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Review of application and implementation of the Set

Model Law on Competition (2010) – Chapter XI

Model Law on Competition (2010) – Chapter XI

Sanctions and relief

I. *The imposition of sanctions, as appropriate, for:*

(i) *Violations of the law;*

(ii) *Failure to comply with decisions or orders of the Administering Authority, or of the appropriate judicial authority;*

(iii) *Failure to supply information or documents required within the time limits specified;*

(iv) *Furnishing any information, or making any statement, which the enterprise knows, or has any reason to believe, to be false or misleading in any material sense.*

II. *Sanctions could include:*

(i) *Fines (in proportion to the secrecy, gravity and clear-cut illegality of offences or in relation to the illicit gain achieved by the challenged activity);*

(ii) *Imprisonment (in cases of major violations involving flagrant and intentional breach of the law, or of an enforcement decree, by a natural person);*

(iii) *Interim orders or injunctions;*

(iv) *Permanent or long-term orders to cease and desist or to remedy a violation by positive conduct, public disclosure or apology, etc.;*

(v) *Divestiture (in regard to completed mergers or acquisitions), or rescission (in regard to certain mergers, acquisitions or restrictive contracts);*

(vi) *Restitution to injured consumers;*

(vii) *Treatment of the administrative or judicial finding or illegality as prima facie evidence of liability in all damage actions by injured persons.*

COMMENTARIES ON CHAPTER XI AND ALTERNATIVE APPROACHES IN EXISTING LEGISLATIONS

Introduction[1]

1. Chapter XI of the Model Law on Competition deals with tools for competition law enforcement: "Sanctions and relief". The latter is more commonly referred to as remedies. Given the objective and the compulsory nature of competition laws, as well as commercial motivations for contravening them, sanctions and remedies are of particular importance. Safeguarding competition – the primary objective of most competition laws – requires companies to comply with compulsory provisions of a procedural or substantive nature. However, experience has shown that undertakings will only comply with compulsory rules if there is a high likelihood that non-compliance will be detected, and, once it is detected, there is a high likelihood that sanctions will be imposed, and that the direct and indirect cost of those sanctions will be commercially significant. In this sense, the threat of significant sanctions appears crucial for encouraging compliance with competition law. With respect to the primary objective of most competition laws, i.e. protecting the competitive process, remedies complement sanctions, since they aim at safeguarding or restoring competition in cases where companies have distorted or are about to distort competition.

2. While the wording of Chapter XI (II) could be understood to refer to sanctions only, it appears from the examples listed that this provision also covers remedies. For instance, the injunctions referred to in Chapter XI (II) (iii) and the orders to remedy a violation by positive conduct referred to in Chapter XI (II) are usually qualified as remedies. In addition, most competition laws provide for both of the two enforcement tools, which complement each other.

3. Sanctions and remedies are tools for public competition law enforcement, that is to say, for enforcement by public authorities, such as competition agencies and courts. Recently, well-established competition law regimes have started to promote private enforcement through private actions by the victims of competition law violations, as a complement to public enforcement. This aspect of competition law enforcement does not fall under Chapter XI, but will be dealt with in the commentaries on Chapter XIII of the Model Law on Competition.

Sanctions

Enforcement body vested with the power to impose sanctions

4. The power to impose sanctions may be vested either in the administering authority, or in the judicial authority, or it may be divided between the two. In the latter case, for example, the administrative authority's power to impose a sanction might be limited to such conduct as refusals to supply information, the giving of false information, or failure to modify agreements.

5. In Pakistan, Panama, Peru, the Russian Federation and Switzerland, and in the European Union, the administering bodies have powers to impose fines. In Australia and the United States, the power to impose fines or other sanctions is vested in the courts.

[1] See also the note by the UNCTAD secretariat entitled "Appropriate sanctions and remedies". TD/RBP/CONF.7/5. August 2010.

Different types of sanctions

6. Sanctions may be imposed in case of violations of a substantive provision of the competition law, and in case of procedural violations, as mentioned in subparagraphs (iii) and (iv) of Chapter XI (I) of the Model Law on Competition. For instance, Austrian competition law provides for procedural sanctions in case of false/misleading information in a merger notification and in case of false/misleading information or incomplete provision of information or non-compliance with a Cartel Court's order to provide information. Under Hungarian competition law, a procedural fine may be imposed on the party or other persons involved in the proceedings of a competition case, and furthermore on persons obliged to provide assistance in clarifying the facts of the case if they engage in an act or display behaviour which is aimed at protracting the proceedings or preventing the disclosure of facts, or which has such an effect.

7. Sanctions for contravention of substantive provisions may be of an administrative, civil or criminal nature. Administrative sanctions – in particular, fines – are the most common form of sanctions in cartel cases. Some legal systems provide for the possibility of imposing fines on individual competition law infringers in addition to those imposed on the undertaking on whose behalf they acted. This is, for example, the case in Germany, where the competition law liability of an undertaking derives from the establishment of a competition law infringement by its management or employees. Other competition legislation only provides for the possibility of fining the companies in question. Besides fines, administrative sanctions may also include prohibiting individuals from serving as officers of public corporations, or blacklisting companies involved in bid-rigging from future government tenders.

8. As opposed to administrative sanctions that can be imposed by a competition authority, civil or criminal sanctions may only be decided upon by a court. Whereas fines may have an administrative, civil or criminal nature, imprisonment is exclusively criminal in nature. Some countries that opted for a system of administrative sanctions provide for criminal sanctions in specific competition cases, e.g. in the case of bid-rigging in government tenders organized by public authorities.

Alternative approaches in existing legislation - Types of sanctions

Country / Jurisdiction	**Sanctions**						
	Civil		Administrative		Criminal		
	Fines	Other	Fines	Other	Fines	Imprison-ment	Other
Australia	X	X			X	X	
Republic of Korea			X	X	X	X	
Japan			X	X	X	X	
Indonesia			X	X	Law 5/1999 provides for several types of criminal sanctions, which are, however, not applied in practice.		

Country / Jurisdiction	Sanctions						
	Civil		Administrative		Criminal		
	Fines	Other	Fines	Other	Fines	Imprison-ment	Other
Armenia			X	X	Limited to severely anti-competitive behaviour		
Russian Federation			X	X			
Turkey			X	X			
South Africa			X	X	X	X	
Kenya				X	X	X	
Zambia					X	X	
Egypt			X	X	X		X
Tunisia			X	X	X	X	X
European Union			Limited to undertakings/no personal liability				
France			X	X	X	X	
United Kingdom			X	X	X	X	X
Germany			X	X	Limited to bid-rigging		
Peru			X	X			
Brazil			X	X	X	X	
Costa Rica			X	X			
Mexico			X	X	Limited to severely anti-competitive		

Country / Jurisdiction	Sanctions						
	Civil		Administrative		Criminal		
	Fines	Other	Fines	Other	Fines	Imprison-ment	Other
					behaviour		
United States	X	X		X	X	X	
Canada			X	X	Limited to price-fixing, market allocation and output restriction		

9. Subsection II of Chapter XI of the Model Law on Competition lists different types of possible sanctions. Although it covers the most common types of sanctions, the list should not be considered as exhaustive.

(i) Fines (in proportion to the secrecy, gravity and clear-cut illegality of offences or in relation to the illicit gain achieved by the challenged activity)

10. As mentioned previously, fines may be administrative, civil or criminal in nature. For various reasons, including relatively low administration costs, they form a central element of every public enforcement system. In many jurisdictions, the competition law itself grants the power to the administering or judicial authority to impose fines, and sets the maximum amount of fines by statutory limit. The maximum amount of fines should be set at a sufficiently high level to achieve a significant deterrent effect. It can be expressed as a percentage of the turnover of the competition law violator, in terms of a specific figure, or in reference to a variable unit, such as a country's minimum salary.

Alternative approaches in existing legislation – Maximum amount of fines

Country	
Maximum amount of fines expressed as a percentage of the competition law violator's turnover	

Country	
European Union	Pursuant to Article 23, paragraph 2 of Regulation 1/2003, the Commission may impose a maximum administrative fine against the infringing undertaking of 10 per cent of the undertaking's worldwide annual turnover.
Australia	Under Australian competition law, the criminal cartel offence is punishable by imprisonment of up to 10 years and/or fines of up to A$220,000 per contravention. Under the civil cartel prohibition, individuals may be liable to a pecuniary penalty of up to A$500,000 per contravention. For corporations, each contravention of the criminal cartel or civil cartel prohibition will result in a fine or pecuniary penalty (whichever applies) not exceeding: (a) A$10,000,000; or (b) three times the total value of the benefit obtained from the commission of the offence, or the act or omission in contravention of the civil prohibition; or (c) where those benefits cannot be fully determined, 10 per cent of the corporate group's annual turnover in a 12-month period preceding the offence/contravention.
China	Concerning fines, Articles 46 to 48 of Anti-Monopoly Law provide that where the business operators reach and fulfil a monopoly agreement or abuse their dominant market position in violation of this Law, the Anti-Monopoly Law Enforcement Agency shall impose fines. The amount of the fines is between 1 per cent and 10 per cent of the sales revenue made in the previous year. Where the business operators implement the concentration in violation of this Law, the Anti-Monopoly Law Enforcement Agency may impose a fine of up to ¥500,000. The Anti-Monopoly Law Enforcement Agency shall consider such factors as the nature, extent and duration of the violations when determining the amounts of fines.
Croatia	According to the new Croatian Competition Act that was adopted in June 2009 and will enter into force on 1 October 2010, fines of up to 10 per cent of the aggregate turnover of the undertaking can be imposed for the most serious breaches of the competition rules, and fines of up to 1 per cent can be imposed for other violations of the competition rules. The new power to impose fines will also include the possibility to increase the fine in order to exceed the amount of gains improperly obtained as a result of the infringement.

Country	
Hungary	According to Hungarian competition law, the maximum fine for substantial competition law violations may not exceed 10 per cent of the net turnover – achieved in the business year preceding that in which the decision establishing the violation is reached – of the undertaking, or, where the undertaking is a member of a group of undertakings that is identified in the decision, of that group of undertakings.
Japan	According to the Japanese Anti-Monopoly Act, surcharges are calculated based on the sales value of the products or services affected during the period of violations (three years at a maximum), by multiplying the respective sales value by percentage factors as determined according to type of violation, scale of operations and business categories. For manufacturing companies, the percentage factors range between 1 and 10 per cent; for wholesalers between 1 and 2 per cent; and for retailers between 1 and 3 per cent.
Ethiopia	In Ethiopia, the maximum fine for competition law violations amounts to 10 per cent of the value of the total assets of the company infringing the law or to 15 per cent of its annual sales.
Maximum amount of fines expressed as a fixed sum	
Benin	According to Law N° 90-005 of 15 May 1990 stipulating the conditions for commercial activities in Benin, fines between FCFA 500,000 and FCFA 10 million can be imposed for violation of the law. Note that the fines provided for by the Benin's draft competition legislation under discussion in 2010 are significantly higher.
Canada	According to Canadian competition law, administrative monetary penalties may not exceed $10 million (or $15 million in the case of a subsequent order). Criminal offences, such as cartel agreements, are punishable by terms of imprisonment of up to 14 years and/or fines of up to $25 million.
Chile	In Chile, fines may be of up to approximately $400,000, the amount being determined by the Tribunal duly taking into consideration the offender's turnover and economic capacity and the gravity of the infraction.
United States	In the United States, legislation was enacted in 2004 raising the maximum corporate fine for an antitrust violation from $10 million to $100 million.
Zambia	Under Zambian legislation, penalties include a fine not

Country	
	exceeding 10 million kwacha.
Maximum amount of fines expressed by reference to a variable unit	
Brazil	According to Article 23 of Law 8.884 of 3 June 1994, the following antitrust penalties shall apply: – (i) for companies: a fine from 1 to 30 per cent of the gross pre-tax revenue during the latest financial year. The fine shall by no means be lower than the advantage obtained from the underlying violation, if assessable; – (ii) for managers directly or indirectly liable for their company's violation: a fine from 10 to 50 per cent of the fine imposed on the said company, which shall be personally and exclusively imposed on the manager; and – (iii) in the case of other individuals and other public or private legal entities, as well as any de facto or de jure associations of entities or persons, even temporary ones, with or without legal identity, that do not engage in business activities, when it is not feasible to use the gross sales value, the fine will be from 6,000 (six thousand) to 6,000,000 (six million) UFIR* or any other index replacing it. Fines imposed for recurring violations shall be doubled. * Fiscal reference unit.
Peru	Peruvian competition law distinguishes different degrees of competition law infringement. For the most serious infringements, it provides for a fine ranging between 1,000 times the *Unidades Impositivas Tributarias* (which is a reference unit based on the consumer price index) and 12 per cent of the annual turnover of the group of companies to which the competition law violator belongs.

11. In several jurisdictions, the administering authority has published guidelines identifying the elements that will be taken into account when calculating the amount of the fine. Aggravating factors, such as a continuation or repetition of the infringement or an important role in its realization may lead to an increase in the fine. In this context, a high amount of illicit profit may constitute an aggravating factor. By contrast, mitigating circumstances result in a reduction of the fine. Most importantly, in several countries, cooperation by a competition law violator within the framework of a leniency programme justifies a reduction of the fine. For instance, in Hungary, the Competition Council grants immunity from – or reduces – the fine imposed on undertakings that disclose to the Hungarian Competition Authority, in a manner specified by the Act, agreements or concerted practices between competitors which are aimed directly or indirectly at fixing purchase or selling prices; at sharing markets, including bid-rigging; or at the allocation of

production or sales quotas.[2] On 1 April 2010, a new amendment came into force in Hungary which institutionalized the so-called informant reward scheme. Based on the amendment, those persons who provide indispensable information about hardcore cartels may be entitled to obtain a reward under conditions specified by law (the reward must not exceed 1 per cent of the fine). In addition, competition authorities may reward a company's willingness to agree on settlement of a cartel case with a reduction in the fine, since such settlements help to shorten the prosecution period and to save resources. Further mitigating factors may include the immediate termination of an infringement subsequent to the intervention of the competition authority, and negligent violation of competition law as opposed to intentional wrongdoing. In exceptional cases, a competition authority may also take into account an undertaking's inability to pay in a specific social and economic context, and may therefore reduce the fine or allow for moderated payment modalities. Fining a company to the level of bankruptcy and thereby causing a market exit would be against competition laws' primary objective of protecting the competitive process.

(ii) Imprisonment (in cases of major violations involving flagrant and intentional breach of the law, or of an enforcement decree, by a natural person)

12. Recent enforcement attitudes in well-established competition law regimes towards anti-competitive agreements have been to seek deterrence by means of very substantial fines for companies. For instance, in 2008 the European Commission fined Saint-Gobain, of France, €896 million for its involvement in a market-sharing cartel with other glass manufacturers. In 2009, the chip manufacturer Intel was found to have infringed article 102 of the EU Treaty, and consequently, a fine of over €1 billion was imposed. In addition, a trend towards higher fines can also be observed in some younger competition law regimes.

13. Although most competition legislation provides for administrative or civil sanctions in the case of anti-competitive behaviour, there is a trend towards criminalization. Until recently, only the United States imposed criminal sanctions involving imprisonment on individuals in cases of competition law violation. The Sherman Act provides for criminal penalties (for violations of Sections 1 and 2), and an infraction may be prosecuted as a felony punishable by a corporate fine and up to 10 years' imprisonment for individuals. A number of other countries had provisions in place without applying them. Today, more countries – including Canada, Israel, Japan and the United Kingdom – impose criminal sanctions on individuals to fight hardcore cartels. The United Kingdom has introduced – under the Enterprise Act 2003 – criminal sanctions for individuals who commit certain clearly defined anti-competitive offences. In 2008, jail terms were imposed for the first time by courts of the United Kingdom on individuals who had participated in an international cartel. In 2009, the Parliament of Australia passed legislation to criminalize specific cartel conduct (price-fixing; restricting outputs in the production or supply chain; allocating customers, suppliers or territories; and bid-rigging).[3]

14. Proponents of criminal sanctions for individuals argue that these are the most effective motivation for compliance by corporate managers and therefore corporations. Since the current level of fines imposed on companies in jurisdictions such as the United States and the European Union could not be raised further without causing economic damage, and since fines would

[2] Act No. LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices, Articles 78/A-78/B, and 88/D.

[3] Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009, available at http://www.comlaw.gov.au/.

ultimately be passed on to consumers, greater deterrence by other means would be needed. Therefore, personal liability on the part of wrongdoers would have to play a more important role. In this context, it is also argued that pecuniary sanctions imposed on individuals would not result in the desired deterrence, since there is a high risk that companies would assume the respective fines on behalf of their employees. This risk may be mitigated by a respective prohibition addressed to the company.

15. However, for a number of reasons, a State may opt against criminal sanctions for competition law violations. Firstly, it may not be appropriate to provide for criminal sanctions when competition law is new and the business community has not had a reasonable period to familiarize itself with the new legal obligations. Furthermore, until competition law principles are widely accepted as an important part of the legal and economic environment, the criminalization of violations may not be in line with social and legal norms. In addition, the costs of criminal sanctions – in particular, imprisonment – may appear too high in comparison with the costs of other forms of sanctions. Another concern put forward against criminal sanctions in competition cases relates to increased procedural requirements – for example, a higher standard of proof to be respected in criminal cases. These factors may make the prosecution of competition law violations more difficult and costly, and decrease the number of successful cases. In summary, each of these arguments may have some validity.

16. The power to impose imprisonment would normally be vested in the judicial authority. In certain countries, such as Japan and Norway, the power to impose terms of imprisonment is reserved for the judicial authorities on the application of the Administering Authority.

Remedies

17. In contrast to sanctions, remedies that aim at maintaining or restoring competition in the future are not punitive in nature. Remedies serve to put a competition law infringement to an end, compensate victims, and cure the competitive harm. Remedies are conventionally classified as either structural or behavioural. Structural remedies are generally one-off remedies that intend to restore the competitive structure of the market. Behavioural remedies are normally ongoing or time-limited remedies that are designed to modify or constrain the behaviour of firms (in some jurisdictions, behavioral remedies are referred to as “conduct remedies”). Where these remedies require any ongoing supervision or monitoring, the cost for both the authority and the undertakings can be high. Some remedies, such as those relating to access to intellectual property rights, are particularly difficult to categorize on this basis.

18. Depending on the legal framework, competition authorities may impose remedies unilaterally, or they may negotiate them with the parties concerned upon a proposal made by the parties (so-called undertakings or commitments). It is true that undertakings or commitments are sometimes considered as sanctions. However, taking into account that they primarily seek to reinstate competition where it has been distorted by an anti-competitive practice, undertakings or commitments may very well be classified as remedies.

19. In addition to fines and imprisonment, subsection II of Chapter XI of the Model Law on Competition lists a number of measures that actually qualify as remedies, according to the understanding of most competition laws today.

(iii) Interim orders or injunctions;

20. Interim orders or injunctions generally fall within the category of behavioural remedies. They may be granted as a preliminary measure during a pending competition case in order to prevent a company from violating or continuing to violate the competition law. In different competition law regimes, different enforcement bodies are vested with the power to impose interim orders or injunctions. In common law countries, it is mainly the courts who exercise this power. For instance, in Canada, the Director of Public Prosecutions may – in urgent situations – apply for an interim injunction to the competent court to temporarily halt behaviour that constitutes, or is directed toward, the commission of an offence. In civil law countries, competition authorities may have such powers. For example, the German Federal Cartel office may pronounce interim measures according to Section 32a of the Act against Restraints of Competition. In Hungary, the Competition Council may – as an interim measure – prohibit, in its injunction, the continuation of the illegal conduct, or order the elimination of the unlawful situation, if prompt action is required for the protection of the legal or economic interests of the interested persons or because the formation, development or continuation of economic competition is threatened. The Competition Council may also require a bond as a condition, if the interim measure was required by the party under investigation.[4]

(iv) Permanent or long-term orders to cease and desist or to remedy a violation by positive conduct, public disclosure or apology, etc.;

21. In effect, cease and desist orders are similar to injunctions, and serve as a means to bring a competition law infringement immediately to an end. For instance, a competition authority may order cartelists to stop price-fixing agreements, or it may order a dominant undertaking to stop anti-competitive bundling of certain products. Most competition legislation provides for cease and desist orders.

22. In certain situations, however, the conduct under scrutiny has already caused anti-competitive harm, so it may be necessary to order specific measures in order to restore competition. In this context, Chapter XI (II) (iv) of the Model Law on Competition refers to orders to "remedy a violation by positive conduct, public disclosure or apology, etc." The imposition of a behavioural remedy compels the undertaking to act in a particular way. This includes, for example, amendments to price structures, rebate systems, changes to trading conditions, and granting access to infrastructure or intellectual property etc.

23. Although behavioural remedies may be formulated to address a specific competitive concern, they are often considered to be inconvenient from the perspective of monitoring, given that they require ongoing monitoring, which affects a competition authority's resources.

(v) Divestiture (in regard to completed mergers or acquisitions), or rescission (in regard to certain mergers, acquisitions or restrictive contracts);

[4] Act No. LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices. Articles 72 (1) (c) and 72 (2).

24. Divestiture in merger cases is the most frequent structural remedy. Under a pre-merger notification system, competition authorities typically assess the likely effects of a notified transaction on competition. When this prognosis reveals competitive concerns, these may be addressed through appropriate remedies, such as divestiture of specific parts of an undertaking, for example a production site or a distribution network. Competition legislation varies on the question of whether divestitures must be proposed by the notifying parties and then tested by the competition authority, or whether the authority is granted the power to unilaterally impose a divestiture in its clearance decision. Taking into account the fact that the parties to a proposed merger are primarily responsible for shaping the transaction, it might be advisable that the competition authorities rely upon the parties to design an appropriate remedy in dialogue with the competition authority.

25. In Japan, for instance, in many cases, the parties voluntarily hold prior consultations with the Japanese Fair Trade Commission (JFTC) in advance of formal notifications. The JFTC carries out inspections at an early stage, and if it concludes that the transaction is problematic, the JFTC indicates its competition concerns to the parties. Then, the parties propose a remedial measure on a voluntary basis, the effectiveness of which is assessed by the JFTC. Thanks to this procedure, the JFTC seldom imposes remedies in merger and acquisition cases as a formal action.

26. Under post-merger notification systems, a competition authority only intervenes once the transaction in question has already been completed. Thus, any remedy to competitive concerns can only be designed and decided upon after implementation of the merger, which may pose certain inconveniences from a practical perspective. In a situation where a divestiture may not remedy the competitive harm caused by a merger, the competition authority may have to order the rescission or dissolution of that merger, which involves the difficulty of "unscrambling the eggs".

27. In merger cases, rescission constitutes an *ultima ratio*, when competition cannot be safeguarded by any other means. Typically, it may be applied if the parties to an anti-competitive merger have not respected a statutory waiting period in a pre-merger notification system and have implemented the proposed transaction without the required approval by the competent authority. As mentioned earlier, rescission may also occur under post-merger notification systems.

Alternative approaches in existing legislation – Structural remedies in merger cases

Country	
Canada	Where the Canadian Competition Bureau believes that a merger is likely to prevent or lessen competition substantially, the Commissioner may either apply to the Competition Tribunal to challenge the merger under the applicable provisions of the Act, or negotiate remedies with the merging parties in order to resolve competition concerns on consent. Where the Tribunal finds that a merger prevents or lessens or is likely to prevent or lessen competition substantially, it may issue an order prohibiting the merger, or a remedial order requiring the parties to dissolve the merger or make divestitures. Parties to a proposed transaction that exceeds certain monetary thresholds must notify the Commissioner and wait for a statutory review period to expire before the transaction may close. Parties

Country	
	that fail to respect the waiting period rules may face an order requiring them to dissolve the merger, make divestitures, or pay an administrative monetary penalty of up to Can$10,000 for each day of non-compliance.
European Union	In the case of mergers, the Merger Regulation expressly provides that the Commission may decide to declare a concentration compatible with the EU market following modification by the parties, both before and after the initiation of proceedings. To that end, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market. However, the Commission is not in a position to unilaterally impose any conditions on an authorization decision; it can only accept such conditions when they are proposed by the parties. Where a concentration raises competition concerns in that it could significantly impede effective competition, the parties may seek to modify the concentration in order to resolve the competition concerns and thereby gain clearance for their merger. The Commission has to assess whether the proposed remedies, once implemented, would eliminate the competition concerns identified. According to the case law of the European courts, the basic aim of commitments is to ensure competitive market structures. Accordingly, commitments that are structural in nature, such as the commitment to sell a business unit, are, as a rule, preferable from the point of view of the objectives of the Merger Regulation, inasmuch as such commitments eliminate the competition concerns which would be raised by the merger as notified. Moreover, they do not require medium- or long-term monitoring measures.
Mauritius	Proposed mergers notified to the Competition Commission of Mauritius (CCM) and investigated can be blocked if they are expected to result in a significant lessening of competition, and if there is no more effective remedy. If a significant lessening of competition is expected only in some markets, then the CCM 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 CCM will apply the same principles to determining the package of assets that must be removed from the merged enterprise as set out below.

Country	
	The divestment of assets can represent a highly effective means to create a more competitive market structure than would otherwise have existed. However, the CCM 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. 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. The CCM 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. The CCM may also place restrictions on the types or the specific identities of allowed buyers of the divested assets. Before proceeding to due diligence, enterprises divesting assets must obtain the CCM's approval of the preferred buyer. The CCM 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. Divestment remedies normally require no monitoring or enforcement by the CCM, once the sale of assets is complete. However, as part of the divestiture order (or accepted undertakings), the CCM 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 10 years.
United States	In the United States, divestiture constitutes a remedy in cases of unlawful mergers and acquisitions. It is considered as a "structural remedy", requiring some dismantling or sale of the corporate structure or property which contributed to the continuing restraint of trade, monopolization or acquisition. Structural relief can be subdivided into three categories, known as the "three Ds": dissolution, divestiture and divorcement. "Dissolution" is generally used to refer to a situation where the dissolving of an allegedly illegal combination or association is involved; it may include the use of divestiture and divorcement as methods of achieving that end. "Divestiture" refers to situations where the defendants are required to divest themselves of property, securities or other

Country	
	assets. "Divorcement" is a term commonly used to indicate the effect of a decision where certain types of divestiture are ordered; it is especially applicable to cases where the purpose of the proceeding is to secure relief against antitrust abuses flowing from integrated ownership or control (such as vertical integration of manufacturing and distribution functions or integration of production and sale of diversified products unrelated in use or function). This type of remedy is not created in express terms of statute. But Section 4 of the Sherman Act and Section 5 of the Clayton Act empower the Attorney-General to institute proceedings in equity to "prevent and restrain violations of the antitrust laws", and provide that "Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined otherwise prohibited". Furthermore, aside from these general statutory authorizations, the essence of equity jurisdiction is the power of the court to mould the decree to the necessities of the particular case. Thus, invocation by the Government of the general authority of a court of equity under the Sherman Act or the Clayton Act enables the court to exercise wide discretion in framing its decree so as to give effective and adequate relief. See: Chesterfield, Oppenheim, Weston and McCarthy (1981). *Federal Antitrust Laws.* West Publishing Company: 1042. See also: Bureau of Competition of the Federal Trade Commission (1999). *A Study of the Commission's Divesture Process.*

(vi) Restitution to injured consumers;

28. Some competition legislation allows the competent authority to order restitution to those who suffered harm resulting from the anti-competitive conduct. For instance, in Indonesia, administrative measures provided for by Article 47 of Law 5/1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition include the stipulation of a compensation payment by the Indonesian competition authority. Such a restitution order, as part of public enforcement, is different from damages, which may be accorded by a civil court as part of private competition law enforcement. The latter is referred to in Chapter XIII of the Model Law on Competition (Action for damages).

(vii) Treatment of the administrative or judicial finding or illegality as prima facie evidence of liability in all damage actions by injured persons.

29. As has already been mentioned, well-established competition law systems have begun promoting private enforcement of competition law – that is to say, private actions for damages by those who have suffered harm resulting from anti-competitive conduct, in particular by hardcore cartels. These private actions are generally commenced in civil courts, and predominantly take the form of follow-on actions, i.e. actions that follow the public prosecution in a cartel case.

30. For the purposes of procedural efficiency, competition legislation may stipulate that the findings of the competition authority or court that established anti-competitive behaviour should be binding for follow-on claims for damages. This means that claimants for damages will not need to prove the anti-competitive behaviour by the defendant; claimants will only need to substantiate and prove the damage that they have suffered from the infringement of the competition law. For instance, according to Germany's Act Against Restraints of Competition, where damages are claimed for a competition law violation, the court shall be bound by a finding of such a violation in a final decision of any national cartel authority of a member State of the European Union or of the European Commission. In some countries, private action for damages is only allowed subsequent to a competition authority's decision, for example in Costa Rica, Japan and South Africa.