

REMEDIES – HOW FAR AND HOW MUCH?

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One of the age-old questions that pervades every area of antitrust law is how to craft the appropriate remedy once conduct has been found to contravene antitrust laws. In general, the appropriate approach to remedies has historically been paid less attention than how to define or identify the problematic conduct itself. However, the central role that remedies have played in recent high profile unilateral conduct cases as well as the remedies ordered by the European Commission (the "EC") and recently upheld by the European Court of First Instance ("CFI") in *Microsoft* have moved remedies to the forefront of discussion for unilateral conduct.

The need for a precise scalpel rather than a blunt sledgehammer to craft the appropriate remedy is arguably amplified in unilateral conduct cases where there is a need to maintain a fine balance between discouraging "anti-competitive" conduct and encouraging aggressive but competitive behaviour. With record fines issued by the EC in unilateral conduct cases and the CFI's recent decision to uphold the EC's decision in *Microsoft*, the debate continues as to whether, in this context, fines are necessary or adequate, behavioural remedies are workable and structural remedies are ever appropriate. The appropriate approach to remedies in unilateral conduct cases is an inescapable point for consideration in our "marathon" of discussions.

The approach to remedies in unilateral conduct cases differs widely across the major antitrust jurisdictions. For instance, in Canada, with the exception of the airline industry, the underlying legislation does not allow for the imposition of any kind of fines once conduct has been found to contravene the "abuse of dominance" provisions. While the Canadian Competition Bureau has attempted to initiate legislative amendments to introduce "administrative monetary penalties" of

up to \$10 million for every contravention of the abuse of dominance provisions, these proposed amendments have failed to find traction due to a variety of reasons including opposition from the Canadian private competition bar.

In other jurisdictions, the imposition of fines or administrative penalties appears to have become *de rigueur* in unilateral conduct cases and an accepted method of deterring and perhaps punishing unilateral conduct. Telefonica was recently fined €151 million by the EC for abusing its dominant position by charging excessively high prices to its competitors for access to its infrastructure in the Spanish broadband market.¹ One of the factors that the EC cited as part of its rationale for issuing a higher fine in this case (as compared to other Article 82 cases involving the broadband market) was that Telefonica's "behaviour shows that the fines imposed in those cases did not have a sufficient deterrent effect".² Similarly, Mittal Steel was recently fined US \$93 million by the South African Competition Tribunal for charging excessively high prices in the domestic market for its products.³ The South African Competition Tribunal justified its decision to fine Mittal by explaining that through exercise of its market power and ancillary restraints, Mittal was able to effectively "fix prices" for its products at a supra-competitive level without having to engage in any horizontal agreements with competitors. Although the Tribunal acknowledged that the conduct at issue was not criminal in nature, it nonetheless found the conduct to be egregious and "akin to price-fixing".

¹ See: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1011&format=HTML&aged=0&language=EN&guiLanguage=en>

² See: <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/274&format=HTML&aged=0&language=EN&guiLanguage=en>

³ See <http://www.comtrib.co.za> for a full copy of the decision.

In some cases, such as the most recent decision of the CFI in *Microsoft*, significant fines were only a part of the overall remedy for the conduct at issue. In what is perhaps the most glaring illustration of the divergence in approach to remedies between the United States and European Union, the CFI upheld the original remedies ordered by the Commission including: (i) a fine of €497 million; (ii) requiring Microsoft to offer for sale within the European Economic Area a version of its operating system without Windows Media Player; and (iii) perhaps most controversially, requiring Microsoft to provide its workgroup server rivals complete interface information so that their software can interoperate seamlessly with Microsoft's operating system and workgroup servers.

The requirements for Microsoft to release its own proprietary intellectual property to its rivals and to remove Windows Media Player from its product have generated significant debate and commentary. Many have taken the position that such remedies unfairly and unnecessarily protect competitors rather than competition as a whole. Furthermore, some individuals have questioned whether such remedies effectively chill innovation and unnecessarily reduce the incentive for dominant companies to compete vigorously.⁴

The divergence between the approach adopted by the EC and now CFI and the US in *Microsoft* highlights not only the divergence in the approach to appropriate remedies but also the divergence in the underlying characterization of unilateral conduct itself. FTC Commissioner J. Thomas Rosch recently attributed this clear divergence to different schools of economic thought with the Chicago School approach preferred in the United States and the post-Chicago School

⁴ See, for example, the statement issued by Assistant Attorney General Thomas Barnett in reaction to the CFI's decision available at: http://www.usdoj.gov/atr/public/press_releases/2007/226070.htm

reflected in the European Union's approach to unilateral conduct.⁵ Clearly, the approach to remedies is inextricably linked to the jurisdiction's underlying economic approach and views regarding the egregiousness of unilateral conduct as a whole.

Regardless of the approach that one ascribes to, the divergence in approach between regulators in major jurisdictions in the treatment of dominant firms raises potential compliance issues for global companies. Furthermore, remedies ordered in one jurisdiction could potentially impact a company's operation outside such jurisdiction. For instance, while the EC's remedies in Microsoft are theoretically constrained to Europe, since Microsoft's competitors are similarly global entities, one wonders whether the impact of the EC's remedies will, on a practical level, be limited to Europe. Questions have also been raised about the potential for "overregulation" of global companies where multiple enforcers are involved and multiple remedies are suggested. In such cases, should (as some antitrust scholars have previously suggested) enforcement agencies take into consideration and address the rationale and remedies adopted by other enforcers?

Along with the potential for "overregulation" when multiple enforcers are involved, concerns have also been raised about enforcement authorities attempting to use the severity of remedies ordered in unilateral conduct cases to "one up" each other in the global enforcement arena. Unlike cartel cases, where punishment and deterrence is often the goal of extracting high fines, given the difficulty in distinguishing between "good" and "bad" conduct, it is questionable whether the same goal should be pursued in unilateral conduct cases.

⁵ See: <http://www.ftc.gov/speeches/rosch/070908isaymonopolyiba.pdf>