Guidelines

CC 6 - REMEDIES AND PENALTIES

November 2009

1. Introduction

1.1. This document describes the approach of the Competition Commission to setting remedies and penalties, as required by Section 38 of the Competition Act 2007, which specifies that the Competition Commission shall, within six months of its establishment, publish (inter alia):

"guidelines on the principles which shall be used for the determination of penalties or remedies imposed under the Act, and on the manner in which turnover is to be calculated for the purposes of section 59"

1.2. The Competition Commission is empowered by the Act independently to remedy competition problems that it finds in its investigations, and in some cases to impose financial penalties on enterprises in breach of the Act. Remedies are actions taken to correct an existing or anticipated failure of competition, going forward. Penalties penalize past anticompetitive behaviour. This document describes the principles the Competition Commission will follow in taking both these different forms of action.

1.3. The Act establishes four categories of restrictive practice, described in Sub-parts 1 to 4 of Part III of the Act. There is a clear distinction between 'Collusive agreements' as described in Sub-Part 1 (sections 41 to 43), and the other restrictive practices. Collusive agreements can be penalized, other restrictive practices can only be remedied.

1.4. Collusive agreements, including cartels, bid-rigging and resale price maintenance are prohibited and any agreement determined by the Competition Commission to be in breach is null and void. Section 58 of the Act provides for the Competition Commission to make directions to ensure that this is so, and Section 59 gives Competition Commission the power to impose a financial penalty. Such penalties can be imposed *only* for intentional or negligent breaches of Sections 41 to 43: collusive agreements.

1.5. In contrast, restrictive practices covered by (a) non-collusive agreements, (b) the monopoly provisions or (c) resulting from mergers cannot be penalised. Instead, the approach in the Act is for the Competition Commission to take action to remedy the situation, so that the anticompetitive conduct, or the effects of that conduct, do not occur in the future. The Competition Commission has strong powers independently to impose a range of different remedies, and these are set out in Sections 60 and 61.

1.6. These guidelines are not a substitute for the Act and the regulations. They may be revised from time to time, should the need arise. The examples in these guidelines are for illustrative purposes only and should not be taken as exhaustive. Nor do these examples set a limit on the powers of investigation and enforcement of the Competition Commission. In applying these guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice.

2. Financial penalties

2.1 The only form of restrictive practice that can result in a financial penalty under the Competition Act 2007 is a collusive agreement: price-fixing agreements, bid-rigging, market sharing or resale price maintenance. The Act provides that the Competition Commission may impose a financial penalty only if it is satisfied that an enterprise has committed a breach of sections 41, 42 and 43 intentionally or negligently.

Policy objectives

2.2 In imposing any financial penalty, the Competition Commission has the following two objectives:

(a) to reflect the seriousness of the breach; and

(b) to deter enterprises from engaging in anti-competitive practices.

2.3 The imposition of a financial penalty is discretionary. The Competition Commission will, where appropriate, impose financial penalties in respect of horizontal agreements which are collusive (Section 41); Bid Rigging (Section 42); and vertical agreements which involve resale price maintenance (Section 43), as they are the most serious breaches of competition law. This is aimed at deterring not only the infringing enterprises but also other like-minded enterprises which might be considering activities contrary to the section 41, 42 and 43 prohibitions.

2.4 The assessment of an appropriate penalty to be imposed for all types of breaches will depend on the facts of each case.

2.5 Note that the Commission's leniency policy provides substantial reductions in, or complete immunity from, financial penalties, for enterprises coming forward with information about breaches of Sections 41 to 43. Details are set out in Chapter 5 of *CC 3: Collusive Agreements*.

Determining the amount of penalty

2.6 A financial penalty imposed by the Competition Commission under section 59 of the Act will be calculated taking into consideration the following:

(a) the turnover of the enterprise in Mauritius in the last business/financial year, multiplied by the duration of the breach;

(b) Adjustments to reflect other relevant factors such as deterrent value and any further aggravating or mitigating factors;

(c) To a maximum of 10% of the turnover of the turnover of the enterprise in Mauritius in the last business/financial year, multiplied by the duration of the breach.

Calculation of turnover multiplied by the duration of the breach

2.7 The Act provides that these guidelines should set out how turnover shall be calculated for the purposes of imposing the financial penalty on an enterprise in Mauritius.

2.8 In assessing the impact and effect of the breach on the market, direct or indirect impact, the Competition Commission will take into consideration, among other things the net turnover (the value of sale of goods and services) of the enterprise in Mauritius for the last business year. The business year, for this purpose, will be the one preceding the date on which the decision of the Competition Commission is taken, or if figures are not available for that business year, the one immediately preceding it.

2.9 Where the enterprise is a group of companies, the Competition Commission will normally consider the relevant turnover to be that of the company active in the market(s) affected by the breach.

2.10 The amount of financial penalty to be imposed will also depend on the duration of the breach[1].

Other Relevant Factors

2.11 The amount of financial penalty to be imposed may be determined by the Commission, as appropriate, on a case by case basis according to the following factors.

The seriousness of the breach, in terms of its effects upon competition and on consumers.

2.12 In general, the Competition Commission regards breaches of Sections 41 and 42 as particularly serious breaches of the Act. The greater the damage to customers of the colluding enterprises, resulting from the increase in price over levels that would otherwise have obtained, the larger the Competition Commission will normally set the penalty, up to the maximum limit imposed by the Act.

Deterrence effect of the penalty

2.13 By its clear prohibition of collusive agreements, and the penalty regime it introduces, the Act establishes the principle that collusive agreements are no longer acceptable as a way of doing business. A fine should not be seen merely as part of the normal costs and risks of doing business. Consequently, the Commission will normally expect to set a fine at a level well above any assessment of damage to customers, or of the excess profits made by the parties to the collusive agreement.

[1] Note that the breach can only be deemed to have occurred from or after the date at which Part III of the Act came into force, currently expected to be December 2009.

Other aggravating or mitigating factors

2.14 In assessing the amount of financial penalty to be imposed, the Competition Commission will consider any aggravating or mitigating factors.

2.15 Aggravating factors include:

(a) role of the enterprise as a leader in, or an instigator of, the infringement;

(b) involvement in or awareness by directors and senior management;

(c) retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the breach;

(d) repeated breaches by the same enterprise or other enterprise in the same group;

(e) breaches which are committed intentionally rather than negligently; or

(f) retaliatory measures taken or commercial reprisal sought by the enterprise against a leniency applicant[2].

2.16 Mitigating factors include:

(a) role of the enterprise, for example, that the enterprise was acting under duress or pressure;

(b) genuine uncertainty on the part of the enterprise as to whether the agreement or conduct constituted a breach;

(c) adequate steps taken with a view to ensuring compliance with section 41, 42 and 43 of the Act, for example, existence of any effective compliance programme;

(d) termination of the breach as soon as Competition Commission intervenes; or

(e) co-operation which enables the enforcement process to be concluded more effectively and/ or speedily.

The maximum penalty

2.17 The amount of financial penalty to be imposed may not exceed 10% of the turnover of the enterprise in Mauritius for each year of the breach, up to a maximum of 5 years.

2.18 The involvement of an association of enterprises (e.g. a trade association) in a breach of section 41, 42 and 43 of the Act, may result in financial penalties being imposed on the association itself, its members or both. Where the breach by an association of

[2] See Competition Commission guidelines on leniency, Chapter 5 of *CC 3: Collusive Agreements*.

enterprises relates to the activities of its members, the penalty shall not exceed 10 percent of the sum of the turnover of the business of each member of the association of enterprises in Mauritius, active on the market affected by the breach, for each year, up to a maximum of 5 years.

Procedure in imposing a financial penalty and date of payment

2.19 When the Competition Commission makes an order imposing a penalty on an enterprise, such order shall be in writing and shall specify the date before which the penalty is required to be paid.

2.20 The date specified in an order imposing a penalty shall not be a date before the end of the period within which an appeal against the order of the Competition Commission may be brought under the Act.

3. The Competition Commission's approach to determining the appropriate remedy

3.1 Sections 60 and 61 of The Act concern "Directions relating to distortion, prevention or restriction of competition" (relating to restrictive practices under sections 44, 45 and 46) and "Remedies in merger control" (relating to mergers, as set out in sections 47 and 48), respectively. Directions under both of these sections will be referred to here as "remedies".

3.2 It is important to distinguish such remedies from penalties applied under Section 59. Penalties can be applied only for intentional or negligent breach of the prohibitions on collusive agreements. They penalize past actions, to act as a deterrent against such breaches in the future. Remedies, in contrast, should not be seen as penalties. In imposing remedies, the Competition Commission aims to make markets work better than they would otherwise have done, in the future. In particular, the Competition Commission might make directions in order to remove restrictions to competition or otherwise to enhance (or prevent from worsening) the competitive working of the market. Where effective, such remedies will deal with the root cause of the problem. However, both Sections 60 and 61 also specify that the Competition Commission may also remedy adverse effects, dealing with the symptoms of the problem as well as the causes.

3.3 This section describes how the Competition Commission will select a remedy, or package or remedies, to achieve these aims. In selecting a remedy, or package of remedies, the Competition Commission will have regard to:

(a) Effectiveness;

(b) Timeliness; and

(c) Proportionality of implementation costs to the expected benefits of the remedy.

3.4 The choice of remedy, with reasons, will be set out in the Competition Commission's published report. Before that, there will normally be an interactive process of remedy design with the parties to whom remedies will apply, and where appropriate, other interested parties. It will normally be in the parties' interests to engage with the process of remedy design, for example by offering undertakings to meet the Competition Commission's concerns. Such a process is likely to lead to better-focused and less burdensome remedies than might be imposed if the Competition Commission has to design remedies without such a dialogue.

Effectiveness

3.5 Having identified a breach of sections 44 to 46, or having concluded that a merger is likely to result in a substantial lessening of competition, the Competition Commission will seek an effective, comprehensive solution to the problem. 'Effectiveness' will be judged according to a remedy's likely effect on the state of competition in the relevant market, and the adverse effects resulting from any weakness of competition.

3.6 The sole purpose of remedies is to remove or mitigate the effects of the anticompetitive effects identified by the Competition Commission in its investigation, as published in its report. The Competition Commission will not seek wider 'remedies' to promote competition in areas beyond those identified in its report.

3.7 This does not imply that remedies under Sections 44-46 will always be limited to, or focused on, the anticompetitive agreement or conduct identified. A commitment to cease the conduct in question might not be as effective as alternative measures that would better deal with the competition problem identified by the Competition Commission.

3.8 In merger control, the Competition Commission will not seek through remedies to create a market that is any more competitive than was the case before the merger. An outcome in which an anticipated merger does not go ahead will therefore always be regarded as an effective and comprehensive solution to any problems that the merger was expected to cause, and will therefore always be a sufficient remedy (although outright prohibition will not be a necessary remedy in all circumstances). If an enterprise is prepared fully to abandon an anticipated merger, the Competition Commission will not seek further remedies. The same will normally apply to full divestment (reversal) of a completed merger, although in this case the Competition Commission may need to impose additional remedies to address any diminution of the competitive threat provided by the acquired assets, as a result of actions taken while they were under the control of the acquiring party, to restore the pre-merger state of competition.

3.9 In seeking an effective and comprehensive solution, the Competition Commission will normally strongly prefer remedies which enhance or protect the process of competition, rather than those which attempt to deal with the adverse effects of a failure of competition. This is because competition between independent enterprises is normally the best guarantor of good outcomes for customers, and for the efficient working of the economy as a whole. Remedies which deal only indirectly with weak competition, for example by restricting the ability of enterprises facing weak competitive constraints to exploit that position, are unlikely to be as effective as strengthening those competitive constraints. Thus, when considering remedies, the Competition Commission will first seek a remedy that removes the problem by strengthening competition, only considering other remedies:

(a) If remedies to strengthen competition are unavailable;

(b) If the costs of implementing remedies to strengthen competition would be disproportionate to the benefits they would produce; or

(c) As an interim measure, if competition is expected to develop over time (possibly as a result of other remedies within the package adopted by the Competition Commission)

3.10 This does not necessarily imply that structural solutions (divestment of assets, or prohibition of a merger) will always be preferred over other remedies. For example, changes to the behaviour of a monopolist, enforced by direction or undertakings, might remove barriers to entry or expansion by potential competitors and thereby promote competition. For mergers, where a substantial lessening of competition arises from a structural change in the relevant market, the Competition Commission will always consider a structural solution as a possible remedy.

3.11 The Competition Commission will only seek to apply remedies in the relevant markets identified in its decision. In most cases, anticompetitive conduct and the effects of that conduct will occur in the same relevant market. However, in some cases behaviour in one relevant market may have adverse effects on another (for example if a monopolist of one product leverages its market power through tying or bundling it with another product that would otherwise face competition). In such circumstances, the Competition Commission may apply remedies in either or both relevant markets, to deal either with the cause or effects of the anticompetitive conduct, or both.

3.12 Remedies must, therefore, be specific to the problems identified. The Competition Commission cannot accept as a remedy an offer by an enterprise to take some action in one relevant market (to the benefit of consumers) to off-set a loss of competition in another relevant market.

3.13 As noted above, it may well be appropriate for the Competition Commission to apply a temporary remedy aimed at mitigating the effects of anticompetitive behaviour or mergers that reduce competition, if it expects competition to develop over time (whether because of pre-existing trends and anticipated developments, or other remedies that form part of a package). For example, tying and bundling might be prohibited after a vertical merger until sufficient competition develops in the market where the enterprise has market power.

Timeliness

3.14 Other things being equal, the Competition Commission will prefer remedies that act swiftly to deal with problems it has identified, over those that operate only after a delay. However, timeliness and effectiveness of remedies may be in conflict, if the most effective remedies operate only over the longer term. In particular, remedies that aim to increase the degree of competition in a market by encouraging entry are likely to be quite slow in acting to correct a failure of competition. In such circumstances, the Competition Commission may need to balance effectiveness against timeliness, although it may instead adopt a package of remedies which both provide for short-term improvements and a more comprehensive long-term solution.

3.15 The Competition Commission will not normally impose remedies if it expects problems to be transitory (whether because of naturally occurring trends or market processes that might solve the problem, or when considering whether additional remedies are required to supplement slow-acting remedies imposed by the Competition Commission itself). The Competition Commission does not regard it as appropriate to adopt a fixed definition of 'transitory'. Normally, if the Competition Commission expected entry or other competitive developments to solve a competition problem within two years, it would not seek further remedies, and it would be very unusual to impose a remedy for a problem that is expected to last less than one year. However, in circumstances in which the damage to competition, or the harm to consumers or the economy generally, is regarded as very great, it might be appropriate to impose remedies even for very short-term problems. Furthermore, if it regards the competitive developments as likely but uncertain, the Competition Commission might impose a remedy as an alternative (active, or available to be activated), if they do not materialise.

Proportionality

3.16 It would not be sensible to impose remedies if the costs of those remedies are out of proportion to any benefits that can be expected to emerge from them. The Competition Commission will therefore consider the proportionality of the costs of any remedy it imposes to the benefits it expects to result from the operation of that remedy.

3.17 It should not be assumed that the lowest-cost remedy will be chosen. The Competition Commission's primary focus will be on the effectiveness (and timeliness) of different remedies, and a more effective remedy will normally be preferred to a less effective one even if its costs are higher. If the Competition Commission judges that its preferred remedy on grounds of efficiency and timeliness would have costs that are disproportionate to its benefits, it will not impose that remedy but will consider alternatives. If no alternative remedy can be found that has costs that are not disproportionate to the benefits, then the Competition Commission will impose no remedy.

3.18 'Proportionality' is a broader concept than simply the comparison of two figures to see which is bigger. The Competition Commission does not expect to conduct a full 'cost-benefit' analysis of its remedies, and does not regard itself as bound to produce any numerical estimates of costs or of the benefits of its remedies. The benefits of competition can be diffuse and difficult to quantify, while the costs are normally clearer.

3.19 Cash costs are not the only 'costs' of intervention. The benefits must justify the intervention itself. The Competition Commission will not intervene in property rights (for example by requiring divestment in a monopoly case) unless it expects substantial benefits from doing so, even if the cash costs of divestment are expected to be relatively low.

3.20 Nothing in this section should be taken to imply that the Competition Commission is required to 'prove' or even demonstrate, that the benefits of its intervention will exceed the cost in any numerical sense. Instead, the Competition Commission will consider (and welcomes submissions on) arguments that the costs of some proposed remedy are disproportionate, whether because those costs are unusually high or the benefits of the remedy are particularly low.

3.21 The assessment of costs is intended to be comprehensive, and additional sources of costs that are not discussed here can be considered by the Competition Commission. However, there are two specific categories of costs that will not be considered by the Competition Commission.

3.22 Firstly, the loss of any profits or other value resulting from the possession of monopoly power will not be considered a cost by the Competition Commission. For example, if an intervention by the Competition Commission is likely to result in lower prices to consumers, it regards that as a benefit, not a cost. Such losses of monopoly profits might arise indirectly. For example, where divestment of assets is required, to create a more competitive market, it will often be the case that the market value of those assets is lower than the market value they would have held under monopoly ownership - because that value would have been inflated by the expectation of a stream of monopoly profits.

3.23 Secondly, the additional costs of reversing a completed merger will not be taken into account by the Competition Commission when assessing proportionality. This is because enterprises planning to merge have the option of seeking prior approval for their deal, and so if they complete a merger without Competition Commission approval they do so at their own risk. The Competition Commission therefore takes no account of divestment costs when assessing a completed merger: as far as remedies are concerned, it is as if the merger has not yet occurred, to create neutrality in the assessment of anticipated and completed mergers.

Offsetting benefits

3.24 Section 50 of the Act requires the Competition Commission to determine whether there are any off-setting benefits to be taken into account in determining the remedial action to be taken. These off-setting benefits, listed in Section 50(4) essentially provide for an 'efficiency defence'[3]. If the Competition Commission does find that there are significant off-setting benefits, this might cause it to modify its remedy package if the benefits would otherwise be lost. More rarely, this consideration could even extend to the Competition Commission taking no remedial action at all, if any such action would nullify the benefits. For example, a merger might be permitted if it results in such economies of scale that the consumer will be better off despite a reduction in competition.

3.25 'Efficiency' or other arguments arise at the stage when the Competition Commission is considering remedial action – which can only occur after it has reached a decision that a restrictive practice exists. Efficiency arguments can therefore play no part in the Competition Commission's decision as to whether a restrictive practice exists or not.

3.26 In assessing the off-setting benefits, the Competition Commission will see whether its proposed remedy will nullify or weaken the off-setting benefits. The aim of the Competition Commission is ideally to remedy the anti-competitive effect it has found, while also preserving any off-setting benefits (as part of the overall assessment of proportionality described above).

3.27 When the Competition Commission considers whether there are off-setting benefits, it will apply the following criteria:

[3] This is a standard term in competition policy, meaning essentially that conduct which is agreed to be anticompetitive is beneficial because it has positive effects which outweigh the negative effects of reduced competition. Different jurisdictions have adopted significantly different approaches to assessing such benefits, differing for example in whether any cost savings must be passed to customers in order to be taken into account.

(a) Off-setting benefits are limited to those categories specified in Section 50(4) of the Act

(b) In assessing efficiency arguments, the key test for the Competition Commission will normally be whether customers of the enterprise will be better-off. Thus, if it is claimed that costs will be lower as a result of the restrictive practice or merger, it must be expected that some cost savings will be passed to customers[4].

(c) The off-setting benefits must be specific to the restrictive practice or merger and would not be available in its absence. The Competition Commission may require parties to explain why contractual or other arrangements that do not harm competition cannot produce the same beneficial effect.

(d) The off-setting benefits must be timely, and reasonably certain to appear within the foreseeable future.

(e) Off-setting benefits must be a natural consequence of the restrictive practice or merger under investigation. It is not open to the parties to offer an unrelated off-setting benefit to compensate for anti-competitive effects.

[4] As restrictions on competition normally result in prices rising, and diminished pressure to pass cost reductions to customers, this requires either a specific reason to believe that cost savings will be passed on, or relatively large cost savings to counter-act the anti-competitive effect.

4. Types of remedy

4.1 Remedies applied by competition authorities are often divided into structural remedies, such as divestment, which aim to restore or enhance competition by changing the market structure, and behavioural remedies, which aim to change the behaviour of enterprises (through orders or contractual undertakings). Generally, structural remedies require little if any monitoring once the structural change has taken place, while behavioural remedies will normally require the Competition Commission or a nominated agent to monitor compliance. The Competition Commission may also make non-binding recommendations to Government.

Structural remedies

Blocking mergers

4.2 Anticipated mergers notified to the Competition Commission and investigated can be blocked if they are expected to result in a significant lessening of competition (SLC) and if there is no more effective remedy.

4.3 If an SLC is expected only in some markets, then the Competition Commission might block only part of the deal, allowing the merger to be completed subject to certain parts of the target enterprise remaining independent. Alternatively, the merger could be allowed to be completed in full, but the merged enterprise would then be required to sell off part of the enterprise (within a specified period). In both cases, the Competition Commission will apply the same principles to determining the package of assets that must be removed from the merged enterprise as are set out under 'Divestment' below, particularly the need for them to be viable under new ownership.

Divestment

4.4 The divestment of assets can represent a highly effective means to create a more competitive market structure than would otherwise have existed. However, as a remedy to apply in monopoly or other cases, the Competition Commission recognizes that forced divestment represents a considerable intervention in property rights. It therefore will not require divestment in such cases, unless it is satisfied that no other equally effective remedy exists, and that such intervention is not disproportionate to the expected benefits.

Viability

4.5 The package of assets must be viable, whether in independent ownership or under the control of an existing player in the market. Viability requires that the divested business be able to offer an effective competitive threat to other producers in the market, while remaining profitable. It may well be the case that a larger divestment package is required, to create a viable competitor[5].

4.6 The Competition Commission will generally regard a complete existing business as more likely to be viable than a package of assets extracted from existing businesses. In assessing the viability of a divestiture package, the Competition Commission will consider not only the physical assets to be transferred, but also access to intellectual property, to customer relationships, staff expertise and any required regulatory permissions.

Sale value of the divested package

4.7 In general, the Competition Commission will allow enterprises as much freedom as possible in choosing the manner of divesting their assets, as long as the effectiveness of the remedy is preserved, and the divestment proceeds in a timely fashion. Those enterprises will normally be responsible themselves for the sale. The Competition Commission will not impose conditions that could adversely affect the sale value of the assets, unless it is necessary to do so in order to preserve the effectiveness of the remedy[6].

4.8 The Competition Commission will normally set a deadline for the enterprise itself to sell the assets. If it fails to do so without good cause within the deadline, the Competition Commission itself will take steps to ensure that the assets are sold – typically by appointing a third party to act as a trustee with power to dispose of the assets. Fees and other costs incurred as a result of appointing such a trustee would normally be the responsibility of the divesting party.

4.9 The Competition Commission may also place restrictions on the types, or specific identities of allowed buyers of the divested assets. Before proceeding to due diligence, enterprises divesting assets must obtain the Competition Commission's approval of the preferred buyer. The Competition Commission is likely to reject potential buyers if it believes that they will not use the assets to compete effectively in the relevant markets in which it has identified concerns.

4.10 If the assets cannot be sold to any buyers acceptable to the Competition Commission, the Competition Commission will review its decision and consider allowing sale to less acceptable buyers. However, before doing so, it will assess whether any aspect of the sale process (such as a minimum price) effectively prevents any acceptable buyers from bidding. It may appoint a divestment trustee, as noted above, to ensure that this is not the case.

4.11 Divestment remedies normally require no monitoring or enforcement by the Competition Commission, once the sale of assets is complete. However, as part of the

[5] For example, an entire factory or entire chain of shops might be required to be divested, even if only some of the products or areas they serve face competition problems

[6] For example, restrictions on the timing or allowed bidders for divested assets (see below) will not normally be made public before the sale, as they might strengthen buyers' bargaining power.

divestiture order (or accepted undertakings), the Competition Commission will normally specify that the divested assets cannot be repurchased by the divesting enterprise (or otherwise come back under its control). This prohibition will be limited by a sunset clause, typically of ten years.

Intellectual property (If) in remedies

4.12 Whether as a remedy in itself or to accompany divestment of physical assets, the Competition Commission may require the sale of IP rights, to promote competition in the affected relevant markets. For example, IP rights may be an inherent component of the business being divested (for example a trademark or a brand name), the absence of which would significantly weaken the competitiveness of the divestment package.

4.13 IP rights as part of a divestiture package may be sold or licensed. In general, the Competition Commission has a preference for full transfer of IP rights through sale, to diminish the need for contact between the old and the new owners of the divested assets. Where IP can only be licensed, the Competition Commission must approve the licensing terms, to ensure that they do not act to diminish the competitive effect of the divestment package.

Behavioural remedies

4.14 The term ‘behavioural remedies’ covers a very wide range of possible interventions, all of them aimed at changing the behaviour of market participants. As noted earlier, the Competition Commission’s strong preference is for remedies which promote and protect competition itself, rather than merely mitigating the effects of inadequate competition.

Monitoring and enforcement

4.15 Behavioural remedies may take the form of orders by the Competition Commission, or undertakings by the parties concerned. Such orders or undertakings require monitoring and may require periodic review, as we discuss below.

4.16 In assessing the proportionality of different possible remedies, the Competition Commission will take into account the costs of monitoring and enforcement. In general, the Competition Commission will place less weight on costs incurred by the party creating the problem than costs imposed on third parties, the public sector or the Competition Commission itself. Where possible, the Competition Commission will seek to make its remedies self-enforcing, for example by finding ways of embodying them in commercial contracts which private sector counterparties will have an interest in enforcing. If monitoring and enforcement must be carried out on the Competition Commission’s behalf, the Competition Commission will seek to ensure that the costs are borne primarily by the enterprises at fault.

4.17 All behavioural remedies will contain arrangements for review, triggered either by a specific date or a set of objective circumstances. It is not the intention that the review should be as intensive as the original Competition Commission investigation. Consequently, where possible, the Competition Commission will establish clear criteria for lifting the remedy when it makes its original order (or accepts undertakings). All behavioural remedies will contain a sunset clause, typically 10 years, to ensure that they lapse if not reviewed.

Enabling measures

4.18 Behavioural remedies that seek to create better access for new entrants, or allow smaller existing competitors to expand, are termed enabling measures. For example, a vertically integrated enterprise might be required to purchase some of its requirements from competitors, rather than its own upstream suppliers - a class of remedies termed 'access measures'. Access measures typically force enterprises to behave in ways that go against their incentives to maximize profits, and therefore require very careful design and monitoring, if they are to be effective and to minimize the distortion they create to normal competition.

4.19 When large enterprises have been found to be abusing a monopoly position (or a merger to create such a position), behavioural remedies could be used as an alternative to divestment, to enable new entrants or smaller existing players to compete more effectively. Such measures might include restrictions on the monopoly's ability to conclude long-term or exclusive contracts with customers or suppliers, or might involve more complex measures such as restrictions on bundling products, discounts or other marketing and pricing devices.

4.20 The Competition Commission notes that such measures, in addition to being administratively difficult to implement can themselves distort competition. They amount to an attempt temporarily to reduce the degree of competition in the market, and the Competition Commission will need to be convinced that such restrictions are necessary to promote competition in the long run, before it chooses such an approach.

4.21 By their nature, enabling measures must be time-limited. They are intended to promote competition by encouraging entry. After time, they will either have succeeded (in which case they will be unnecessary) or failed. Either way, they will be removed.

Informational remedies

4.22 Competition problems typically become more acute the more ignorant or confused customers are about competitive alternatives. Either as a remedy for a general failure of competition, or to correct a problem specifically arising from a lack of information, the Competition Commission may require enterprises to provide more information[7]. More directly, enterprises might also be required specifically to draw the attention of customers

[7] For example, enterprises offering products with complex charging structures could be required to adopt simplified or standardised billing, or to make restrictions on the product (the 'small print') clearer.

to the existence of competitors or to procedures for cancelling or amending their decision to buy (such as 'cooling off periods') so that it is easier for customers to switch to competitors.

4.23 General consumer regulations from Government are a better approach to long-run consumer protection than can be provided by Competition Commission decisions, applied only to enterprises which have been investigated.

Price control remedies

4.24 The Act specifically permits the Competition Commission to impose a "requirement that the enterprise shall [...] cease or amend a practice or course of conduct, including conduct in relation to prices", for breaches of sections 44-46 (monopoly situations) and "require an enterprise to [...] adopt, or desist from, such conduct, including conduct in relation to prices", in the case of mergers. Thus, the Competition Commission can issue directions to control prices.

4.25 The Competition Commission does not have the power to control prices generally in the economy. Any price controls can be imposed only on a case-by-case basis, following investigation, of breaches of the Competition Act or of mergers likely to result in a significant lessening of competition. Price controls can only be imposed on enterprises found to be in breach of the Act and not on any other enterprises active in the market. The Competition Commission is not a price regulator, with the ability simply to intervene to reduce prices upon complaint.

4.26 The ability to control prices as a remedy to abuse of monopoly or an anticompetitive merger is a powerful tool in the Competition Commission's toolkit, but one that will be used only with caution. The Competition Commission regards free competition as the best guarantor of good outcomes for customers and the economy in general, and would therefore expect a price control to act as a poor second-best alternative to remedies that enhance or protect competition.

4.27 The benefits of price controls are that they provide rapid and direct relief to customers suffering excessive prices as a result of monopoly power. However, price controls may also be ineffective, costly to implement and distortionary compared to free competition. Controls on prices are sometimes necessary to prevent exploitation of an extreme monopoly position (or to promote other government objectives, although this is not a matter for the Competition Commission). However, as a solution to a failure of competition, they should be seen as a last resort.

4.28 If the Competition Commission imposes a price control as a remedy, it will specify the circumstances in which that remedy would be removed, just as it will for other behavioural remedies. If it is expected that price controls will be required indefinitely (for example, if the Competition Commission has identified a market that is a natural monopoly given the scale of the market in Mauritius, and expects abuse of that monopoly to be unavoidable) then it may be more appropriate to recommend that

Government impose price controls in that sector, rather than to do so through Commission decisions on a case-by-case basis.

Recommendations to Government

4.29 In addition to these actions taken by the Competition Commission itself, the Competition Commission may make non-binding recommendations to Government. This would be appropriate in two general circumstances.

4.30 When, as a result of its investigation, the Competition Commission has concluded that certain Government policies or regulations contribute to the competition problems it has found, the Competition Commission might recommend removing or modifying them. It would be up to Government whether to do so, as only the Government can consider the effects of its policies other than on competition.

4.31 Secondly, if as a result of the Competition Commission's investigation, it seems necessary to create permanent regulation over some matter, it may be better for the Government to legislate or otherwise introduce regulation than for the Competition Commission to do so through behavioural remedies. Again, any such recommendation would be non-binding, and the Competition Commission would normally introduce its own remedies as a temporary or fallback measure alongside the recommendation, to be removed or modified if Government takes action.

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