How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements?

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This paper concerns remedies in the European Commission’s antitrust infringement decisions under Article 7 of Regulation No. 1/2003, as distinct from commitments under Article 9 of the same regulation, and remedies under the Merger Regulation. This paper tries to answer four questions: What are remedies for? When can the Commission impose them? What kind of remedies? And what is the framework for enforcing remedies?

I. Background

Recital 12 of Regulation No. 1/2003 mentions the Commission’s power to impose any remedy, whether behavioural or structural, which is necessary to bring the infringement effectively to an end, having regard to the principle of proportionality. Structural remedies should only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy.

Changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.

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. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.

Key points

- Article 7 remedies for infringements of Articles 101 and 102 TFEU have a specific function (‘bringing the infringement effectively to an end’), which is distinct from interim measures, fines, and actions for damages.
- Alongside merger remedies and Article 9 commitments, Article 7 remedies can shape markets in very significant ways.
- In this paper, the author examines the purposes of Article 7 remedies, the types of remedies, and the procedures used to impose and enforce them.


The equivalent article in Regulation No. 17 (Article 3(1)) was much shorter: ‘Where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 or Article 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.’ See Regulation No. 17, First Regulation implementing Articles 85 and 86 of the Treaty, OJEU 13, 21 February 1962, p. 204.

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Remedies under Article 7 are different from interim measures under Article 8 and from commitments under Article 9, although in practice similar measures can be used under all three articles. As the Court of Justice stated in *Alrosa*, Articles 7 and 9 pursue different objectives. This paper only concerns Article 7 remedies.

Article 7 remedies are also different from ‘nullity’ under Article 101(2) TFEU. Nullity only ensures that anticompetitive agreements are unenforceable. It is meant to reduce the effectiveness of anticompetitive agreements and thereby discourage potential participants from entering into such agreements. Nullity also ensures that the taxpayer-funded justice system is not used to enforce illegal activity. Nullity does not ensure that such agreements are actually terminated.

The case law sometimes refers to Article 7 remedies as ‘injunctions’, although it would be more precise to refer to them as permanent injunctions, as opposed to interim measures, which are temporary injunctions.

Source materials concerning Article 7 remedies include not only Regulation No. 1/2003 but also case law, the 99 decisions that the Commission has adopted under Article 7 since the entry into force of Regulation No. 1/2003 on 1 May 2004 (23 non-cartel decisions, 76 cartel decisions), and the Commission’s Antitrust Best Practices. One may also be able to draw inspiration from merger remedies, commitments under Article 9, and the ‘remedies’ that the Commission obtained in return for granting individual exemptions to notified agreements under Regulation No. 17, before 1 May 2004.

**II. What are remedies for?**

By definition, an Article 7 decision finds an infringement. It may also include fines if the Commission finds that they are necessary to punish the undertaking concerned and deter future infringements. By contrast, the purpose of a remedy in an Article 7 decision is to ‘bring the infringement effectively to an end’. In principle, a fine is not a remedy, and, conversely, a remedy is not a punishment. The fine and the remedy are spelled out in different articles of the operative part of the decision. The remedy is challengeable separately from the fine. The EU courts can modify the fine by using their unlimited jurisdiction, while this does not apply to the remedy. Finally, the remedy does not contain any element of indemnification for the past (compensation or restitution). The remedy is forward-looking.

But what kind of situation does the remedy seek to establish or re-establish? Is it stopping the anticompetitive conduct, preventing the repetition of the infringement, eliminating the consequences of the infringement, or ‘all of the above’?

**A. Stopping the anticompetitive conduct**

What is the meaning of ‘bringing the infringement effectively to an end’? The adverb ‘effectively’ is there to emphasise that the infringement must end in all its manifestations. In this sense, ‘effectively’ means ‘fully’, not ‘essentially’ or ‘practically’. In this respect, Maier-Rigaud argues that the term ‘effectively’ stresses the need for remedies that are effective not only in the short run but also in the long run.

From the perspective of bringing the infringement ‘effectively’ to an end, merely ceasing the infringing conduct is not necessarily enough: Article 7(1) is about stopping the ‘infringement’. An ‘infringement’ includes both the conduct and its effects. If the conduct has already ceased but the effects are ongoing, then the undertaking may have to take positive action to stop the effects. If the conduct is still ongoing, one would need to decide whether ceasing the conduct will also stop the effects, or whether specific further action is required to stop the effects.

For those cases where stopping the conduct remains relevant, there can be two scenarios. When the offending conduct at issue was some specific action over a period of time, like an anticompetitive agreement, stopping it is...
straightforward: an order to cease the conduct can be sufficient for this purpose. In such cases, the remedy mirrors the conduct at issue. This is typically the case for cartel cases, for example.

By contrast, when the conduct at issue is a failure to do something—for example, in a refusal to supply case, the conduct starts from the initial refusal and continues as long as the input is not supplied—stopping the conduct requires some positive action. This is more common for Article 102 infringements, which often involve a failure to do something, whereas Article 101 infringements only involve illegal conduct which must be stopped (agreements, concerted practices, or decisions of associations of undertakings).

B. Preventing the repetition of the infringement

The Commercial Solvents, Akzo, and Irish Sugar judgments contain references to ‘preventing the repetition of the infringement’. However, in practice, in all three cases, the remedy spelled out what the undertaking should and should not do in the future. While the remedy aimed to prevent the repetition of the infringement, it did not remove the undertaking’s ability to commit the infringement again.

By contrast, preventing the repetition of the infringement was the core justification for break-up remedies (a subtype of structural remedies) in Regulation No. 1/2003. Recital 12 states that break-up remedies are there to address situations ‘where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking’. In summary, truly preventing the repetition of the infringement may require a break-up remedy, although this is understandably subject to quite a high legal threshold, and indeed it has not been done thus far under Regulation No. 1/2003 (see below Section IV.D).

C. Eliminating the consequences of the infringement

The Akzo judgment also refers to ‘eliminating the consequences’ of the infringement. Does this mean restoring the situation that existed before the infringement (the status quo ante) or the situation that would have existed today if the infringement had not taken place (the counterfactual or ‘but for’ situation)?

The Akzo Court chose the first option—‘re-establish[ing] the situation that existed before the dispute’. In that case, the remedy stated that if Akzo’s smaller competitor—ECS—endeavoured to win back from Akzo the customers that Akzo took from ECS unlawfully, AKZO could not align itself on ECS’s prices without giving its own other customers the benefit of this price cut. In essence, the remedy prohibited selective price-cutting by Akzo for the customers that ECS was targeting. In practice, this remedy fell short of ‘re-establishing the situation that existed before the dispute’. The remedy merely aimed to encourage the re-establishment, for the future, of the competitors’ positions as they existed before the infringement.

Truly eliminating the consequences of the infringement would require placing the competitors in the situation that would have existed today in the absence of the infringement—so that, looking forward, they may develop their businesses unimpeded by the consequences of the infringement. This would mean constructing a counterfactual scenario. Admittedly, this may be a difficult task—although that is not a reason for not trying to build at least an approximation of the counterfactual. Anything short of recreating the situation that would have existed ‘but for’ the infringement would be under-deterrent. It would fail to fully remedy the infringement—especially if the infringer gained a significant and long-lasting advantage, for example, because of a ‘tipping point’ in the market. The prospect of a far-reaching remedy to recreate the situation that would have occurred ‘but for’ the infringement may also have a strong deterrent effect on undertakings: it would signal that infringing competition law does not pay.

Assuming, for instance, that a firm’s exclusionary behaviour was successful in driving out a smaller competitor, merely stopping the conduct at issue would not bring back the smaller competitor. In fact, the conduct to competition to three other Austrian-German routes on which they do not face competition. The Parties have some discretion when it comes to choosing these three other routes. By making the costs of price dumping significantly higher for the Parties, this condition affords new entrants some protection from predatory pricing by the Parties’).

13 Joined cases 6/73 and 7/73, ECLI:EU:C:1974:18, paragraphs 45 (an infringement decision ‘may include an order to do certain acts or provide certain advantages which have been wrongfully withheld as well as prohibiting the continuation of certain actions, practices or situations which are contrary to the Treaty’).
16 Ibid, paragraphs 155 and 157.
17 A similar type of remedy was used in Commission decision of 3 July 2002 in case 57730 Lufthansa/Austrian Airlines, paragraph 110 (‘The Parties are thus required to apply any price cuts that they introduce on routes subject
at issue may have already stopped. The remedy should rather be to (a) grant advantages to the other smaller competitors so that they may grow as fast as possible and replace the excluded competitor or (b) impose a structural remedy so that the divested new business may replace the excluded competitor. In short, the remedies to be imposed for this purpose may go much further than merely requiring antitrust-compliant conduct.19

Giving advantages to smaller competitors could mean handing over customer lists or technology licenses, or information obligations, such as informing customers that they could also choose competitors B and C (as in the Microsoft browser case, as a commitment under Article 9 of Regulation No. 1/2003).20 By contrast, pricing remedies aiming to favour smaller competitors can be problematic when they deny consumers the benefit of low prices—like the remedy discouraging Akzo from aligning itself on ECS’s prices for some customers. A divestment remedy may be easier to define and may remedy the situation more swiftly and more effectively.

It is important to stress that eliminating the consequences of the infringement for the aggrieved competitor is a strictly forward-looking remedy. It would aim to place the competitor in a favourable position for the future. Any damage for the past is a matter for national civil law, as amended by the Damages Directive.21 If the infringement is still ongoing, the national judge may also order forward-looking injunctive relief and may draw inspiration from the Commission’s practice as regards Article 7 remedies for this purpose.22

III. When to impose remedies

A. Past versus ongoing infringements

Article 7(1) mentions remedies in connection with ongoing infringements. Logically, the Commission can only impose remedies in connection with ongoing infringements: when the infringement has already ended, there is nothing to remedy.23

Distinguishing past infringements from ongoing infringements depends on the definition of an ‘infringement’. The duration of an ‘infringement’ includes both the duration of the conduct and the duration of its effects. Even if the conduct is instantaneous, it may produce effects over a certain period of time. If the conduct continues to produce effects as of the day of the decision, the infringement is ongoing.24 (But, in some cases, the conduct is instantaneous and does not produce effects—for example some ‘by object’ infringements.25)

In practice, in some ‘past infringement’ cases, the Commission orders the undertaking not to commit the infringement (or an equivalent infringement) again. In other cases, when the Commission is not certain whether the infringement has ended, it makes sense for the Commission to (a) order the company to cease the infringement ‘to the extent that it has not already done so’ and (b) not to commit it again in the future.

In all other cases, the decision concerns an ongoing infringement. In such cases, the full range of remedies can apply: an order to cease the infringement and not to commit it again, a behavioural remedy (spelling out specific actions that the undertaking should or should not do), a structural remedy, and/or flanking measures.

B. When to impose a cease and desist order

Articles 101 and 102 of the Treaty are self-executing, meaning that they impose legal obligations on every undertaking even in the absence of any specific decision to that effect.26 Thus, when the Commission finds an infringement in an Article 7 decision, its order to cease the infringement and not to commit it again, a behavioural remedy (spelling out specific actions that the undertaking should or should not do), a structural remedy, and/or flanking measures.

19 Or, as Doug Melamed puts it, ‘a restorative remedy does not need to be related to the unlawful conduct’. See D Melamed, ‘Afterword: The Purposes of Antitrust Remedies’ (2009–2010) 76 Antitrust Law Journal 364. Another way to put it is that conduct required of a particular company under a restorative remedy is not necessarily required of all companies to avoid antitrust liability.

20 Commission decision of 16 December 2009 in case 39350 Microsoft Tying.


23 With the exception of orders not to commit the infringement (or any equivalent infringement) again in the future, and break-up remedies ‘where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking’. See below.

24 See the case law cited in n 12 above. But see the counter-example in Commission decision of 29 April 2014 in case T-136/11 Microsoft: the infringement ‘ended on 29 May 2012’ (Article 2) but the ‘anti-competitive effects of Motorola’s conduct persist’ (paragraph 558). In that case, Article 2 of the decision stated that ‘Motorola Mobility LLC shall eliminate any anti-competitive effects resulting from the infringement’.

25 C-49/92 P Aris, ECLI:EU:C:1999:356, paragraph 81, and Article 25(2) of Regulation No. 1/2003.


legally required, since, as the General Court stated in *Microsoft*, ‘[w]hen the Commission finds in a decision that an undertaking has infringed Article [102], that undertaking is required to take, without delay, all the measures necessary to comply with that provision, even in the absence of specific measures prescribed by the Commission in that decision.’ Nonetheless, the Commission’s current policy is to include cease and desist orders in its antitrust decisions.

Since the entry into force of Regulation No. 1/2003, the Commission imposed remedies going beyond a cease and desist order in three cases.44

- In the 2007 *Mastercard* decision, the Commission ordered Mastercard to repeal its fallback multilateral interchange fees (MIFs), as well as its network rules and board decisions concerning those fees, within 6 months. The decision, including the remedy, was confirmed by the General Court and the Court of Justice. In the meantime, although Mastercard implemented satisfactory remedies with a 1-year delay (1 July 2009 instead of 21 June 2008), the Commission did not pursue Mastercard for non-compliance.36

- In the 2008 *CISAC* decision, the Commission required the collecting societies to ‘review bilaterally with each other’ their reciprocal representation agreements for satellite, cable transmission, and internet use within 4 months. This aspect of the decision was then nullified on the substance by the General Court: the infringement was not proved.38

- In the 2014 *Motorola* decision, the Commission ordered Motorola to ‘eliminate any anti-competitive effects resulting from the infringement’, which meant repealing three clauses from its Settlement Agreement with Apple.39 The decision was not challenged in court.

### C. When to impose remedies going beyond a cease and desist order

When is it appropriate for the Commission to impose remedies going beyond an order to cease the infringement and not commit it again? The Commission would not need to do so if the conduct which is expected of the undertaking in response to the decision is straightforward.

By contrast, in some circumstances, the Commission may have reason to believe that the undertaking 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 undertaking should take to implement the decision.

The Commission has discretion in this regard. The text of Article 7 shows that it can choose to impose specific remedies, and it does not have to explain its view on this point as such (the Commission ‘may impose on them any behavioural or structural remedies’, but it does not have to). By contrast, the Commission does have to provide reasoning on the proportionality and necessity of the remedy.33

### D. When to solicit or require remedy proposals, instead of imposing remedies upfront

Even when the Commission wants remedies going beyond a cease and desist order, it does not have to impose them (or at least not initially): it can require the undertaking to submit remedy proposals.40 This is especially the case for non-compliance decisions, which did not exist before Regulation No. 1/2003.

Third, many individual exemption decisions under Regulation No. 17 included changes to the notified agreements which could be seen as remedies, whereas those types of decisions no longer exist today.

- **Case T-310/94 Gruber + Wüber**, ECLI:EU:T:1998:92, paragraph 165 (‘la Commission a le pouvoir de préciser l’étendue des obligations qui incombent aux entreprises concernées afin qu’ils soit mis fin à ladite infraction’).

- **Case T-310/94 Gruber + Wüber**, ECLI:EU:T:1998:92, paragraph 165 (‘la Commission a le pouvoir de préciser l’étendue des obligations qui incombent aux entreprises concernées afin qu’ils soit mis fin à ladite infraction’).


- **Press release number IP/09/515 dated 1 April 2009** (‘In view of the changes to be made by MasterCard to its MIFs . . . Commissioner Kroes does not intend to propose to the Commission to pursue MasterCard for non-compliance with the Commission’s 2007 decision’). To be fair, Mastercard did comply with the remedy from 12 June 2008 to 1 October 2008.

37 Commission decision of 16 July 2008 in case 38698 *CISAC*.

38 Case T-442/08 CISAC, ECLI:EU:T:2013:188, among other judgments concerning the same Commission decision. When an aspect of a decision is annulled, the corresponding remedy becomes moot; see case 89/85 *Ahlstrom* (‘Wood pulp’), ECLI:EU:C:1993:120, paragraph 184.

39 Commission decision of 29 April 2014 in case 39985 *Motorola*, article 2 and paragraph 558.

40 Joined cases 6/73 and 7/73 *Commercial Solvents*, ECLI:EU:C:1974:18, paragraph 45 (‘the Commission may, if necessary, require the undertaking
specialy useful in circumstances where the undertaking is best placed to understand what is technically necessary and sufficient as a remedy. This is also a good way for the Commission to ensure that the remedy is effective and proportionate.

Nothing prevents the Commission from soliciting remedy proposals before the infringement decision. Indeed, in such cases, the undertaking may be rewarded for this. By contrast, if the Commission wants to require the undertaking to propose remedies, an order to that effect must appear in the operative part of the infringement decision. The order specifies what must be remedied and the deadline for submitting remedy proposals. That order is legally binding and can be challenged in court.

If the proposed remedies are satisfactory, the Commission accepts them and makes them binding in a new decision specifically for that purpose. If the undertaking proposes unsatisfactory remedies, the Commission can impose its own remedies in a new decision, and it can also start non-compliance proceedings for failing to propose remedies by the deadline. (On non-compliance proceedings, see Section V below.)

The Commission required undertakings to propose remedies in five cases so far.

- In the 1971 Continental Can decision, the Commission required Continental Can to make proposals within 6 months as to how it would divest its 80 per cent shareholding in Thomassen. The decision was annulled on other grounds (contradictions in the definition of the relevant market).
- In the 1972 Commercial Solvents decision, the Commission ordered Commercial Solvents to provide some input to the complainant ‘immediately’ and to submit proposals, within 2 months, as to future supplies. The Court confirmed that the Commission had the power to do so.
- In the 1988 Magill decision, RTE, ITP, and the BBC were ordered to start ‘supplying each other and third parties on request and on a non-discriminatory basis with their individual advance weekly programme listings and permitting reproduction of those listings by such parties’, subject to reasonable license terms and royalties. The parties were therefore required to submit proposals within 2 months concerning those license terms and royalties. The EU courts upheld this.
- In the 1998 Frankfurt Airport decision finding that the undertaking had unlawfully reserved the ground-handling market to itself, the Commission ordered Frankfurt Airport to submit within 3 months ‘a precise plan for the reorganization of the ground-handling market at Frankfurt Airport, “so as to open up market access for air carriers and independent providers”’. The decision was not challenged in court.
- In the 2004 Microsoft decision, the Commission required Microsoft to propose, ‘within 30 days’, ‘a suitable mechanism assisting the Commission in monitoring Microsoft Corporation’s compliance’, including an independent monitoring trustee. This was not discussed as such in the subsequent court case: the General Court only discussed and annulled the fact that the Commission delegated investigation powers to the trustee and that it placed the cost of the trustee on Microsoft (see Section IV.E below).

IV. What kind of remedies?

A. Background

There are four types of ‘remedies’: (1) orders to cease the infringement and not to commit it again; (2) behavioural remedies; (3) structural remedies, including break-up remedies; and (4) ‘flanking measures’. Flanking measures

41 M Vestager, ‘Setting priorities in antitrust’, speech at the GCLC Conference of 1 February 2016 in Brussels (‘We should reward companies that admit to having broken the law, especially when they come up with remedies to make the markets more competitive, or companies that provide evidence voluntarily’).
43 In Commission decision of 24 March 2004 in case 37792 Microsoft, to be on the safe side, the Commission decision even stated that ‘in case the Commission considers Microsoft Corporation’s proposed monitoring mechanism not suitable it retains the right to impose such a mechanism by way of a decision’, but this kind of language is arguably not even necessary.
44 Commission decision of 9 December 1971 in case 26811 Europenballage.45 The decision was not discussed as such in the subsequent court case: the General Court only discussed and annulled the fact that the Commission delegated investigation powers to the trustee and that it placed the cost of the trustee on Microsoft (see Section IV.E below).
are not strictly speaking ‘remedies’, but they contribute to their effectiveness or at least to monitoring their effectiveness.

Some characteristics or requirements apply to all four types of remedies.

First, all four types of remedies can apply cumulatively in a single case.

Second, the Commission decision may impose remedies going beyond the potential remedies or draft Article 9 commitments that the Commission discussed with the parties during the administrative procedure.53

Third, the remedies ultimately imposed in the decision must have been previously described ‘in a sufficiently detailed manner’, ‘even briefly’, in the Statement of Objections.54

Fourth, for all types of remedies, the Commission can impose deadlines for compliance—such as 3 months, as in Microsoft, or 6 months, as in Mastercard—as opposed to immediate compliance. The undertaking has an interest in implementing the remedies as quickly as possible, since, for the purpose of damage claims, the infringement continues until the remedies are implemented.

Fifth, in principle, remedies under Article 7 apply indefinitely. In Der Grüne Punkt—Duales System Deutschland, the undertaking claimed that the remedy should have applied ‘only for the period corresponding to the entry of competitors on the market’. The General Court rejected this point, arguing in essence that ceasing to apply the remedy would mean that the undertaking would be infringing competition law again.55

However, nothing prevents the Commission from ordering remedies only for a specified period, or to attach a condition subsequent or a ‘sunset clause’ or a review clause to a remedy package. In Deutsche Post, the undertaking was required to report to the Commission the accounts of its newly created commercial parcel subsidiary, but only for 3 years.56 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 undertaking leaves the market. Presumably, an undertaking which was subject to Article 102 remedies would no longer be bound by them once it is no longer dominant (except for ‘restorative’ remedies aiming to establish the market situation that would have prevailed if the infringement not taken place: see Section II.C above).

Sixth, the Magill and Automec II judgments state that the Commission cannot impose a particular remedy ‘where several remedies exist for bringing an infringement to an end’.57 A good way to ensure that the Commission respects this principle is to require the undertaking to propose remedies (see Section III.D above). In Automec II, the General Court went on to state that ‘it is not for the Commission to impose upon the parties its own choice from among all the various potential courses of action which are in conformity with the Treaty’.58 As Hjelmeng puts it, in such cases, the Commission may order the undertaking to comply but may not dictate how to comply.59 It follows that the Commission can only impose a specific behavioural or structural remedy which is ‘the only way of bringing the infringement to an end’.60

Ironically, this can work in the Commission’s favour when the undertaking argues in court that the remedy is not sufficiently clear and precise: the Commission can reply that it is not for it to impose its own choice from among various potential courses of action. In Microsoft, the General Court sided with the Commission on this point.61

Seventh, all four types of remedies are subject to the principle of legal certainty, which requires that the remedy be ‘clear and precise so that the [undertaking concerned] may know without ambiguity what are [its] rights and obligations and may take steps accordingly’.62 However, the text of the remedy in the operative part of the decision should be interpreted in light of its authorization of publication dependent on certain conditions, including payment of royalties—was the only way of bringing the infringement to an end‘).58 Case T-24/90 Automec II, ECLI:EU:T:1992:97, paragraph 52.


Second, the remedy has to be ‘necessary’, in the sense that the individual concerned is in a position, on the basis of the wording of the relevant provision and, if need be, with the help of the interpretation of it given by the courts, to know which acts or omissions will make him liable.64 In practice, remedies that are defined in broad terms are likely to be both 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.

Eighth, any remedy is subject to the principle of proportionality,65 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.’66 This means that there are three legs in the proportionality test.

- First, the remedy has to be ‘appropriate’ (or ‘adequate’, or ‘suitable’), in the sense of actually addressing the harm at issue—and not some other kind of harm—and addressing it fully, or ‘effectively’. Another aspect of this leg is to check that the remedy does not destroy efficiencies within the firm to such an extent that the remedy’s net effect would be counter-productive for consumers: obviously, that would not be ‘appropriate’ to the goal of establishing a more competitive environment.

- Second, the remedy has to be ‘necessary’, in the sense that when there are several appropriate measures, ‘recourse must be had to the least onerous’ (or ‘burdensome’). To ensure that there is no equally effective but less burdensome remedy, the Commission can ask the undertaking concerned to propose remedies (see Section III.D above).

- Third, ‘the disadvantages caused must not be disproportionate to the aims pursued’. This is also known as the ‘proportionality stricto sensu’ leg of the test. The ‘proportionality stricto sensu’ leg does not exist across all areas of EU law; it is a fairly recent import in the area of EU competition law, and even in the EU competition case law, it is not consistently applied.67 Applying this leg in the area of antitrust remedies is unfortunate because it supports the view that, in some circumstances, the Commission may not impose a remedy which is a bit more effective than the next best remedy but much more burdensome. As such, the ‘proportionality stricto sensu’ leg can conflict with the principle of effectiveness.68 To be sure, in the abstract, the proportionality stricto sensu leg is good policy: it is essentially a cost/benefit analysis (‘the disadvantages caused must not be disproportionate to the aims pursued’; i.e., is the benefit worth the cost?). Certainly this is good policy when both the costs and the benefits are borne by the public, or at least by two groups of comparable importance. But in the sphere of antitrust remedies, implementing the remedy is a cost for the undertaking—a private interest—while it benefits the public interest. This would seem to militate against the use of the ‘proportionality stricto sensu’ leg in the sphere of antitrust remedies.

B. Orders to cease the infringement and not to commit it again

As mentioned above, the Commission may order the undertaking to cease the infringement and not to commit it again.69 Such an order is by definition proportionate.70


64 Case T-167/08 Microsoft, ECLI:EU:T:2012:323, paragraph 84. See also paragraph 91.

65 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, paragraph 39.

66 Case T-491/07 Cartes Bancaires, ECLI:EU:T:2012:633, paragraphs 428 and 438, citing case C-180/96 United Kingdom v Commission, ECLI:EU:T:1998:192, paragraph 96, and case T-30/05 Prym, ECLI:EU:T:2007:289, paragraph 1276: ‘the principle of proportionality requires that the burdens imposed on undertakings in order to bring an infringement to an end do not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed.’ See also case C-441/07 P Alrosa, ECLI:EU:T:2010:377, paragraphs 36 and 39.


68 But see E De Smijter and L Kjolbye, ’The Enforcement System Under Regulation 1/2003’ in J Faull and A Nikpay (eds), The EU Law of Competition (3rd edn Oxford University Press, Oxford 2014), at pp. 124 and 125: ‘If one proportionate remedy is more effective than other available remedies, the Commission can impose the most effective one’ and ‘The Commission is not obliged to choose a less effective behavioural remedy if a structural remedy is more effective’.


70 Case T-491/07 Cartes Bancaires, ECLI:EU:T:2012:633, paragraph 430.
It is also sufficiently precise provided that ‘the grounds of the decision reveal . . . the factors which led the Commission to find that the conduct . . . was illegal’.71 The order not to commit the infringement again in the future ‘is, of its very nature, preventive’.72 Accordingly, it remains valid even if the undertaking is no longer present on the market at issue on the day of the decision.73

Such an order may also prohibit any similar or equivalent infringement.74 This is also known as a ‘like effects’ order. Typically, the decision states that the undertaking ‘shall refrain from repeating any act or conduct described in Article 1 of this Decision and from any act or conduct having the same or similar object or effect’.75 (The phrase ‘object or effect’ in this context does not have the same meaning as in Article 101 TFEU.) This was judged to be proportionate.76

The General Court explained the rationale of such orders in the PVC case:

Just as the Commission is entitled to prohibit exchanges of information on sales and prices, which are covered by the Decision, it is entitled to prohibit also exchanges which indirectly allow an identical or similar result to be achieved. . . . To deny the Commission the power to prohibit such an exchange would allow the undertakings to circumvent easily the injunction upon them not to continue or resume conduct such as that found by the Decision to exist.77

C. Behavioural remedies

A behavioural remedy requires the undertaking concerned to perform certain acts or refrain from certain acts relating to its behaviour on the market, for example with regard to prices, supply obligations, product characteristics, contracts, or internal organisation measures (e.g. Chinese walls).

For instance, in the Akzo predatory pricing case, the undertaking had to raise its prices. In Magill, the Commission ordered the undertakings to provide the information to the complainant. In Microsoft, the undertaking had to provide the interoperability information to competitors and had to market a version of Windows without tying Windows Media Player. In Mastercard, the undertaking had to lower its interchange fees.78

A behavioural remedy cannot prohibit behaviour which is itself not prohibited by EU competition law.79 80 Two Commission decisions were partly annulled on this ground.

• In Cartonboard, the Commission prohibited the parties from exchanging aggregated information on the ground that this may be used for collusive purposes.81 The General Court annulled this aspect of the decision, noting that Article 101 does not prohibit exchanges of aggregated information ‘as such’.82 By contrast, the parties had infringed Article 101 by exchanging individualised information, so the remedy on this point stood.

• In Langnese-Iglo, the Commission prohibited the undertaking from concluding exclusive purchase agreements in general.83 The Court annulled this aspect of the decision, noting that Article 101 only prohibits exclusive purchasing agreements that significantly contribute to a cumulative effect foreclosing competitors.84

D. Structural remedies

According to the Commission proposal that led to Regulation No. 1/2003, structural remedies can be necessary in order to bring an infringement effectively to an end. This may in particular be the case with regard to cooperation agreements and abuses of a dominant position, where divestiture of certain assets may be necessary.85

73 Ibid.
76 Case T-334/94 Sarrio, ECLEU:T:1998:97, paragraph 269; case T-491/07 Cartes Bancaires, paragraphs 439 and 440 (‘L’utilisation du terme “similaire” ne permet donc pas d’établir le caractère disproportionné de cette injonction’).
77 Joined cases T-305/94 et seq. LVM and others, ECLEU:T:1999:80, paragraph 1254.
78 Commission decision of 14 December 1985 in case 30698 ECVs Akzo, Commission decision of 21 December 1988 in case 51851 Magill TV.
80 Except to restore competition to the pre-infringement situation or to the situation that would have prevailed ‘but for’ the infringement: in such cases, the Commission can place limits on the undertaking’s behaviour.
81 Commission decision of 13 July 1994 in case 33833 Cartonboard.
83 Commission decision of 23 December 1992 in case 34072 Langnese-Iglo.
The European Commission’s contribution to the 2006 OECD roundtable on ‘Remedies and Sanctions in Abuse of Dominance Cases’ states that:

A tentative definition of structural remedies is: ‘a structural remedy is 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 ongoing relationships between the former and the future owner. After its completion, a structural remedy does not require any further monitoring.’

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 freedom of 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’.

While Regulation No. 17 did not contain provisions explicitly concerning structural remedies, the Commission implicitly had the power to impose structural remedies at that time, and used it twice (Continental Can and Gillette). By contrast, under Regulation No. 1/2003, the Commission has not imposed structural remedies thus far. This contrasts with the Commission’s practice in merger cases, where there is a clear preference for structural remedies. This seems logical since merger control prohibits anticompetitive market structures (hence structural remedies), while the antitrust rules prohibit anticompetitive behaviour (hence behavioural remedies).

Article 7 of Regulation No. 1/2003 states that ‘[s]tructural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. It is sometimes claimed that this drafting expresses a preference or priority for behavioural remedies over structural remedies. In fact, the choice between behavioural remedies and structural remedies is only governed by the principles of effectiveness and proportionality: (a) the most effective remedy applies (Recital 12: ‘any remedy, whether behavioural or structural’); and (b) if a behavioural remedy and a structural remedy are equally effective, the least burdensome applies. Consequently, Regulation No. 1/2003 does not prefer or prioritise behavioural remedies over structural remedies.

Moreover, a situation where behavioural and structural remedies would be ‘equally effective’ is highly theoretical and unlikely. It would also be difficult to demonstrate, as structural and behavioural remedies function completely differently. And even assuming a situation where behavioural and structural remedies would be ‘equally effective’, a structural remedy is not necessarily more burdensome: a behavioural remedy consisting of price controls plus monitoring measures is probably more burdensome than a divestiture.

There are two types of structural remedies: (a) changes to the structure of an undertaking as it exists as a result of the infringement and (b) ‘changes to the structure of an undertaking as it existed before the infringement was committed’ (Recital 12). The latter are

87 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). See also Commission decision of 9 December 1971 in case 26811 Europenbalage (requiring Continental Can to make proposals within 6 months as to how it would divest its 80 per cent shareholding in Thomassen) (annulled on other grounds).
88 But the Commission notes that ‘the power to impose structural remedies under Article 7(1) has, nevertheless, positively contributed to the obtaining of structural changes as commitments under Article 9’. See Commission Staff Working Paper accompanying the first report on the functioning of Regulation No. 1/2003, SEC/2009/574 final, paragraph 92.
90 But see, contra, F Maier-Rigaud, who seems to think that the different frequency of structural remedies in merger cases and antitrust cases is a ‘curious asymmetry’. Maier-Rigaud, n 3, at p. 207.
91 R O’Donoghue and J Padilla, The Law and Economics of Article 102 TFEU (2nd edn Hart, Oxford 2013), pp. 880 and 887 (‘Regulation 1/2003 sets forth an express preference for behavioural remedies’, and there is a ‘[s]trong presumption that structural remedies are disproportionately’); E Wind, ‘Remedies and Sanctions in Article 82 of the EC Treaty’ (2005) 26 European Competition Law Review 659 (‘Priority is given to behavioural remedies, as structural remedies are used only if it is not possible to use the first’).
92 Similarly, De Smijter and Kjolbye, n 68, at p. 125: ‘It follows that Article 7(1) does not impose restrictions on the choice of remedies beyond those that already flow from general principles.’
also known as ‘break-up’ remedies.\textsuperscript{94} For example, when an undertaking’s acquisition of intellectual property or a shareholding is itself an infringement of Article 101 or 102 (as in, eg, Continental Can, Tetra Pak I, and Gillette),\textsuperscript{95} divesting those assets is a change to the structure of the undertaking as it exists as a result of the infringement. By contrast, a vertical foreclosure abuse by a vertically integrated undertaking may have to be addressed through structural separation (unbundling). That is much more serious—it is a change to the structure of the undertaking ‘as it existed before the infringement was committed’ (Recital 12). According to the same recital, this ‘would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking’. This language is reminiscent of the Article 106 case law on the automatic abuse theory and the assumed causal link between the situation of the undertaking and the abuse.\textsuperscript{96}

De Smijter and Kjolbye propose a four-pronged test for break-up remedies: ‘(1) the infringement has a substantial impact on competition and consumers; (2) the undertaking has engaged in repeated infringements or the structure of the undertaking causes it to infringe the EU competition rules, for instance by creating an inherent conflict of interest; (3) other available remedies are ineffective; and (4) breakup must not lead to a significant loss of efficiencies at the level of the undertaking, which would undermine the pro-competitive effects of the remedy’.\textsuperscript{97} Again the language concerning the ‘inherent conflict of interest’ is reminiscent of the Article 106 case law.\textsuperscript{98}

E. 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 undertaking to set out in writing, by a certain deadline, the detailed measures that it has implemented to comply with the decision.\textsuperscript{99}

- **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 cases\textsuperscript{100} and confirmed in Schöller.\textsuperscript{101}

- **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 undertaking bear the cost of the trustee.\textsuperscript{102} (The situation in merger cases is different since the parties’ commitments specify that they will pay for the trustee.)

V. Enforcement

When faced with a situation of non-compliance, the Commission can impose daily periodic penalty payments until the undertaking complies with the remedy.\textsuperscript{103} This is a three-step process.\textsuperscript{104}

As a first step, there must be a warning, based on Article 24(1) of Regulation No. 1/2003, stating the amount of the periodic penalty payment, the remedy that the undertaking is expected to comply with, and the specific measures that it has implemented to comply with the decision.\textsuperscript{99}

- **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 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 JCBI; 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.

- **Case T-9/93 Schöller;** ECLI:EU:T:1995:99, paragraph 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”).


- See also N Banasevic, A Barberá Del Rosal, C Hermes, T Kramler, I Taylor, and F Verzelen, ‘Commission Imposes a Penalty Payment Pursuant to...
deadline for such compliance. This warning can be a standalone decision (as in Microsoft), or it can appear in the operative part of the initial substantive decision finding the infringement and imposing remedies (as in Mastercard).

The periodic penalty payment can be expressed as an absolute amount (as in Microsoft: 2 million euros per day until 12 July 2006 and 3 million euros until 22 October 2007) or as a percentage (as in Mastercard: 3.5 per cent of its global turnover per day). The periodic penalty payment is capped at 5 per cent of the average daily turnover in the preceding business year.

As a second step, if the undertaking has not complied by the deadline, the Commission can issue a statement of objections.

The third step is the decision imposing the total amount to be paid on the basis of period penalty payments. It can be imposed, while the undertaking has still not complied, as in Microsoft. If it is imposed after the undertaking has finally complied, ‘the Commission may fix the definitive amount of the periodic penalty payment at a figure lower than that which would arise under the original decision’. Finally, instead of pursuing an undertaking for violation of a cease and desist order the Commission may equally decide to open a new investigation (with a decision to open proceedings) in the case of infringements that were continued or repeated despite a prohibition decision including a cease and desist order. The starting date of such a new infringement would be the date of the previous Commission decision or a subsequent date from which the recommencing of the infringement can be proven. In such a case the legal entities within the undertaking that continued or repeated the same infringement may also be liable for the aggravating circumstance of recidivism.

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105 Commission decision of 10 November 2005 in case 37792 Microsoft.
106 Commission decision of 19 December 2007 in case 34579 Mastercard.
107 Regulation No. 1/2003, Article 24(1).
108 Ibid, Article 24(2).