competition Issues in the Digital Age

The seminar will provide the participants with specific knowledge and practice related to issues arising from new technologies' impact in the field of competition law. We will discuss difficulties to apply traditional criteria of market definition and market power to dynamic markets, merger issues such as innovation and shaping of commitments in digital sectors, platforms and e-commerce, including vertical restraints in online distribution; and finally issues related to Article 102 TFEU including abusive practices and discriminatory behaviours, Standard Essential Patent ("SEP") and FRAND disputes. The seminar will be organized around hypothetical case exercises that will give national judges an opportunity to analyse major aspects that could be raised in antitrust litigation in the context of a real situation.

OECD Competition Committee Meetings, 4 – 6 December 2017

Roundtable - 10 years on from the Financial Crisis: Co-operation between Competition Agencies and Regulators in the Financial Sector¹

The roundtable on Co-operation between Competition Agencies and Regulators in the Financial Sector discussed whether, 10 years after the global financial crisis began to unfold, financial regulators and competition agencies have successfully co-operated to implement a regulatory and competitive framework that delivers a stable system in which innovative and efficient firms can thrive. Have changes to prudential regulation complemented competition and, for example, helped to incentivise traditional banks not to take on excessive risk; have these changes restricted competition in the hope that banks, insurance firms and other financial institutions will use market power to build their resilience? The roundtable analysed if the regulatory framework has dealt with the potential of Fintech, including mobile payments and shadow banks, to introduce innovative business models. It also explored the way in which macro-prudential measures have affected competition. In addition, it was considered whether, where greater transparency on rates and other conditions has been introduced, this has helped consumers to choose and switch between providers of financial services, or whether it has backfired and provided banks with detailed knowledge about each other's policies, thereby leading to higher prices.

¹<http://www.oecd.org/daf/competition/cooperation-between-competition-agencies-and-regulators-in-the-financial-sector.htm>

Roundtable on the Extraterritorial Reach of Remedies²

While there is broad consensus that foreign conduct sufficiently affecting domestic markets merits extending a country's jurisdiction to cover it, countries remain aware of the need to balance this extended jurisdiction with the principles of international comity, including the evaluation of another state's interests and at times deference to them, and the avoidance of imposing inconsistent demands on private parties who may need to comply with several and occasionally conflicting competition regimes. Recent cases and commentary debate the right territorial scope and level of nexus between a competition remedy and the alleged violation, that is whether a remedy overreaches, and the extent to which it is enforceable. Delegates discussed the appropriate scope of remedies with potential extraterritorial reach, and their relevance, effectiveness and proportionality in redressing domestic harm.

Roundtable on Safe Harbours and Legal Presumptions in Competition Law³

Safe harbours are rules that preclude a finding of a competition infringement and/or make it unnecessary to assess market circumstances in order to find a conduct lawful. Presumptions of illegality usually refer to per se rules or object prohibitions and with safe

² <http://www.oecd.org/daf/competition/extraterritorial-reach-of-competition-remedies.htm>

³ <http://www.oecd.org/daf/competition/safe-harbours-and-legal-presumptions-in-competition-law.htm>

harbours they delineate the borders of conduct that must be subject to detailed market analysis. They can be absolute or rebuttable, depending on whether evidence against them can be brought by either the parties or the enforcing agency. Safe harbours and presumptions, in the form of market shares, HHI indices, or other market structure variables, are widely used. Commonly, they are applied in the area of horizontal mergers, unilateral conduct, market dominance, and/or monopolisation, vertical relations including vertical mergers and vertical restraints. The roundtable offered an opportunity to discuss the rationale for adopting bright-line rules or flexible standards in competition enforcement; the reasons behind the adoption of safe harbours and/or presumptions of illegality for certain conducts and not others; whether rule-design is influenced by institutional considerations regarding the enforcement body's capacity to conduct in-depth analyses.

Hearing on Common Ownership by Institutional Investors and its Impact on Competition⁴

This hearing discussed the recent literature on common ownership and its impact on competition, especially in concentrated markets, and its effects on firms' incentives to compete fiercely. Recent empirical studies conclude that horizontal shareholdings are widespread in our economies especially in sectors (such as airline or banking) where institutional investors are active and that they can lead to strong concentration in such sectors. The discussion addressed questions such as: How does competition law deal with cross or partial ownership? When considering the competition effects of a merger, even if the ownership is less than a controlling interest in the target, how does this affect competition? Similarly, what are the impacts of this common ownership on cartel conduct?

⁴ <http://www.oecd.org/daf/competition/common-ownership-and-its-impact-on-competition.htm>

OECD Global Forum on Competition, 7 – 8 December

Competition and Democracy⁵

Competition has traditionally been considered as supportive of democracy by dispersing economic power through efforts that guard against concentrations and cartelisation. Economic power would then be shared across a wide range of economic actors rather than in the hands of a select few who would have the potential to exert influence over government and political leaders. This session considered to what extent competition is a sufficient or a necessary condition for democracy to thrive, particularly when considering countries transitioning to democratic systems. As competition enforcement evolves, does this change the degree to which it can or does support democracy? Are there linkages between democracy, the degree to which a country is democratic, and the prevalence of competition across an economy?

Judicial Perspectives in Competition Law⁶

Competition cases are often characterised by complex litigation and differing sets of economic evidence. Compounding these difficulties, judges may also face the prospect of overturning decisions from a competition agency with vast resources and expertise that may exceed their own. This roundtable addressed various dimensions of the judicial adjudication of competition law. While recognising the differences that exist across jurisdictions, the session tried to elicit the

main common challenges that judges face when applying competition law, and to find ways to address those challenges. Since the audience comprised both competition authorities and judges from around the world, the roundtable provided a venue for an exchange of views regarding the interaction between competition agencies and courts.

Focus on Small and Developing Country Agencies: Overcoming Adversity and Attaining Success⁷

Every competition agency has to overcome obstacles to enforce its competition law. But for small and developing jurisdictions these obstacles are often more acute, numerous and reinforced by challenges specific to these jurisdictions. A lack of a competition culture, or even a hostile environment, created by government, business and society at large can hinder the work of an agency with few resources. Relations with regulators as well as other parts of government can take on a particular complexity when competition authorities are young, lack resources and influence. This lack of resources, along with other institutional design issues, or inadequate legislation can further distance these authorities from success. The discussion took place in three breakout sessions:

Breakout Session 1: Advocacy

Advocacy efforts within the government and creating a competition culture in the public “within the budget”.

Breakout Session 2: Enforcement

⁵<http://www.oecd.org/daf/competition/democracy-and-competition.htm>

⁶<http://www.oecd.org/daf/competition/judicial-perspectives-competition-law.htm>

⁷<http://www.oecd.org/daf/competition/small-competition-agencies-developing-economies.htm>

Co-operating with public prosecutors and work relations between the competition authority and the sectoral regulators.

Breakout Session 3: How can competition authorities overcome hostility or indifference?

Different techniques for developing authorities' credibility and legitimacy, in particular through fighting bid-rigging in public procurement.

Antitrust Remedies: What do we try to achieve, and how?



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1. What are antitrust remedies for?

What action should be taken once an infringement of competition law has been established? One conclusion could be to impose a fine, if appropriate. Another conclusion could be to impose remedies, again if appropriate.

A fine may be necessary to punish the firm and thereby deter future infringements – by the same firm or others. By contrast, the purpose of a remedy is to end the infringement. A fine is not a remedy, and, conversely, a remedy is not a punishment. A remedy is purely forward-looking – it does not contain any element of indemnification for the past (compensation or restitution).

Under EU competition law, Article 7(1) of [Regulation No. 1/2003](#) provides that the Commission "may by decision require the undertakings and associations of undertakings concerned to bring such 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."

* The views expressed in this paper are personal and do not necessarily represent the European Commission's views. This paper borrows from my article entitled "How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements?", *Journal of European Competition Law & Practice*, volume 7, issue 9, 2016, p. 587.

But when is a remedy appropriate? First, when the infringement is still on-going. Second, when the competition authority finds it useful to spell out the behaviour which is expected of the firm to end the infringement. For example, it may be that – particularly in an abuse case – the firm is expected to take specific actions to end the infringement. For example, supplying other firms to end a refusal to supply; or charging new prices to end a margin squeeze or predatory pricing abuse. In such circumstances, the Commission may have reason to believe that the firm concerned may not bring its behaviour fully in line with the competition rules, or may not do so quickly enough. In such cases, to ensure the effectiveness of the decision, the Commission may spell out the specific measures that the firm should take to implement the decision. By contrast, when the infringement takes the form of participation in a cartel, the way to end the infringement is obvious.

But what kind of situation does the remedy seek to establish, or re-establish? Is it stopping the anti-competitive conduct? Removing the firm's ability to commit future infringements? Or re-establishing the *status quo ante* – the situation as it was before the infringement? Or establishing the situation as it would be today had the infringement not taken place? This could mean boosting the market presence of competitors who were squeezed out during the infringement (a so-called "restorative" remedy). There are some traces of EU case-law and literature supporting each of these views, but ultimately it is of course for each competition law system to take a stance on this point.

2. Shaping the remedies

There are several types of remedies, but some key characteristics or requirements apply to

all of them (subject to the specific legal system).

First, the remedies ultimately imposed in the decision should have been previously described in a sufficiently detailed manner, even briefly, in the Statement of Objections, to ensure that the firm has a chance to defend itself on this point.

Second, for all types of remedies, the competition authority may consider imposing deadlines for compliance – as opposed to immediate compliance. In the European Commission's [Microsoft decision](#), for example, Microsoft was given three months to implement the remedy.⁸ In [Mastercard](#), the deadline was six months.⁹ Usually, the firm has an interest in implementing the remedies as quickly as possible anyway, since, for the purpose of damage claims, the infringement continues until the remedies are implemented.

Conversely, the remedy does not necessarily have to apply indefinitely. A competition authority may consider ordering remedies only for a specified period, or may attach a subsequent condition, or a "sunset clause", or a review clause to a remedy package. In [Deutsche Post](#), for example, the firm was required to report to the Commission the accounts of its newly created commercial parcel subsidiary, but only for three years.¹⁰ In any event, an indefinite remedy may become irrelevant over time, for example because of technological developments, or if the product at issue becomes obsolete, or if the firm leaves the market. Presumably, a firm which was subject to Article 102 remedies would no

longer be bound by them once it is no longer dominant.

Third, all types of remedies are subject to the principle of legal certainty, which requires that the remedy be "clear and precise so that the [firm] may know without ambiguity what are [its] rights and obligations and may take steps accordingly".¹¹ However, this does not mean that the remedy should be very detailed. In practice, remedies that are defined in broad terms are likely to be simpler and more effective than detailed remedies. A detailed remedy can sometimes be circumvented in a way that respects its letter but not its spirit.

Fourth, any remedy is subject to the principle of proportionality,¹² which requires that "measures adopted by the Commission do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the act in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued".¹³

3. What kind of remedy?

A. Behavioural remedies

A behavioural remedy requires the firm concerned to perform certain acts or refrain from certain acts relating to its behaviour on the market, for example with regard to prices,

⁸ Commission decision of 24 March 2004 in case 37792 *Microsoft*.

⁹ Commission decision of 19 December 2007 in case 34579 *Mastercard*.

¹⁰ Commission decision of 20 March 2001 in case 35141 *Deutsche Post*.

¹¹ Case 92/87 *Commission v. France*, ECLI:EU:C:1989:77, para. 22; [case C-279/95 P Langnese-Iglo](#), ECLI:EU:C:1998:447, para. 78; [case T-491/07 Cartes Bancaires](#), ECLI:EU:T:2012:633, paras. 443-444.

¹² Article 7 of Regulation no. 1/2003 ("any behavioural or structural remedies which are proportionate"), and [case C-441/07 P Alrosa](#), ECLI:EU:C:2010:377, para. 39.

¹³ Case T-491/07 *Cartes Bancaires*, ECLI:EU:T:2012:633, paras. 428 and 438, citing case C-180/96 *United Kingdom v. Commission*, ECLI:EU:C:1998:192, para. 96, and [case T-30/05 Prym](#), ECLI:EU:T:2007:267, para. 223.

supply obligations, product characteristics, contracts, or internal organisational measures (e.g. Chinese walls). A behavioural remedy cannot prohibit behaviour which is itself not prohibited by EU competition law.^{14 15}

For instance, in the European Commission's [Akzo predatory pricing case](#), the decision ordered Akzo to raise its prices. In [Magill](#), the Commission ordered the firms to provide the requested information to the complainant. In *Microsoft*, the firm had to provide the interoperability information to competitors and had to market a version of Windows without tying Windows Media Player. In *Mastercard*, the firm had to lower its card fees.¹⁶

B. Structural remedies

The European Commission has defined a "structural remedy" as "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 on-going relationships between the former and the future owner. After its completion, a

structural remedy does not require any further monitoring."¹⁷

The assets to be transferred by way of structural remedies may include a shareholding, a seat on a company board, a subsidiary, an unincorporated division, intellectual property, customer contracts, or tangible assets. By contrast, ordering a supply relationship would be a behavioural remedy.

There are several ways to distinguish behavioural from structural remedies according to some high-level principle: it could be said that behavioural remedies impinge on the freedom to contract while structural remedies impinge on property rights, or that behavioural remedies restrict property rights while structural remedies modify property rights, or that behavioural remedies require some monitoring while structural remedies are "one-off" remedies based on the "clean break principle".

So far the European Commission has used structural remedies three times.

- In [Continental Can](#) (1971), the Commission ordered the firm to divest an 80% shareholding in a competitor.¹⁸
- In [Gillette](#) (1992), the Commission ordered the firm to divest its entire shareholding in a competitor.¹⁹

¹⁴ [Case T-228/97 Irish Sugar](#), ECLI:EU:T:1999:246, paras. 298 and 301; [case T-9/93 Schöller](#), ECLI:EU:T:1995:99, para. 159; [case T-334/94 Sarrio](#), ECLI:EU:T:1998:97, para. 280; and [case T-310/94 Gruber + Weber](#), ECLI:EU:T:1998:92, paras. 174 and 178.

¹⁵ Except to restore competition to the pre-infringement situation or to the situation that would have prevailed in the absence of the infringement: in such cases the competition authority could place limits on the firm's behaviour.

¹⁶ Commission decision of 14 December 1985 in case 30698 *ECS v. Akzo*; Commission decision of 21 December 1988 in case 31851 *Magill TV Guide*; Commission decision of 24 March 2004 in case 37792 *Microsoft*; Commission decision of 19 December 2007 in case 34579 *Mastercard*.

¹⁷ [European Commission's contribution to the 2006 OECD roundtable on "Remedies and Sanctions in Abuse of Dominance Cases"](#), page 186.

¹⁸ Commission decision of 9 December 1971 in case 26811 *Europemballage* (requiring Continental Can to make proposals within six months as to how it would divest its 80% shareholding in Thomassen) (annulled on other grounds).

¹⁹ Commission decision of 10 November 1992 in case 33440 *Warner-Lambert/Gillette and Others* and case 33486 *BIC/Gillette and Others* (requiring Gillette to "dispose of its equity interest" in Wilkinson Sword).

- And in [ARA](#) (2016), the firm was ordered to divest the part of the household waste collection infrastructure that it owns.²⁰ According to the [Commission's press release](#), "the company will therefore no longer be in a position to exclude competitors from access to that infrastructure. This will ensure that such an infringement cannot be repeated in the future."²¹

C. "Flanking measures"

In addition, the Commission may impose measures designed to monitor or enhance the effectiveness of the remedies. While such measures do not actually "remedy" the infringement on their own, they contribute to the effectiveness of the remedy, or at least to monitoring the effectiveness of the remedy.

- *Obligation to report back to the Commission.* The Commission may require the firm to set out in writing, by a certain deadline, the detailed measures that it has implemented to comply with the decision.²²
- *Informing customers that previous terms and conditions are no longer valid (because they were found to infringe EU competition law) and allowing them to terminate or renegotiate their agreements.* This was done in many cases²³ and confirmed by the EU General Court in [Schöller](#).²⁴

²⁰ Commission decision of 20 September 2016 in case 39759 *ARA* (Altstoff Recycling Austria).

²¹ Commission press release number IP-16-3116 of 20 September 2016.

²² Commission decision of 19 December 2007 in case 34579 *Mastercard*; Commission decision of 16 July 2008 in [case 38698 CISAC](#).

²³ See e.g. Commission decision of 19 December 2007 in case 34579 *Mastercard*; Commission decision of 23 December 1992 in case 32745 *Astra*; Commission decision of 19 October

- *Monitoring trustee.* The Commission may appoint a monitoring trustee who has the role of overseeing the implementation of the remedy and reporting back to the Commission. This is especially useful when the implementation of the remedy entails difficult technical aspects for which the Commission is not well equipped. In the *Microsoft* judgment, the General Court ruled that the Commission cannot delegate investigation powers to such a trustee and cannot make the firm bear the cost of the trustee.²⁵

1994 in case 34446 *Trans-Atlantic Agreement*; Commission decision of 16 September 1998 in case 35134 *Trans-Atlantic Conference Agreement*; Commission decision of 21 December 2000 in [case 35918 JCB](#); Commission decision of 11 March 1998 in [cases 34073, 34395 and 35436 Van den Bergh Foods](#); and Commission decision of 17 October 2007 in [case 38606 Groupement des Cartes Bancaires](#).

²⁴ Case T-9/93 *Schöller*, ECLI:EU:T:1995:99, para. 158 ("The Court considers that that article also confers on the Commission the power to require a notification of the kind imposed by Article 3 of the decision in order to ensure proper implementation of the decision").

²⁵ [Case T-201/04 Microsoft](#), ECLI:EU:T:2007:289, paras. 1263-1279.

Smart Remedies in Abuse of Dominance Cases



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It has been eleven years since the OECD first issued a warning about the lack of studies concerning the efficiency of the remedies adopted by antitrust authorities in concrete cases, especially in abuse of dominance cases. Unfortunately, the situation still remains the same, and competition authorities are still facing difficulties when it comes to designing smart remedies to unilateral violations of antitrust laws.

Smart remedies can be defined as the opposite of flawed remedies. Improper remedies “may not only allow continuing harm to competition by not properly addressing the competition problem, but may also themselves harm competition by preventing conduct by the dominant firm that would benefit consumers”²⁶. On the other hand, smart remedies are those that achieve the antitrust goal in a simple, efficient and clear way, without demanding too much of the authorities’ resources in monitoring the process of compliance with these remedies.

Finding the optimal remedy to bring to an end an abuse of dominance conduct can be as – or even more – difficult as proving that the conduct was unlawful for a number of reasons, such as time elapsing, or the particularities of a given case. There is no formula to antitrust measures, and the same remedy can be efficient in one market, but inefficient in another, or can be of optimal

deterrence to one defendant but ineffective to another – or even to the same defendant in different periods.

Thus, it is often hard to design remedies that will simultaneously achieve several objectives pursued by the antitrust policy. The challenges may include identifying the main objective of the antitrust authority and choosing the type of remedy that will achieve it (structural remedies, behavioural remedies, or a combination of both), and designing a remedy which will be at the same time easy to implement, monitor, and proportional to the damage to competition.

With regards to CADE’s experience in this area, the authority has limited experience in designing and evaluating remedies in abuse of dominance cases for a very simple reason: statistically speaking monopolisation cases and abuse of dominance cases are quite rare if compared to cartel investigations.

In that sense, the Brazilian Competition Authority has generally been imposing behavioural remedies in settlement cases of abuse of dominance, but recognises that a structural solution may be more efficient and effective. Most of the behavioural measures designed are negative actions, such as commitments not to repeat the investigated practice. The remedy sometimes may include positive and/or negative actions related to the defendant’s future behaviour or exclusionary clauses in business agreements.

A successful example of this type of commitment can be seen in the Personal Information Number - Peripheral Adapter Device’s²⁷ (Pinpad) case. In June of 2017,

²⁶ [OECD. Remedies and Sanctions in Abuse of Dominance Cases. DAF/COMP\(2006\)19.](#)

²⁷ Personal Information Number - Peripheral Adapter Device’s (Pinpad) is the name currently used to identify electronic devices used in credit and debit card-based transactions.

CADE settled agreements to cease alleged anticompetitive practices in the Brazilian means of payment market. The agreements signed with Cielo S.A.²⁸ and Redecard S.A.²⁹ aimed to end discriminatory practices among accrediting competitors in relation to their Pinpads equipment and to enhance competition in this market. The signatories of the cease and desist agreements committed themselves to providing access to their Pinpads to all accrediting companies in a reciprocal relationship.

While compliance with positive action remedies is relatively easy to monitor, negative obligations are still an obstacle when it comes to remedies, such as effective measures against discrimination. In the past CADE used to overestimate the assistance of third-party complainants to ensure compliance with negative actions, which leaves the authority with the burden of detecting commitment violations and controlling implementation. This problem has improved since CADE started to demand third-party reports on the compliance with the remedies and explicit confirmation that the parties under investigation are complying with their obligations. It is important to note that, according to Brazilian competition law, the provision of false information may be

sanctioned with up to 5 million BRL (article 43 of Law n. 12.529/11).

CADE sometimes also regulates the extent and manner of controversial actions. In cases involving radius clauses, for example, CADE has closed a considerable number of settlements with different shopping centres, where the latter have agreed not to impose radius clauses that exceed reasonable limits. This means that the radius clause should not exceed 5 years, and 3 kilometres in range. In addition, it cannot be applied to other agents than the tenant company.

Nevertheless, there is a debate stating that such behavioural remedies may lead to overregulation of business behavior, causing more harm than good in a cost-benefit analysis. In some cases, market conditions may have changed over time and/or territory, and remedies that were supposed to be effective may no longer have consistent beneficial impacts on competition.³⁰

Despite being able to do an effects analysis of the remedies applied, CADE is still building expertise via a case-by-case approach. Its Department of Economic Studies is currently analysing the impact of past remedies in old merger cases, to evaluate if the economic forecasts made at the time of CADE's decisions were right. However, this project is still in its initial phase and does not include abuse of dominance cases. Therefore, it would be desirable to follow – or, at least, consider – OECD guidelines on the matter and implement a systematic process for an evaluation of the effectiveness of past remedies.

²⁸ Cease and Desist Agreement n^o 08700.003613/2017-70. More detailed information is also available at: <http://en.cade.gov.br/press-releases/cade-celebrates-agreements-to-stimulate-the-competition-in-the-markets-of-building-maintenance-and-of-electronic-means-of-payment>

²⁹ Cease and Desist Agreement n^o 08700.001845/2017-93.

³⁰ [OECD. Remedies and Sanctions in Abuse of Dominance Cases. DAF/COMP\(2006\)19](#)

Mobile Phones Dominating not only Our Lives, but also Competition!



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Next time you are in a public place, take a look around you, and count how many people are using their phones. Probably more than half, whether you are on public transport, in a café or simply walking down the street. How did these phones come to dominate our lives like this, and does anyone even try to resist? Mobile phones now rule the world's collective unconscious in untold ways. But competition has raised its voice. The mobile telephony market has been targeted by abuse of dominance proceedings several times.

Back in 2012, there was a case that made big news in the media. In this case two mobile telephony companies, AMC and Plus, made a complaint against another company, Vodafone Albania, and claimed that it was abusing its dominant position in the market.

The electronic communication sector is one of the sectors with the highest growth in recent years in the Albanian economy. However, if we compare this sector with the European market, it is still in the development phase, leaving room for further development.

The Albanian Competition Authority has often played an active role in the market of mobile telephony because of the characteristics of this market, such as the small number of operators, transparency in its offers, similarity

of services etc. Despite the fact that in the early beginnings of this new communication method tariffs were relatively high, the number of users was estimated to be large. In such a market, the leading companies seem to have a tendency to use prohibited agreements or to abuse a dominant position, violating competition law.

Market dominance and abuse are not only extraordinary and fascinating topics, they also represent an indisputable challenge for competition authorities when it comes to the assessment and the application of these



concepts in a sector such as telecoms.

The Albanian Competition Authority, based on the complaint in 2012, decided to open the preliminary investigation procedure in the market of mobile telephony. A general overview showed that only four companies operated in the market of mobile telephony in Albania: Telecom (AMC until 2015), Vodafone Albania, Eagle Mobile and Plus, which was the last to join this market.

Vodafone Albania SHA had a dominant position in the market according to the results of the preliminary investigation procedure. The Competition Commission decided to open an in-depth investigation procedure to see if

there was any sign of abuse of this dominant position.

It was investigated if the dominant operator had the power to implement differentiated tariffs for on-net and off-net charges. This differentiation could be used by the company to lock in the existing customers using zero cost offers for calls within the network, making it very unattractive for its existing customers to switch to another operator, as this would make it very costly to call into the old network.

Vodafone Albania applied very low prices for calls within the network (below the termination tariffs³¹). Competitors would be charged a higher price if their clients made a call to the Vodafone network and so could not compete in a profitable way.

In order to be competitive in the market, small competitors were forced to lower their prices. Asymmetry in the number of subscribers caused low traffic to small operators and resulted in negative revenues. Vodafone Albania applied very high prices for calls to other mobile operators (off-net calls), this way raising a barrier to its customers. The reduction in incomes from termination calls at Vodafone Albania was quite obvious because its competitors had suffered from losses during the investigation period. The differentiation of fees for on-net and off-net calls led to the "club effect" phenomenon, locking customers into the existing network

The Competition Commission mainly assessed Vodafone's price behaviour and the effect of Vodafone Card and Vodafone Club tariff plans on its competitors in the relevant market. The strategy followed by Vodafone with the application of differentiated on-net vs. off-net tariffs could distort competition in the

relevant market and would in the long-term result in negative effects on competition, putting smaller competitors at a disadvantage. Price differentiation inside and outside the network can be used as a market foreclosure mechanism by large operators on small operators, and may result in the latter exiting the relevant market.

Vodafone's on-net retail price differences to other operators were unrelated to the wholesale prices that Vodafone had to pay to operators for call termination, based on AKEP's regulation 32. The Competition Commission considered that these price differences were unjustifiable and were intended to encourage customers to choose or stay in the Vodafone Club network³³.

Price differentiation between on-net / off-net calls is a common practice in the retail telecommunications market. The same "not-so likable" phenomenon of tariff differentiation of on-net and off-net calls, has occurred in many European countries and beyond³⁴, producing reactions of regulators

³² Regulatory Entity- Electronic and Postal Communications Authority

³³ Decision no.303 date 16.01.2014 of Competition Commission,
http://www.caa.gov.al/uploads/decisions/Decision_303_HTH_Vodafone.pdf

³⁴ In the case of Slovenia, Western Wireless International, which was the third operator in the retail mobile phone market, was forced out of the market after operating in it for five years, due to the delayed intervention of the Regulator addressing the existing competition problems. Network-Based Price Discrimination and 'Bill-and-Keep' vs. 'Cost-Based' Regulation of Mobile Termination Rates* <http://market-analysis.co.uk/PDF/Topical/harbordpagnozzirnemarch2010.pdf>

Mobile phone wholesale voice termination charges <http://webarchive.nationalarchives.gov.uk/20140402195256/http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non->

³¹ Mobile termination rates, or MTRs, are the costs charged by mobile operators for completing outgoing calls on its network.

and competition authorities. The market has been subject to various investigations and regulatory action in several states, as this practice has the potential to distort and restrict competition in the retail market for mobile telephony.

Vodafone Albania made a public commitment to equalise tariffs, both within and outside the network, for all three other operators in the retail market in Albania. In conclusion, the Competition Commission, in 2014, decided to provide some recommendations to the regulatory body of this market, referring to Vodafone Albania's behaviour, which constituted a concern for competition. In regulated markets, the role of competition authorities often overlaps with the role of regulatory entities, due to the lack of full competition in these markets. The Regulatory Entity applied the Competition Commission's decision, taking into consideration the given recommendations and published a document containing a more detailed analysis on how to regulate the mobile telephony market in the most effective way. Mobile termination rates, according to the measures suggested by the regulatory body, will be oriented at average long-term cost in the long run in order to stabilise the market. This way it will be a competitive market with many more benefits for its subscribers, too. Following the monitoring of the mobile telephony market, to examine the implementation of the commitment of Vodafone Albania, it was found that a real reduction of this difference was reflected not only in off-net and on-net tariffs, but also in the units included in the optional national communication offers.

The telecommunications market is undoubtedly abundant with cases relating to abuse of dominant positions. In order to

[inquiry/appeals/communications_act/mobile_phones_determination.pdf](http://www.caa.gov.al/uploads/laws/Law_nr_9121_date_09.05.2012.pdf);

foster efficient market conditions, competition and regulatory authorities should cooperate closely through the recommendations given.

Nowadays, the mobile telephony market in Albania is stable and undertakings compete with each other with transparent, multiple offers. In order to facilitate the regulation of markets, authorities should approve internal regulations and guidelines³⁵ to help undertakings to effectively assess and follow competition law. The Competition Authority, in order to assist all markets that have expressed concerns over abuses of dominant positions, published in 2016 the regulation "On Commitment Procedures"³⁶. Commitments offered by the undertakings themselves, such as in the case of Vodafone Albania, which are binding on them, create legal certainty, restore market competition, and ensure its effective maintenance on an ongoing basis.

Mobile phones are here to stay. These miniature computers we all carry around in our pockets all day, every day are consuming us. This may be a good thing for the mobile telephony operators, but it is not for the market, if it is not properly monitored and regulated. The challenge of competition is to provide a happily ever after relationship between all the actors in markets.

³⁵ Albanian Competition Authority approves internal regulations based on article 24 of Law no. 9121, date 28.207.2003 http://www.caa.gov.al/uploads/laws/Law_nr_9121_date_09.05.2012.pdf

³⁶ <http://www.caa.gov.al/laws/read/id/89>

Consumers First: the Latest Copyright Related Case of the Hungarian Competition Authority



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In December 2016 the Hungarian Competition Authority (Gazdasági Versenyhivatal - GVH) terminated its competition supervision proceedings (case number VJ/15/2014) against the five major Hungarian collection societies (HCS) that are in charge of setting the so-called blank carrier media remuneration. The remuneration is a fee paid by producers and retailers of media equipment capable of copyright protected media content storage eg. MP3 player, PC, USB keys. Indirectly it is the consumers of the abovementioned products who essentially pay this fee, as it is contained in the final price of the devices. When paying the purchase price of such a device, consumers are also paying for the legal possibility of keeping copies of contents falling under the protection of intellectual property law. The GVH initiated its proceedings against the HCS because in the Authority's view both the method applied by the societies in determining the remuneration and the actual level of the remuneration raised competition law concerns. During the proceedings a number of entities which had been involved to some degree in a consultative capacity during the formation of the remuneration announcements in previous years indicated to the GVH that the level of the remuneration may have resulted in consumers turning to the black market to purchase devices. The annual aggregate turnover from the blank carrier media

remuneration of the HCS in Hungary exceeds one billion HUF every year.

The GVH discovered that the method used to determine the amount of the remuneration in the announcement by the societies had some deficiencies. For example, the method used each year to determine the amount of the remuneration followed a historic approach, and merely adjusted the fees to the extent necessary given the experiences of the previous year, thereby failing to consider changes over a longer period of time. Meanwhile the setting of fees also lacked consideration and representation of different clusters of consumers based on their different behaviour concerning media consumption, and it was only in 2012 that the societies decided to obtain an economic analysis in order to gain a bigger picture of the economic background of the blank carrier media devices. New media consumption tendencies such as the phenomenon of streaming technology were not investigated. Further shortcomings must also be mentioned, namely the fact that the fees reflected and tracked exclusively music consumption and its market but failed to evaluate audio-visual contents, how consumers treated them, and on what types of devices consumers accessed them. While determining the blank carrier media remuneration of tablets, the HCS chose to compare and measure it to the remuneration of mobile phones, the latter of which also took into consideration MP3 player remuneration.

As for the activity of the societies, the GVH thoroughly analysed their conduct and in its statement of objections formed the legal opinion that the activity of the societies in determining the tariff announcement could

not be identified as state behaviour, as the Hungarian Intellectual Property Office only gave its consent and had no power to influence the content of the announcement. Furthermore, the GVH was of the opinion that societies were in so-called collective dominance in relation to the determination and setting of the blank carrier media remuneration. The test for collective dominance formed by the case law of the European Court³⁷ requires that the entities involved in the conduct must have set themselves up and represented themselves towards their consumers as a collective entity, the market on which they operate must be transparent enough so that their agreement can be sustained, and neither their competitors nor their consumers must be in a position to set barriers against the dominant conduct. In order to determine whether these societies had abused their collective dominance, the GVH applied the following two tests. First it observed if the level and method applied for the blank carrier media remuneration in Hungary could be compared to those in the member states of the EU. However, this test is subject to a major flaw as a result of the 2001/29/EC directive,³⁸ which requires each member state to apply a regime that guarantees compensation in such a way that is satisfactory considering the system as a whole. Consequently, the directive has led to a wide variety of remuneration systems being developed within the EU, which prevents the systems from being effectively compared to each other. The second test was also

developed under EU law in the so-called Kanal 5 case.³⁹ The Kanal 5 test implies that an entity or entities may abuse dominance if there exists an alternative method, besides the one under scrutiny, which makes it possible for the items falling under intellectual property protection and the audience (consumers) consuming these items to be identified more easily and for their numbers to be given more precisely, and this alternative method is capable of achieving the same legitimate aims without resulting in higher costs associated with managing contracts and monitoring the use of the protected items.

After shedding light on the deficiencies of the existing method of setting the blank carrier media remuneration, the GVH was offered commitments by the HCS. The commitments were reformulated several times during the proceedings and were finally formulated in a manner that was acceptable for the Authority in terms of what served the public interest best.

According to the final commitments accepted in the final decision of the GVH, the HCS offered to remedy the deficiencies present in their market researches and economic analyses, take into account the changes to content consumption patterns, even if this necessitates abandoning obsolete methods and employing new content consumption technologies, and establish the possibility of reclaiming blank carrier media remuneration that has already been paid. The HCS offered to conduct new analyses for the years 2018, 2019 and 2020. As for the possibility of reclaiming the blank carrier media remuneration, the GVH was among the very first regulators in Europe to create the legal possibility by its binding decision for end consumers to take legal measures and gain

³⁷ Relevant cases are the following: [C-395/96 P - Compagnie Maritime Belge Transports and Others v Commission, ECLI:EU:C:2000:132](#), [T-193/02 - Piau v Commission, ECLI:EU:T:2005:22](#)

³⁸ [Directive 2001/29/EC](#) of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information, Official Journal of the European Communities L 167/10., 22.6.2001.

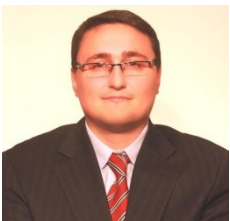
³⁹ [C-52/07 - Kanal 5 and TV 4](#), ECLI:EU:C:2008:703

back financial interests. The GVH also required the HCS under the framework of their commitments to launch a campaign aimed at consumers detailing the consumers' legal right to recoup the excessive blank carrier media remuneration. When determining whether to accept the offered commitments, the GVH carefully weighed the pros and cons of the case. The Authority took into account timeliness, consumers' immediate interests and efficiency, when terminating the case without imposing fines.

The offered and accepted commitments are of a mixed nature. In terms of the newly adopted analysis and methodology, they provide concrete solutions to the raised competition

law concerns. The last part of the commitments directly affecting consumers by providing for the possibility of reclaiming blank carrier media remuneration is a remedy that goes beyond competition law concerns. However, by making consumers aware of their legal right to bring a private law action to reclaim excessive remuneration, this commitment may prove to be particularly efficient, as the proceedings for the reclaim are well designed, while the binding decision of the GVH creates the legal background and hence gives leverage for consumers to step up for their rightful claims..

Remedies Issued by the Turkish Competition Authority in Abuse of Dominance Cases



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[Act No. 4054 on the Protection of Competition](#) ^{*}(Competition Act) was passed by the Grand National Assembly of Turkey in 1994 and the Turkish Competition Authority (TCA) was established 3 years later in 1997. The TCA's decision-making body is the Competition Board, which is comprised of 7 members. According to Article 27 (a) of the

Competition Act, the Competition Board has the duty to “...carry out, upon application or on its own initiative, an examination, inquiry and investigation about the activities and legal transactions prohibited in this Act; to take the necessary measures for terminating infringements upon establishing that the provisions provided in this Act are infringed, and to impose administrative fines on those responsible for them”.

Similar to other competition acts around the world, abuse of dominance is also covered by the Turkish Competition Act. In article 6 of the Competition Act it is stated that “*The abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices, is illegal and prohibited*”. The Article lists the following examples of abusive behaviour:

^{*}The views presented in this article are of the author's and do not necessarily reflect those of the Turkish Competition Authority. The author would like to thank competition experts Ebru İNCE and Aytül KÜÇÜK for their contributions to this article.

- *preventing, directly or indirectly, another undertaking from entering into the area of commercial activity, or actions aimed at complicating the activities of competitors in the market;*
- *direct or indirect discrimination by offering different terms to purchasers with equal status for the same and equal rights, obligations and acts;*
- *purchasing another good or service together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or imposing limitations with regard to the terms of purchase and sale in case of resale, such as not selling a purchased good below a particular price;*
- *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; and*
- *restricting production, marketing or technical development to the prejudice of consumers.*

Article 9 of the Competition Act gives the Competition Board the power to offer remedies in cases related to abuse of a dominant position. It is stated in Article 9 paragraph 1 that, *“If the Board, ...establishes that articles 4, 6 or 7 of this Act are infringed, it shall notify the undertaking or associations of undertakings concerned of its decision*

relating to the infringing behaviour(s), of the actions that must be taken or avoided in order to re-establish competition and bring about the situation that occurred before the infringement took place, in accordance with the provisions mentioned in section Four of this Act”.

According to Articles 6 and 9 of the Competition Act, the Competition Board, in the same way as the decision-making bodies of other competition authorities, is equipped with sufficient provisions for tackling abuse of dominance cases.

In order to better understand the trends and the types of remedies used by the Competition Board, we should review all of the decisions regarding Article 6 of the Competition Act between the years 1999 – 2016. Before going into further detail, it should be noted that the opinions of third parties (such as government bodies, trade associations etc.) in accordance with Article 9 are excluded from this review as such opinions do not impose conditions on a dominant firm. However, when opinions are sent to the investigated firms, for example, detailing how they should behave in order to avoid repeating the same infringing conducts, such opinions are regarded as remedies. A summary of the results of the Competition Board’s decisions regarding Article 6 of the Competition Act between the years 1999 – 2016 is provided in the table below.

Table 1: Competition Board's Decisions Regarding Article 6 of the Competition Act between the years 1999 - 2016

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	Total
Total Number of Article 6 Cases	1	2	6	3	3	4	1	1	3	1	4	4	5	5	6	8	4	11	72
- Number of Cases Resulted with an Infringement	1	2	5	2	2	1	1	0	1	1	2	1	2	1	2	3	0	3	30
- Decision Involves a Remedy	0	0	3	2	1	0	1	0	1	1	1	1	2	0	1	1	0	2	17
- Decision does not Involve a Remedy	1	2	2	0	1	3	0	0	0	0	1	0	0	1	1	2	0	1	15
- Number of Cases Resulted Without an Infringement	0	0	1	1	1	3	0	1	2	0	2	3	2	4	4	5	4	8	41
- Decision Involves a Remedy	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	2
- Decision does not Involve a Remedy	0	0	1	1	1	3	0	0	0	0	2	3	2	4	4	5	0	8	34

The table can be summarised as follows:

- between the years 1999 – 2016, there were a total of 72 abuse of dominance cases (almost 4 decisions per year);
- 30 cases resulted in an infringement decision (42%) and 42 cases ended without an infringement decision (58%),
- out of the 30 cases which resulted in an infringement decision, more than half (16 cases) involved a remedy;
- out of the 42 cases ending without an infringement decision, less than 5% (2 cases) involved a remedy; and
- even though the Competition Board did not find an infringement in 2 of the cases, a remedy was issued in order to solve the competition problems.

One more interesting fact that was not included in the table but that is worth

mentioning is that none of the Competition Board's decisions with a remedy involved a structural remedy. All of the remedies imposed by the Competition Board were behavioural in nature, such as the removal of certain provisions or the declaration that a certain behaviour was void.

In its [contribution](#) to the 2006 June OECD Roundtable entitled; "Remedies and Sanctions in Abuse of Dominance Cases", the TCA provided examples of the remedies issued in important decisions. Therefore, it would be better to take a look at the remedies issued after this contribution.

In its 2 decisions in 2007, the Competition Board concluded that the firms under investigation were not abusing their dominant positions but imposed a behavioural remedy. In the first decision ([Decision No: 07-47/506-181, Decision Date: 5.6.2007](#)) the biggest producer of glassware products in Turkey was ordered to terminate its restrictive conducts. In the second decision ([Decision No: 07-74/896-333, Decision Date: 19.9.2007](#)) the dominant yacht fair organising firm in Istanbul was ordered to refrain from conducts that

would exclude its rivals from entering the market or obstruct the other incumbent firms' activities; furthermore, it was required not to directly or indirectly discriminate against buyers with equal status for the same and equal rights by offering different terms.

In its Turk Telecom decision ([Decision No: 08-65/1055-411, Decision Date: 19.11.2008](#)), the Competition Board required the dominant firm operating in the wholesale broadband access services market to refrain from conducts that would lead to a price squeeze against its rivals according to the criteria set in its reasoned decision.

The only decision that imposed a remedy in 2009 was in the investigation of Turkcell, the dominant mobile phone operator in Turkey ([Decision No: 09-60/1490-379, Decision Date: 23.12.2009](#)). Like in its previous decisions, the Competition Board required Turkcell to terminate conduct that would result in an infringement of the Competition Act.

In its 2010 decision ([Decision No: 10-14/175-66, Decision Date: 8.2.2010](#)) concerning Izocam, the dominant producer of mineral wool used for insulation, the Competition Board also required Izocam to terminate conduct that would result in an infringement of the Competition Act.

In its first decision which included a remedy in 2011 ([Decision No: 11-18/341-103, Decision Date: 30.03.2011](#)), the Competition Board required the conglomerate firm operating in the (daily) newspaper advertisement market to terminate its conduct infringing the Competition Act. The second decision concerned Turkcell ([Decision No: 11-34/742-](#)

[230, Decision Date: 06.06.2011](#)) and the Competition Board ordered Turkcell to end its exclusivity conducts that required its retailers to design their outlets in a way that suggested that they only sold Turkcell's products and none of its rivals' services.

In 2013, the Competition Board fined Turkcell for its exclusivity conduct against other vehicle tracking firms and required Turkcell to terminate this conduct and to inform its retailers that they were free to advertise Turkcell's competitors' products and to join Turkcell's competitors' campaigns. ([No: 13-71/988-414, Date: 19.12.2013](#)).

In its decision against Tüpraş, the biggest importer of crude petroleum products into Turkey, the Competition Board imposed its highest fine so far (approximately 137.338.360 €) and required Tüpraş to terminate its conduct ([Decision No: 14-03/60-24, Decision Date: 17.01.2014](#)).

In 2016 the Competition Board fined yemeksepeti.com, the biggest online food ordering platform in Turkey, as it was found that its most favoured customer practice was an abuse of its dominant position and it was ordered to amend its agreements with restaurants ([Decision No: 16-20/347-156, Decision Date: 09.06.2016](#)).

As can be seen from the above, the Competition Board has made frequent use of remedies in its decisions concerning abuse of a dominant position. This demonstrates that the Competition Board does not hesitate to use remedies in order to restore competition in markets in which there is a dominant firm.

Literature Digest*



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This issue* of the Literature Digest for the January issue of the RCC Newsletter focuses on the assessment of the impact of mergers on innovation. This is a topic that has been at the forefront of academic debate, following a number of recent mergers that had to be assessed by European authorities.

[Raphael De Conink 'Innovation in EU Merger Control' \(2016\) Competition Law & Policy Debate 2 \(3\) 41](#)

This article provides an overview of merger control practice in Europe as regards innovation. It begins by noticing that the European Commission has been more interventionist in recent pharmaceutical mergers, where it has requested the divestment of pipeline products – including, in some cases, products at an early stage of development. The Commission has also stressed the need to protect innovation as grounds for requiring divestments in other technology-driven industries.

** This "Literature Digest" was prepared by Pedro, who is working as a Competition Expert at the OECD's Competition Division. Before joining the OECD, Pedro worked in the private sector, obtained a doctorate from Oxford and was a full-time University lecturer. He regularly reviews competition articles (you can subscribe to his Weekly Digest by sending him an e-mail). Pedro will point out a few articles previously reviewed in his Digest that might be of particular interest to RCC beneficiaries and which will hopefully inspire and enrich your reading lists. If you come across an article that you think could be mentioned in this section, please do not hesitate to send it to Pedro.*

A review of the economic literature highlights that, while there is a wealth of theoretical and empirical work on the impact of competition on innovation, there is no consensus about how this relationship works – even if there are a number of useful concepts that authorities may have recourse to, such as potential competition, future markets, or impact on R&D. Nonetheless, the case for establishing general presumptions associating market concentration and innovation appears to be rather weak. Authorities should conduct merger assessments on a case-by-case basis, taking into account the specific features of the relevant industries.

In conclusion, the author recommends that competition authorities should develop a consistent framework for how the impact of mergers on innovation should be assessed. This framework should build on existing economic theory and empirical evidence, as well as on the agency's experience dealing with innovation concerns. To be useful, any framework must go beyond enumerating situations where mergers could potentially harm innovation. Instead, it should include a set of limiting principles that the authorities should follow – including identifying the type of evidence necessary to establish that the transaction would lead to the discontinuation of research projects, or explaining how the authority would deal with research projects with a low probability of success.

[Nicolas Petit 'Significant Impediment to Industry Innovation: A Novel Theory of Harm in EU Merger Control?' ICLE White Paper 2017-1](#)

This paper looks at what the author perceives to be a novel theory of harm applicable in EU merger control. The identification of such a novel theory of harm requires an overview of

previous decisions and practice adopted by the European Commission. The main conclusion of this overview is that merger assessments in the EU traditionally required the delineation of specific product markets in which innovation would be impacted by the merger.

Under a novel approach, however – which the author calls ‘Significant Impediment to Industry Innovation’ (henceforth “SII”) – the European Commission can intervene in mergers that reduce innovation incentives in an industry as a whole. This is said to be a departure from previous practice – which focused not on the impact of the merger on innovation in the industry as a whole, but on the impact of the merger on specific foreseeable product applications.

The author is critical of this novel approach. He begins with the observation that the relationship between firm size, market structure and innovation remains unsettled in economic theory. He suggests that merger reviews should be based on inquiries: *“about the effects of specific transactions within a particular industry based on a fact-intensive investigation into the incentives and capabilities of actual and potential innovators.”* In the light of this, he recommends: (i) that the traditional test (Significant Impediment to Effective Competition) should be applied to innovation similarly to how it is applied to other parameters of competition; (ii) the adoption of alternatives to “projected R&D expenditure” which are likely to act as better proxies to the impact of a merger on innovation, such as the impact of the merger on the classification of a firm on the four-tier “technology group” scale that is conventionally used by R&D experts; (iii) to regulators that they be careful when relying on metrics such as R&D expenses or intensity, or patent / citation measures; and (iv) that

analysis of quantitative indicators of innovation be complemented by qualitative analyses, which requires regulators to understand the key drivers of innovation in the relevant industry.

[Giulio Federico, Gregor Langus, Tommaso Valletti “A simple model of mergers and innovation” \(2017\) Economics Letters 157 136](#) and [RBB Economics Brief 54 ‘An innovative leap into the theoretical abyss’ \(2017\)](#)

Lastly, we have a debate about a new model for assessing the impact of mergers on innovation.

The model is developed in the first paper. It starts from the assumption that efforts to innovate are strategic substitutes, and that a merger between competitors affects the incentives to innovate through two channels: (i) by impacting both merging and non-merging competitors’ incentives to innovate; (ii) by relaxing competition in the market after the merger. In a concentrated industry, a merger will thus lead to a decrease in overall efforts to innovate by the merging parties, while also increasing the possibilities for price coordination between all companies in the market – which may also lead to a reduction of the incentives of these non-merging firms to innovate. Ultimately, the merger will lead to increased profits for the industry but reduce consumer surplus.

The second paper challenges the validity of this model. In practice, one can never assume that a merger will reduce innovation. Instead, the impact of a merger on R&D investments requires a complex balancing exercise of a number of factors that affect the incentives to innovate, most notably cannibalisation – i.e. when innovation by one merging party would cannibalise the profits of the other merging party, which will reduce innovation – and appropriability – i.e. the extent to which a firm can realise the benefits generated by its

innovation efforts, which may lead to increased innovation post-merger. It is argued that the model developed in the first paper ignores appropriability altogether, and hence it is not realistic.

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