



## **ECN RECOMMENDATION ON THE POWER TO IMPOSE STRUCTURAL REMEDIES**

By the present Recommendation the ECN Competition Authorities (the Authorities) express their common views on the power to impose structural remedies. It contains general principles which the Authorities consider are relevant to ensure the effective enforcement of the EU competition rules within the ECN.

This document may serve as guidance to all those involved in shaping the legal framework for enforcement of Articles 101 and 102 TFEU. It is without prejudice to the legal frameworks of those ECN jurisdictions which already provide for these general principles or which go beyond the scope of the present Recommendation.

### **I. INTRODUCTION**

1. The power to prohibit conduct that infringes the competition rules is one of the key powers of the Authorities. This includes the power to order remedial action in order to bring the infringement to an end and restore competition in the market. It is desirable that Authorities have the choice and the power to impose both behavioural and/or structural remedies depending on the case. Behavioural remedies include e.g. supply obligations such as non-discriminatory access to infrastructure or technology, licencing of intellectual property rights, the termination of exclusive agreements or other obligations to behave in a certain manner. Structural remedies include all measures necessary to oblige an undertaking to sever on-going businesses, physical assets or

intellectual property held by it such as, among others, sales of activities, division of undertakings, disposal of equity interests in undertakings, or transfer of industrial property rights and other rights.

2. Structural remedies are an important tool to enforce competition rules since they contribute to bringing infringements to an end, prevent their recurrence and restore competition in the market. The Authorities do not resort to structural remedies frequently but may do so when it is deemed necessary and proportionate to the infringement committed. Indeed, structural remedies may be a more efficient and effective tool to restore fair conditions of competition than only imposing sanctions and/or the prohibition of the anticompetitive behaviour. Structural remedies are often easier to implement than behavioural remedies and they can help businesses and markets to work better, more productively and speedily.
3. Structural remedies can be imposed by a prohibition decision, jointly with, or alternatively to, a fine. Whilst fines constitute a sanction imposed on past behaviour and aim at deterring the same or similar conduct in the future, structural remedies mainly pursue the objective of restoring competition. They are not intended to punish.
4. The Authorities may also accept structural commitments which had been submitted by undertakings on a voluntary basis (see further the ECN Recommendation on Commitment Procedures) and make them binding in the context of a commitment decision. Structural commitments have to address the competition concerns identified.
5. Currently there is divergence within the ECN as regards the power of the Authorities to impose structural remedies when applying the EU competition rules. Some national legislative frameworks are aligned with Article 7(1) of Regulation 1/2003, which provides the European Commission with the power to impose structural remedies subject to specific conditions, whereas others differ. Some Member States' laws provide for an explicit legal basis which enables the Authorities to impose structural remedies, whereas other Member States' laws recognise such powers on a general legal basis which covers

all types of remedies without being specific. Finally some Authorities are not equipped with this power at all.

6. Divergence among jurisdictions also exists as to the conditions which may trigger the imposition of structural remedies. Whereas in most cases structural remedies can be imposed by the Authorities when issuing a prohibition decision, this type of measure may also be imposed or envisaged in a broader context, e.g. after the completion of a sector inquiry to restore competition in specific cases (e.g. highly concentrated markets).
7. Further convergence on the power to impose structural remedies within the ECN would contribute to reinforcing the range of appropriate enforcement tools which the Authorities should have at their disposal to effectively and adequately enforce the competition rules and to ensure competitive conditions for businesses and markets. It would also strengthen legal certainty for undertakings by limiting the risk of different treatment in cases of parallel investigations in different jurisdictions.
8. The exercise of the powers outlined in this Recommendation should be in accordance with the general principles of EU law and fundamental rights, including those enshrined in the Charter of Fundamental Rights of the European Union and the European Convention of Human Rights where applicable.
9. Structural remedies must be effective and proportionate, that is both necessary to remedy the infringement and not going beyond what is necessary to that effect, namely the re-establishment of competition and compliance with the rules infringed. If equally effective, preference shall be given to the less burdensome remedy for the undertaking concerned.
10. Even though the use of structural remedies depends on the facts and circumstances of each individual case, experience within the ECN shows that the type of infringement for which they may be suited includes abusive behaviour and cases involving network industries in liberalised markets. Such cases involving major structural problems may call for structural solutions. An example may be proceedings against an incumbent vertically

integrated company (e.g. a gas or electricity provider) which forecloses the downstream supply markets by refusing indispensable access to its distribution network. Such abusive conduct stems from the very structure of the vertically integrated companies, which may favour the interests of their group and leverage their control of the network to maintain their dominance downstream. In such constellations structural remedies can be a proportionate tool to effectively remedy the infringement. Other examples brought forward by the Authorities concern markets in which under certain circumstances direct competitors eliminate or reduce competition through the establishment of joint ventures in the same market in which they are active. A spin-off of their common joint venture may remedy the competition infringement.

11. The effective implementation of structural remedies is key to remedy the infringement and restore competition in the market. In some cases it may be sufficient to rely on the vigilance of market participants, but in other cases additional safeguards are required to ensure the successful implementation of the remedies. Many Authorities have the ability to monitor and to enforce the compliance of undertakings with structural remedies through different mechanisms or procedures, such as reporting obligations from the undertakings, the appointment of trustees and/or external experts or non-governmental advisors or through cooperation with other authorities and sectoral regulators. It is desirable to provide for such powers to enable all Authorities to effectively order remedial action in order to restore competition in the market.
12. For the implementation of structural remedies in an effective and timely manner, independent trustees appointed by the Authorities can play a crucial role. The duties and obligations of a trustee can vary significantly, depending on the specific circumstances of each case. For example during a divestment procedure a trustee may supervise the interim preservation of the status quo of assets or rights for divestiture and make sure that the actual divestiture is done in a timely manner and in compliance with the criteria set out for the specific structural remedy by the Authority.

13. Non-compliance with a structural remedy imposed by an Authority may lead to the adoption of measures sanctioning the undertakings concerned and ensuring future compliance with the remedies. These measures include sanctions, notably fines, and effective means to compel compliance, such as periodic penalty payments. Experience shows that the ability of Authorities to impose such measures underpins the effectiveness of structural remedies.

## **II. ECN RECOMMENDATION**

### **It is recommended that:**

1. The Authorities should have the power to impose structural remedies where it is necessary to bring a competition infringement efficiently and effectively to an end and thereby to restore competition in the market. The power to impose structural remedies should be subject to the principles of proportionality and effectiveness.
2. The Authorities should have the powers to ensure the quick, simple and observable enforcement and implementation of the structural remedies. The Authorities should be able to monitor and enforce structural remedies through effective mechanisms or procedures, including the possibility to revert to external experts such as trustees.
3. In cases of non-compliance with structural remedies, the Authorities should have at their disposal effective sanctions, notably fines, in addition to efficient means to compel compliance with the remedies, for example through the imposition of effective periodic penalty payments set at an appropriate level.

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