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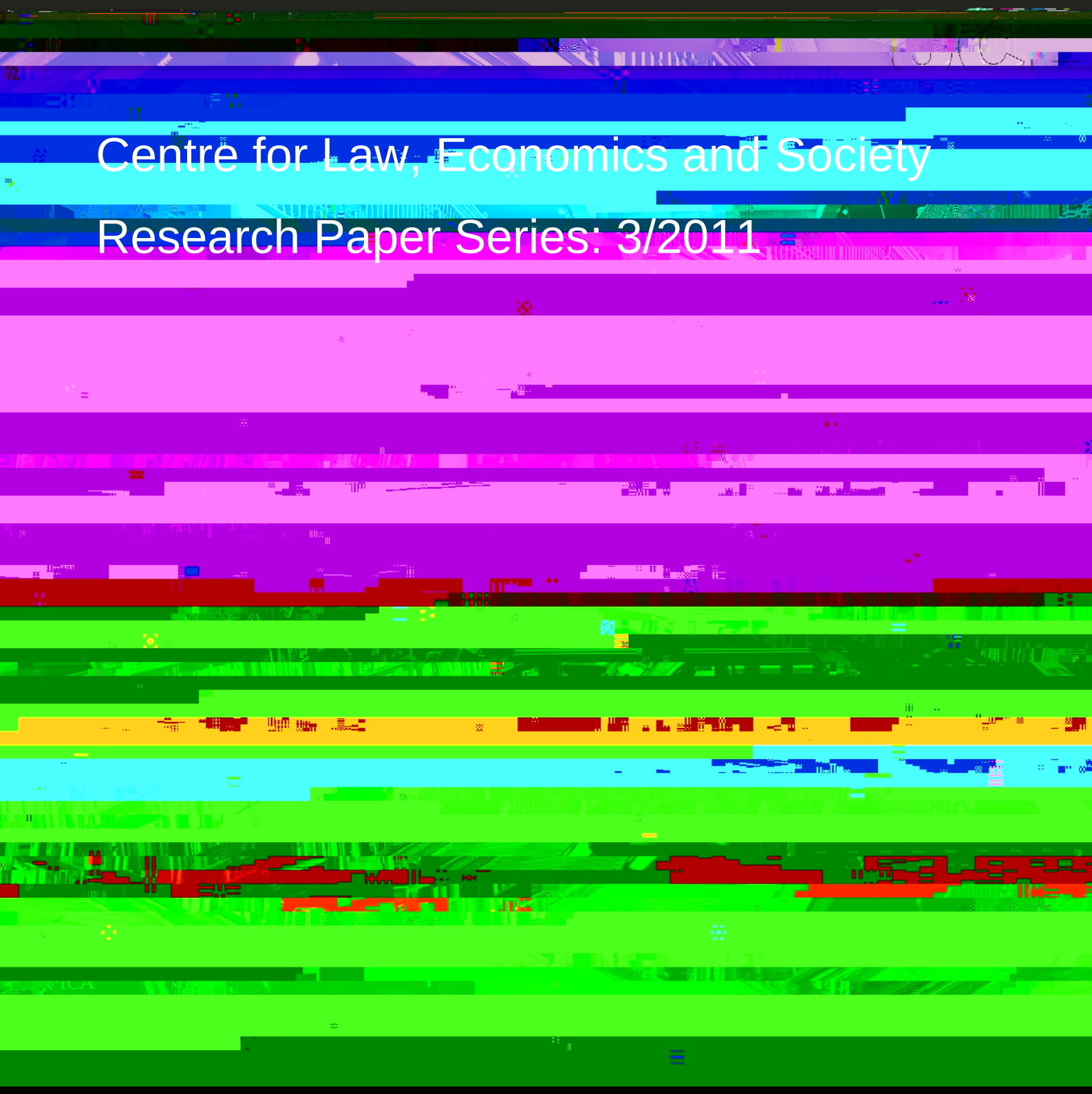

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Competition Law Remedies. In Search of a Theory

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Competition Law Remedies: In Search of a Theory

Ioannis Lianos*

1. Introduction

For a long time, the debate on Article 102 TFEU has focused on the interpretation of the different constitutive elements of the abuse of a dominant position, the R S S R V L W L R Q E H W Z D H V H Q G ´ D ³ Q R U P D O ´ D E X V H R I G H F D V S U R D F K D Q G definition of the scope of the special responsibility of dominant firms to preserve competition. The issue of remedies has been relatively neglected. The coming of age of European Union (EU) competition law on Article 102 TFEU with a number of decisions on high profile abuse of dominance cases involving important international undertakings and the adoption of complex remedial schemes has brought the issue of remedies for the abuse of a dominant position to the center of the attention of competition law policy makers, enforcers, and academics.[1]

The Microsoft decision in the United States (US) and in the EU has been the catalyst of this increasing interest on the topic of remedies. There was little suspense over the existence of a dominant position or that of an abuse. The main concern expressed related to the remedies that were adopted in this case.[2] Some authors argued that these remedies failed to achieve their objectives.[3] Other authors were more measured in their judgement.[4] The Microsoft case did indeed put competition authorities and the courts to the difficult position of engineering a remedy that would achieve a specific market outcome. In the US case, Judge Jackson, of the DC District Court, had ordered the breakup of Microsoft into several different

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[1] See OECD, Policy Roundtables: Remedies and Sanctions in Abuse of Dominance Cases, (2006) available at http://www.oecd.org/dataoecd/20/17/38623413.pdf; NICHOLAS ECONOMIDES & IOANNIS LIANOS

companies.[5] Microsof

separate questions of remedy from questions of liability as proponents of ³GLVFUHWLRQDU\ UHPHGLDOLVP´ RI WKH[10] QLG RW KH L V ³F U H Z W R K courts [in this case we will add competition authorities] have discretion to award the µDSSURSULDWH¶ UHPHG\ LQ WKH FLUFXPVWDQFHV RI HDF limited to specific (perhaps historically determined) remedies for each category of FDXVDWLYH[11] HYHQWV The third section will attempt to integrate the issue of discretionary remedialism and the distinction between the liability and remedial phase to the broader question of the relation between efficiency, distributive justice on the one hand and corrective justice on the other. The thoughts included in this section are preliminary and are part of some ongoing work by the author. The fourth VHFWLRQ ZLOO H[DPLQH WKH LPSRUWDQFH RI ³GLVFUHW the context of antitrust, but also will analyse why it is important to limit its effects. The fifth section will explore the objectives pursued by competition law remedies, in order to show that a coherent theory of competition law remedies is incompatible with a sharp dichotomy between liability and remedy questions. The sixth section

secondary (remedial) right, it is essential to examine if there is a legal cause of action. The concept of legal cause of action breaks the direct causality chain between primary rights and remedies implied by the maxim ubi jus, ibi remedium. A specific remedy does not necessarily follow the violation of the primary right. The relation between these three concepts has been explained in the following terms:

> 3 U L P D U \ U L J K W V G H V F U L E H D S H U V R Q ¶ V L Q L W L D O O H
> describe the remedies to which he is entitled if the primary right is violated. When this violation takes place (for example, a tort is committed or contract breached), we talk of there being an injustice and a legal cause of action. Causes of action describe those events which consist in the violation of private law rights, or, to use diffe U H Q W Z R U G V R I P \ R Z Q S U L P D U \ L Q M X V W L F H V 5 H
> response to such events and describe a secondary level rt istitlededtitle

maximization of wealth, without any specific limit imposed by corrective justice.[30] For

a major issue, because of the future consequence of deterring harmful conduct (and therefore its future positive wealth maximization effects).[36] The boundaries between efficiency and distributive justice are blurred if the welfare of the victims is given more weight than that of the antitrust violators.

Deterrence also might be an objective of corrective justice. One could thus distinguish between two forms of deterrence: deterrence as wealth maximization and deterrence as a moral requirement for corrective justice to work effectively (thus a form of efficiency independent from wealth maximization). As Gardener forcefully explains, there is a distinction to be made between the moral content of corrective

WUDQVDFWLRQ 5LJKWV DQG GXWLHV -gen QH UGLQJ WUDQVDFWLRQ ZKLFK WKH YL

FRUUHFWLYH MXVWLFH -LVFSHHFLDO[38] WKH \´ DUH DJHQW

entitlement, corrective justice will inevitably collapse to distributive justice.[44] However, as the same author notes,

> what is to preclude the injury party from claiming that the infringement should be viewed simply as a redistribution of holdings in accordance with the same or a competing criterion of distribution? If the injury party can coherently frame the dispute in this way, the correction of the infringement should also properly be characterized as an act of distributive justice, seeing that it can be viewed as a decision made between two competing distributive claims.[45]

The wrongdoer thus could claim a different distributive claim, based, for example, on an alternative distributive measure (the so called Robin Hood defense). The only possibility, according to the same author, to avoid a counter-claim based on another distributive justice criterion is to presume that the distribution prior the commitment of the ZURQJ ZDV MXVW DQG WKXV EDU WKH LQMXULQJ SDUW\ RI D FRPSHWLQJ GLVWULEXWLYH FODLP.[46] However, it might be profoundly unjust and arbitrary to confer this presumption of validity to the pre-transactional allocation rather than to the new arrangement.[47] In conclusion, corrective justice [illegible] Corrective6t3-6(p14)-3(r

words, the pre-

remedy phases and the interaction between the principles of efficiency as wealth maximization, corrective justice and distributive justice, I will now turn to the aims pursued by competition law remedies.

4. The Aim of Competition Law Remedies

Competition law remedies are adopted with the principal aim to restore competition in the market.[52] 7KLV LQFOXGHV ILUVW WKH ³PLFURJ infringement to an end, compensating the victims,[53] and curing the particular SUREOHP WR FRPSHWLWLRQ EXW DOVR WKH ³PDFURJRD to minimize the recurrence of just su FK DQWLFRPSHWLWLYH [54] This study adopts

by Regulation 1/2003 concerns public enforcement and does not take into account the emerging role of private enforcement in EU competition law.

Remed LHV VHHN JHQHUDOO\ WR UHVWRUH ³WKH SODLQ the position that the plaintiff would have occupied if the defendant had never violated WKH ODZ´ RU ³WR UHVWRUH WKH GHIHQGDQWV WR WKH G SRVLWLRQ WKDW WKH GHIHQGDQW ZRXOG[57] In other RFFXSL ZRUGV UHPHGLHV DUH D FXUH WR D ³ZURQJ´ WKH SODLQ some legally-UHFRJQL]HG ULJKW[58] or of the category of right-recipients that the legislator intended to protect. The wrong of the defendant gives rise to the enforceable right of the plaintiff (or the protected category) to impose on the defendant a correlative duty to stop the illegal behavior, pay damages, make restitution, or adopt a specific behavior. Article 7 of Regulation 1/2003 does not oppose this conceptualization of remedies, as it links the adoption of a remedy to the end of the infringement, a concept that might be understood narrowly, the termination of the illegal conduct, but also, more broadly, as outcome-oriented, thus requiring the reversal of the effects of the illegal conduct.

An important aspect in the definition of remedies is therefore to determine who would be the beneficiary of this right. In other words, the protected category retains the right to impose a correlative duty to the defendant. We will assume that the protected category for competition law remedies is the consumers of the relevant PDUNHW KDUPHG E\ WKH ³ZURQJ´ FR[59] A wider perspective WKH G ZRXOG EH WR FRQVLGHU WKDW WKH SURWHFWHG FDWHJ deriving benefits from the principle of competition, allegedly jeopardized by the practices of the dominant firm.[60]

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[57] DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 2 (Little Brown 1994).
[58] Michael Tilbury, Michael Noone, & Bruce Kercher, REMEDIES: COMMENTARY AND MATERIALS 1 (LBC Information Services 3d ed. 2000).
[59] In this case, consumer welfare or consumer sovereignty will be proxies of consumer harm.
[60] See the Opinion of AG Kokott in Case C-8/08 T-Mobile Netherlands BV and Others [Feb. 19 2009] paras. 58, 71 defending the view that the objective of EC competit LRQ ODZ LV WR ³SURWHFW FRP VXFK´ EHFDXVH WKLV LV RI EHQHILW QRW RQO\ IRU FR C-8/08 T-PHUV EXW Mobile Netherlands BV and Others [June 4, 2009] para. 38, the Court of Justice of the EU accepted WKDW ³$UWLFOH 81 EC, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the PDUNHW DQG WKXV FRPSHWLWLRQ DV VXFK´ EXW GLG QRW DGRSW W

: K L F K H Y H U S H U V S H F W L Y H U L L Q V J F K R R V H Q W L W U H V Q W R V K R X
interpreted as reaching perfect competition (or free competition if one takes a deontological perspective), which is practically unattainable, and in some cases a normatively undesirable objective from a public policy perspective.[61] The remedy aims to restore the market that would have existed in the absence of the conduct
I R X Q G L O O H J D O W K D W L V Z K D W L V F R P P R Q O \ F D O O H G W

Competition law remedies list also a prophylactic objective. Threy are to
3 H Q V X U H W K D W W K H U H U H P D L Q Q R S U D F W L F H V O L N H O \
I X W X U H[62] This is certainly a difficult enterprise that requires from the courts a guessing exercise linked to a counterfactual analysis of the situation in the market with and without the specific competition law violations. This is particularly true in complex and dynamically evolving markets, where static models cannot easily predict the situation that would have existed absent the restraint. It also requires a difficult decision on the appropriate remedy enforcement mechanism, as the judge or the authority should decide on the degree of her involvement (as opposed to market forces or regulatory institutions) in the operation. One could indeed perceive the operation of designing appropriate remedies as being, first of all, a decision over the need for regulatory interference in order to bring the self-correcting forces of the market back to their usual operation as the default mechanism that would adjust the incentives of market actors and therefore the interaction between supply and demand in the specific sector of the economy. Thus, remedies could be (i) setting up conditions for the market to work or (ii) directly influencing or guiding the market.

There are of course different choices that can be made and combined in order
W R D I I H F W W K H L Q F H Q W L Y H V R I P D U N H W D F W R U V D Q G

[61] In industries with significant network effects, even in the absence of anticompetitive actions, the natural equilibrium is neither perfect competition nor an egalitarian market structure. Markets with strong network effects, such as the market for operati Q J V \ V W H P V R I 3 & V-take D U H R V W L Q Q H U markets with significant market share and profits inequality as well as high concentration. Thus, the

best possible outcome for the consumers of the specific relevant market in terms of price, quality, variety, innovation etc, if one assumes, as does this study, a consumer-driven competition law. First, it is possible to contract out the remedy to

often led the Commission to decide not to impose any fine or a remedy. This demonstrates the interaction between remedies and the nature of competition law violations.

Table 1: Remedies in Article 102 TFEU

Conduct remedies may take different forms. A constant feature is that, in most cases, they respond directly to the nature of the competition law violation. A refusal to deal/license case often involves as a remedy an obligation to supply or to license. Price discrimination, selective price cutting or predatory pricing claims are often dealt with an obligation to ensure that prices are justified by objective considerations and by an injunction to stop practicing discriminatory, selective or predatory prices. Exclusive dealing and tying claims might lead to conduct remedies that are more

was found illegal. The choice of fines over other conduct remedies might be influenced by deterrence reasons and the difficulty to decide remedial schemes that might affect the commercial freedom of the undertakings in their pricing decisions, in particular as the criteria for defining what constitutes a loyalty rebate have been unclear, at least before the publication by the Commission of its guidance on its enforcement priorities under Article 102 TFEU.[64]

However in a number of cases, the Commission has moved further than just adopting conduct remedies mirroring the abuse. The remedies attempt to engineer some form of market or product design. Prophylactic measures imposed to dominant undertakings include the implementation of broad competition law complianlac5034 Tm[(m)

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browser(s) in addition to the one(s) they already have.[69] Users will be able to select one or more of the web browsers offered through the choices screen. Microsoft has F R P P L W W H G W R G L V W U L E X W H D Q G L Q V W D O O W K H F K R L F H that is designed to bring about installation of this update at a rate that is as least as high as that for the most recent version of Internet Explorer offered via Windows 8 S G D[70] W H ´

This remedy does not correspond to the consumer harm story that the Commission advanced in this case. The Commission relied on the relatively favourable case law on tying which establishes a form of quasi per se illegality treatment under Article 102 TFEU if a company has a dominant position. However, W K H ³P X V W F D U U \´ F R P P L W P H Q W D F F H S W H G E \ W K H & R P P for the competition problem does not address directly this particular risk of abuse. Unbundling would seem to be the most appropriate remedy for a tying concern based on leveraging. However, the Commission reacted negatively when Microsoft decided to unbundle IE from Windows 7-E.[71] 7 K H ³P X V W F D U U \´ U H P H G \ Z K ultimately adopted fits better with an essential facilities case, where Windows would have been considered indispensable for the distribution of an Internet browser.

This apparent lack of logical coherence between the remedy adopted and the theory of harm might be justified if one takes a position close to that of discretionary remedialism. But this is not without affecting the nature of the primary right and consequently the scope of the antitrust liability of the dominant firm that is delimited by the theory of harm. The risk of strategic litigation is also present if plaintiffs could employ theories of harm that aret f

logical (causal) connection between the remedy and liability, without, however that leading to collapse the two legal categories to one. The

shall be had both to the gravity and to the duration of the infringement as well as to the effect of the competition law infringement on the market.[74]

The General Court (previously Court of First Instance) has also recently applied the principle of proportionality to commitment decisions adopted under Article 9 of Regulation 1/2003: In Alrosa WKH &RXUW KHOG WKDW ³WKH Y the commitments . . . does not relieve the Commission of the need to comply with WKH SULQFLSOH RI SURSRUWLRQDOLW\ EHFDXVH LW LV WKRVH FRPPLWPHQWV WKDW ³QLYLDQ concerned merely assented, for their own reasons, to a decision which the &RPPLVVLRQ ZDV HPSRZHUHG [75] The Commission is subject to the same duty of applying the principle of proportionality in adopting Article 7 or 9 GHFLVLRQV ZKLFK ZRXOG UHTXLUH LQ WKH H[HUFLVH RI $U WKH YLDELOLW\ RI WKRVH LQWHUPHGLDWH VROXWLRQV Commission.[76] However, in a recent judgement, the Court of Justice of the EU (Court of Justice) struck down the judgement of the General Court for having applied the same level of proportionality control to Article 9 and to Article 7 decisions.[77] The &RXUW RI -XVWLFH QRWHG WKDW ³WKH HQVXUH WKDW WKH principle of proportionality is observed has a different extent and content, depending RQ ZKHWKHU LW LV FRQVLGHUHG LQ UHODWLRQ WR WKH [78]

The principle of proportionality is given a specific content in Article 7 of Regulation 1/2003 and in the competition law case law of the European courts.[79] It requires that

> measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question; when there is a choice between several

[74] See Joined Cases C-189/02 P, C-202 P, C-205-208/02 P, C-213/02 P, Dansk Rørindustry and others [2005] ECR I-5425, para. 243.
[75] Case T-170/06, Alrosa v. Commission [2007] ECR II-2601, paras. 105 ±6; Appeal Case C-441/07 P.
[76] Id. at para. 156. See, however, the contrary positBTi-3(rti9(nc)-5(ofA)5(pBTA-9( )-3(oc.)-7t)-8(c)-5(G T)] ns)] TathoE

appropriate measures, recourse must be had to the least onerous, and the

of the remedies to be imposed would require a precise remedial measurement, not only with regard to the magnitude and scope (amount) of the harm to consumers/competition or the nature of the infringement, but also in relation to the type of violation that was identified. This might cover a specific competition law category (ie a refusal to deal, a tying case, an exclusive dealing case),[84] but also the theory of harm advanced in the specific case (ie maintenance of monopoly, leveraging, essential facilities). The importance of remedial fit is often stressed by antitrust law literature.[85] It is also indirectly linked with the existence of a causal U H O D W L R Q E H W Z H H Q W K H X Q G H U W D N L Q J ¶ V F R Q G X F W D Q
has, as the DC Circuit held in the US Microsoft ca V H ³ P R U H S X U F K D V H L Q F R
Z L W K W K H D S S U R S U L D W H U H P H G \ L V V X H ´[86]

5 H P H G L H V V K R X O G R I F R X U V H E H H I I H F W X O L V W D E O L V K 7 K H L U
the competitive situation, i.e., the competitive process that would have prevailed

E H \ R Q G V L P S O \ ³ P L U U R U L Q J W K H D E X V H ´ D Q G Z R X O G ³ J L
D G Y D Q W D J H R Y H U W K H L Q I U L Q J H U L Q R U G H U W R U H V W R
high remed€OLOLL

> compliance with the principle of proportionality requires that, when measures that are less onerous than those it proposes to make binding exist, and are known by it, the Commission should examine whether those measures are capable of addressing the concerns which justify its action before it adopts, in the event of their proving unsuitable, the more onerous approach.[93]

7 K H & R P P L V V L R Q F D Q Q R W undertakings unless such a decision is necessary to re-establish the situation which H [L V W H G S U L R U W R[94] Commission may prohibit undertakings completely and indefinitely from contracting amongst each other.[95] The Court thus found that, in the absence of these H [F H S W L R Q D O F L U F X P V W D Q F H V W K H & to refrain for an indefinite period all direct or indirect trading relations between them infringes the principle of proportionality. In this case, the Commission imposed a complete and indefinite cessation of trading relations between Alrosa, a

remedy responded to the competition concern raised. First, the Commission had not H[SODLQHG KRZ FRQWLQXLQJ VXSSO\ WR 'H %HHUV ZR guarantee a regular supply of significant quantities of rough diamonds. Second, even if this had been the case, and the continuation of the supply would have increased the competitive advantage of De Beers, thus contributing to maintain or reinforce its dominant position on the market, this does not constitute an abuse of a dominant position. As it is put clearly by the Court:

> [s]ince the object of Article [102 TFEU] is not to prohibit the holding of dominant positions but solely to put an end to their abuse, the Commission cannot require an undertaking in a dominant position to refrain from making purchases which allow it to maintain or to strengthen its position on the market, if that undertaking does not, in so doing, resort to methods which are incompatible with the competition rules. While special responsibilities are incumbent on an undertaking which occupies such a position.[97]

As noted earlier, the judgement of the General Court was set aside by theCourt of Justice, mainly for applying the same standard of proportionality to Article 7 and 9 decisions. Interpreted as such, the judgement of the Court of Justice may be limited to Article 9 decisions, thus not denying to the General Court the possibility to subject Article 7 decisions to a strict proportionality test. However, there is also some ODQJXDJH LQ WKH &RXUW RI -XVWLFH¶V MXGJHPHQW WK General Court to perform a thorough analysis of the substantive proportionality of the remedy and its fit to the liability theory advanced: the General Court should in no case put forward its own assessment of complex economic circumstances and should not substitute its own assessment for that of the Commission.[98] The Commission may therefore enjoy a wide remedial discretion by being able to find cover behind the nebulous and still indetermined concept of complex economic assessment, and thus avoid a strict proportionality control of its remedial action. Although one could accept that commitment decisions are subject to less intensive review standards, simply because of their voluntary, almost contractual, nature, such

[97] Id. at para. 146.
[98] Case C-441/07, European Commission v. Alrosa Company Ltd. [29 June 2010], nyr, para. 67.

an approach will not be optimal with regard to final decisions reached by the competition authorities. It remains to be seen whether this will extend to Article 7 decisions.

The greater incursion of courts to the remedial discretion of competition authorities cannot only be observed in the enforcement of EU competition law but affects also the application of national competition law. In some recent decisions, the UK Competition Appeal Tribunal (CAT) has performed an assessment of the proportionality of the remedies imposed by the Competition Commission in a number of market investigation reference decisions, under Part IV of the Enterprise Act of 2002. In Tesco Plc v. Competition Commission,[99] the CAT required the Competition Commission to perform a "doubly proportionality test":

> the more important a particular factor seems likely to be in the overall proportionality assessment, or the more intrusive, uncertain in its effect, or wide-reaching a proposed remedy is likely to prove, the more detailed or deeper the investigation of the factor in question may need to be.[100]

The application of this test presupposes that courts might eventually need to go beyond rationality to enquire further into the weight attached to the relevant considerations. The CAT is explicitly linking the remedy with the consideration of the "adverse effect on competition" (AEC) which should be proportionate.[101] The principles of this test are set as following:

> the measure: (1) must be effective to achieve the legitimate aim in question (appropriate), (2) must be no more onerous than is required to achieve that aim (necessary), (3) must be the least onerous, if there is a choice of equally effective measures, and (4) in any event must not produce adverse effects which are disproportionate to the aim pursued.[101]

The methodology employed for this analysis is not, however, clearly explained by the CAT which acknowledges that "the application of that principle is a general reference to a general principle of EU law".[102]

[99] Tesco Plc v. Competition Commission, [2009] CAT 6, at para. 139.
[100] Id. at para. 139.
[101] Id. at para. 137.
[102] Id. at para. 138.

F D X V D W L R Q V H Q V L W L Y H U \ G D Q J H U R X V W K H 7 U L E X Q D O [107] > W must satisfy a material L W \ W H V W ´ Z K L F K [3] Z L O O U H T X L U H W K H I I quashed unless the Tribunal is satisfied that a reasonable decision-maker in the S R V L W L R Q R I W K H & R P P L V V L R Q Z R X O G V W L O O K D Y H U H D F [108]

The Tribunal stroke down part R I W K H & R P S H W L W L R Q & R P P L V V L R Q adequate remedies for lack of proportionality, finding that the economic methodology employed by the Commission was defective and that in conjunction with the other failings of the decision should lead to its quashing.

In its most recent decision, BAA Limited v. Competition Commission, the CAT seems to have backed up from the requirement that the proportionality test should require a precise quantitative analysis of the impact of the remedy, as the first step of a cost benefit analysis that will compare the adverse effects on competition with the costs of implementing the remedy and its impact on the undertakings.[109] Even in the absence of a quantitative assessment, the requirement of a qualitative analysis of the impact of the remedy, in comparison to the AEC, is, however, sufficient to establish the link between the remedy and the wrong, and thus to question the foundations of discretionary remedialism.

7. Conclusion

The topic of competition law remedies for abuse of dominant position or monopolization has not attracted sufficient attention from competition law scholarship in both sides of the Atlantic.[110] There is an important difficulty in devising a coherent theory of competition law remedies that would accommodate the discretion that the European Commission or the national competition authorities traditionally enjoy in

[107] Id. at para. 26.
[108] Id. at para. 28.
[109] BAA Limited v. Competition Commission [2009] CAT 35, para. 261. The Commission does not refer to the requirement of quantification in the Barclays decision.
[110] For a useful and broad, compilation of a bibliography on remedies see, Eleanor M. Fox and Paul Sirkis, Antitrust Remedies: Selected Bibliography and Annotations (American Antitrust Institute, Working Paper No. 06-01, 2005), available at http://ssrn.com/abstract=1103601. In Europe, most literature has focused on merger remedies, an area where the Commission has published guidelies: Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2 [2008] OJ C267/1.

this field, while preserving some logical connection between the measure adopted and the competition law issue identified in the liability phase of the decision. The problem is more acute in the new era of the effects-based approach in the enforcement of Article 102 TFEU. An important ingredient of this approach is the identification of a coherent theory of harm that will be subject to the assessment of the decision maker through different analytical steps.[111] The implications of this move towards an effects-based approach for the selection of remedies and the operation of the proportionality principle have not, however, been adequately examined yet.

An effects-based approach creates problems even if a considerable effort is made to create some formalistic safe harbours, such as the price/cost test for loyalty and bundled discounts and predatory pricing abuses that aim to structure if not to restrict within the scope of the prohibition in Article 102 TFEU only practices that exclude [112] This study advances the argument, however, that even if the Commission should be recognized as having an important discretion in adopting the most effective remedies, it would be particularly damaging for competition law to lean towards discretionary remedialism. The effect will be even more devastating for the coherence and legitimacy of competition law, in view of the increasing role of private enforcement, in particular if plaintiffs could employ the less demanding, in terms of standard of proof, theory of consumer harm in order to achieve the most far reaching