

Behavioral versus Structural Remedies under EU Law

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Proportionality, Necessity and Effectiveness



Council Regulation 1/2003,

Article 7(1) Finding and termination of infringement

Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it 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.

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To bring an infringement effectively to an end



What does “bring an infringement effectively to an end” and “equally effective” mean?

“equally effective” implies that effectiveness is a gradual concept, it can be measured (for instance from non-effective to less effective to highly effective) as otherwise the requirement would only be “effective” (in contrast to non-effective in a binary interpretation)

French version:

A cette fin, elle peut leur imposer toute mesure corrective de nature structurelle ou comportementale, qui soit proportionnée à l'infraction commise et nécessaire pour faire cesser **effectivement (in the sense of “to actually terminate”)** l'infraction. Une mesure structurelle ne peut être imposée que s'il n'existe pas de mesure comportementale qui soit aussi **efficace (in the sense of reaching the goal)** ou si, à efficacité égale, cette dernière s'avérait plus contraignante pour l'entreprise concernée que la mesure structurelle

Effectiveness of a remedy is not a binary measure according to which a whole range of measures may be classified as either effective or not effective

-> effectiveness is a gradual concept; it raises the question which remedy is the most effective one

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“Proportionate” and “Necessary”



- Proportionality and Necessity are general filters
- **Proportionality** as a general filter not as ultimate selection criteria
- **Necessity** as a general filter that determines whether the remedy is generally capable of bringing the infringement to an end, does not go beyond this goal and does not concern aspects that are not part of the procedure

In contrast to German law proportionality says nothing about effectiveness and vice versa

A more effective remedy is therefore not automatically a less proportionate one (milder means)

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“it may impose on them any behavioural or structural remedies”



1st filter (Article 7(1) 2nd sentence):

Any measure that is necessary to bring an infringement to an end and that is proportionate to the infringement can be imposed.

Necessity and Proportionality are criteria that both structural and behavioral remedies need to fulfill

2nd filter (Article 7(1) 3rd sentence):

Choose among all necessary and proportionate remedies the most effective one, conditional on Art 7(1) sentence 3.

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How to choose among proportionate and necessary remedies



Art 7(1) 3rd sentence: 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.

What does actually follow from this? Either

1. There is only a single remedy that is both proportionate and necessary
2. There are many remedies that are proportionate and necessary but only a single one is the most effective.

If one of these cases arises, the 3rd sentence is irrelevant, if however, there are several remedies that are all tied on first place in terms of effectiveness, 2 more situations can be distinguished

1. If all tied remedies are either homogenously behavioral or homogenously structural, the concerned undertaking should be allowed to choose (Case T-24/90 Automec [1992] ECR II-2223, §51f.)
2. If the tied remedies include both behavioral and structural measures, then the remedy has to be chosen that is the least burdensome for the undertaking

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Conclusion



- Council Regulation 1/2003 does not imply a preference for behavioral remedies (or the subsidiarity of structural remedies)
- The structural or behavioral nature of a remedy is immaterial as long as they are not equally effective. Only in this highly theoretical case when indeed they cannot be distinguished by the very criteria set forth in Article 7, does the Article suggest a preference for behavioral remedies

“behavioural policies, unlike structural policies, do not eliminate the incentive of the regulated firm to restrict competition. [...] despite the best efforts of regulators, regulatory controls of a behavioural nature, which are intended to control the ability of an integrated regulated firm to restrict competition, may result in less competition than would be the case if the regulated firm did not have the incentive to restrict competition” OECD (2001)

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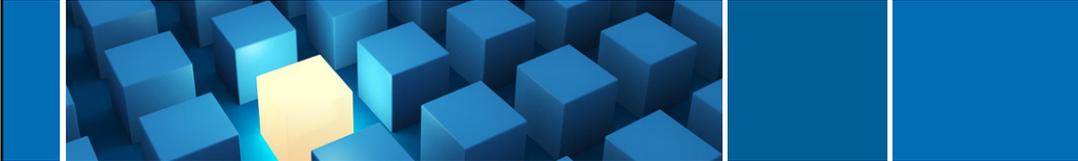
Some Literature



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