



## POLICY ROUNDTABLES

# Remedies in Merger Cases

2011

### Introduction

The OECD Competition Committee debated remedies in Merger Cases in June 2011. This document includes an executive summary of that debate and the documents from the meeting: an issues paper by Antonio Capobianco for the OECD, written submissions from Australia, Austria, Bulgaria, Canada, Chile, Estonia, Finland, France, Germany, Greece, Hungary, Indonesia, Ireland, Israel, Italy, Japan, Korea, Lithuania, Mexico, New Zealand, Poland, Portugal, Romania, Russian Federation, Slovak Republic, South Africa, Spain, Switzerland, Chinese Taipei, Turkey, United Kingdom, United States, the European Union, and BIAC as well as an aide-memoire of the discussion.

### Overview

Competition agencies use remedies in merger cases to eliminate any competitive harm that may result as a consequence of a merger. Generally, merger remedies are classified as either structural or behavioural (or conduct). Each of these categories has benefits and drawbacks, which must be carefully considered when deciding which type of remedy to best employ.

Horizontal and vertical mergers generally involve different competitive concerns. These differences must be taken into account when crafting an appropriate remedy. Frequently, competitive concerns in horizontal mergers can be best resolved by a structural remedy, while vertical mergers lend themselves to behavioural remedies or a combination of both.

While such generalizations may be a useful starting point, each transaction should be evaluated based on its own merits. In crafting remedies, competition agencies often seek the views of third parties in order to ensure that an optimal remedy is found.

### Related Topics

- Cross-Border Merger Control: Challenges for Developing and Emerging Economies (2011)
- Standard for Merger Review (2009)
- Managing Complex Mergers (2007)
- Vertical mergers (2007)
- OECD Council Recommendation on Merger Review (2005)
- Merger Remedies (2004)

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## **FOREWORD**

This document comprises proceedings in the original languages of a Roundtable on Remedies in Merger Cases held by the Competition Committee (Working Part No.3 on Co-operation and Enforcement) in June 2011.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

## **PRÉFACE**

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les Mesures correctives dans les affaires de concentrations qui s'est tenue en juin 2011 dans le cadre du Comité de la concurrence (Groupe de Travail No. 3 sur la coopération et l'application de la loi).

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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## EXECUTIVE SUMMARY

*By the Secretariat*

From the issues paper and the discussion at the roundtable on remedies in merger cases, the following points emerge:

- (1) *Competition agencies use remedies in merger cases to eliminate any competitive harm that may result as a consequence of a merger. Generally, merger remedies are classified as either structural or behavioural (or conduct). Each of these categories has benefits and drawbacks, which must be carefully considered when deciding which type of remedy to best employ.*

Remedies are used by competition agencies to resolve and prevent the harm to the competitive process that may result as a consequence of a merger. They allow for the approval of mergers that would otherwise have been prohibited, by eliminating the risks that a given transaction may pose to competition. As such, they play an essential role in the merger review process, and their careful crafting is of the utmost importance to the competition agencies carrying out the review.

Merger remedies are generally classified as either structural, if they require the divestiture of an asset, or behavioural, if they impose an obligation on the merged entity to engage in, or refrain from, a certain conduct. Structural remedies may include both the sale of a physical part of a business or the transfer or licensing of intellectual property rights. They can be imposed either as a condition precedent to a merger, or their completion may be required within a certain period from the approval of the merger. Behavioural remedies, on the other hand, are always forward looking in that they consist of limits on future business behaviour or an obligation to perform a specific prescribed conduct for a given, sometimes considerable, period of time following the consummation of the merger. They often consist of non-discrimination obligations, firewall provisions or non-retaliation or transparency provisions or contracting limitations.

Both types of remedies have their benefits and drawbacks. While the decision as to which type to use must be first and foremost guided by its suitability to address the competition risk at hand, the advantages and disadvantages of structural versus behavioural remedies must be carefully weighed as well.

Generally, the benefits of structural remedies are of a one-off nature (which eliminates the need for subsequent long-term monitoring) and of relatively straightforward character. Their drawbacks, on the other hand, include high costs to the merging parties, potential disruption to relationship with customers, and their irreversibility (given the fact that some of the feared competitive risks are transitory).

Behavioural remedies pose their own challenges. Often difficult to craft in order to capture all possible eventualities, they also require monitoring in order to ensure that the merged entity is adhering to them in the months and years following the consummation of the merger. Long lasting oversight of a company's behaviour is something competition agencies typically are neither well-equipped nor entrusted to do. On the other hand, behavioural remedies offer clear advantages in vertical and conglomerate mergers, where structural remedies typically offer little help. In addition, they avoid the substantial disruption to the merging parties' businesses that a divestiture would cause.

- (2) *Horizontal and vertical mergers generally involve different competitive concerns. These differences must be taken into account when crafting an appropriate remedy. Frequently, competitive concerns in horizontal mergers can be best resolved by a structural remedy, while vertical mergers lend themselves to behavioural remedies or a combination of both. While such generalizations may be a useful starting point, each transaction should be evaluated based on its own merits. In crafting remedies, competition agencies often seek the views of third parties in order to ensure that an optimal remedy is found.*

Broadly speaking, horizontal and vertical (or conglomerate) transactions lead to different competition concerns and present different risks to the competitive process. Horizontal mergers often involve risks resulting from the increase in market power while vertical mergers lead to concerns about the possibility of upstream or downstream foreclosure.

These competition risks are generally amenable to different types of remedies, and therefore, competition agencies have traditionally tended to use structural remedies for horizontal mergers and behavioural remedies for vertical mergers. However, while this is often the case, there are some notable exceptions. Austria, for example, has imposed mainly behavioural remedies. In New Zealand, on the other hand, the competition authority may impose only structural remedies, which has so far not caused any problems.

While this paradigm has proven effective in the past, there is a discernible move away from focusing on the type of remedy applied and towards its overall effectiveness. Competition agencies are increasingly looking at what makes a remedy successful in dealing with the relevant competition risk, rather than at whether the remedy can be characterized as structural or behavioural. This move is evidenced, for example, by the recent update of the US Department of Justice merger remedies guide and was attested by a number of other jurisdictions during the roundtable discussion. Competition agencies thus increasingly focus on the effectiveness of a remedy, often crafting remedies that combine structural and behavioural elements in order to achieve the optimal and most cost-effective elimination of all relevant competition risks.

Competition authorities regularly market-test the proposed remedies and contact third parties, in particular suppliers, customers and competitors, to better understand the competitive structure of markets. Third parties can be equally helpful in ensuring that the remedies designed by the authorities will be effective at combating the competitive concerns raised by the merger. For example, in the case of a divestiture, third parties may be in the best position to know which assets will enable the divested entity to compete effectively. The German delegation noted that the duration of lease contracts and necessary permits are examples of hidden risks brought to light by third parties. However, it cautioned that getting meaningful input in time to design and impose the remedy may prove challenging. It also warned that third parties' views may be tainted by their commercial interests which may not necessarily be aligned with the general market interests.

- (3) *After an appropriate remedy is designed, authorities must determine the best means of monitoring its implementation by the parties. Competition authorities have employed trustees and third party stakeholders to assist in ensuring compliance with merger remedies.*

Whether the remedies chosen are structural, behavioural or a combination of the two, the authority must provide a certain level of oversight to ensure that the remedies are implemented effectively. To that end and to alleviate some of the authority's burden, third parties are often called upon to assist in the implementation process. When remedies are structural and a divestiture of assets is required, the authority may appoint an experienced, knowledgeable and impartial trustee, such as an investment bank or consulting firm. The trustee can help the merging parties locate interested buyers and arrange for a sale that

will maintain the value of the assets. Sometimes the appointment of a trustee comes only at a later stage if merging parties do not complete the divestiture in time themselves. When remedies are behavioural or conduct-based, a monitoring trustee is often used to carry out the oversight role.

To alleviate the cost of monitoring the implementation of remedies some authorities have made use of arbitration clauses, whereby the merged entity must submit any disputes related to the implementation of the remedies for arbitration. The use of arbitration is particularly useful when the crafted remedy is designed to give rights to third parties, such as access to a facility or infrastructure controlled by the merged entity. The arbitration panel is empowered to grant the aggrieved party private law remedies, while the authority maintains the power to impose traditional public law sanctions such as fines. Alternatively, as discussed in the Korean submission, the authority can simply assign the task of monitoring compliance and effectiveness to a committee comprised of interested third parties such as competitors and customers.

Two obstacles to remedy enforcement, highlighted by the Secretariat arise when the mergers are cross-border. First, an authority may find it difficult to obtain access to necessary information to determine whether the parties are complying with the commitments. Second, the decisions of one national authority may lack coercive effect in another jurisdiction. In other words, it may not be legally possible to force a sale or demand certain conduct in a foreign jurisdiction in case of non-compliance.

- (4) *Competition authorities are exploring the best means of co-operation when handling remedies in cross-border mergers. Effective communication has been used to assist in the negotiation, design and enforcement of remedies to the benefit of the authorities, the merging parties and customers.*

Mergers are increasingly multinational and more countries have developed sophisticated merger control regimes. As a result, communication and co-ordination between competition authorities are paramount to ensuring each authority's general goal of promoting fair competition in its territory. One reason why such co-operation is imperative is that one authority's remedy may have extraterritorial effects on other jurisdictions, which could render one remedy ineffective or exacerbate anti-competitive conditions in another jurisdiction. Apart from the obvious ease on administrative costs for the authorities and the parties, co-operation also benefits customers and local markets. Through successful co-operation, authorities are more likely to understand the competitive structure at play and thus be able to design an effective remedy, which addresses the competitive concerns of stakeholders.

The means and timing of communication were also discussed during the roundtable. The EU delegation suggested the possibility of an early-warning mechanism and regular calls between regulators as practical means to facilitate co-operation. The Secretariat highlighted the possibility of work-sharing arrangements whereby the authorities jointly negotiate with the merging parties or designate a lead jurisdiction to negotiate remedies. Even without a formal work sharing arrangement, communication can reduce the time spent in learning about a market. Many delegations pointed to regular formal and informal contacts with other competition authorities on specific merger cases.

In the implementation and enforcement of a remedy, co-ordination can also prove useful. Aligning timelines can save costs to the parties, in some cases by allowing them to use a common trustee. If a divestiture is called for, authorities will need to agree on a purchaser for the assets. These are the kinds of issues that arise in cross-border mergers and which call for co-operation between the relevant authorities.



## SYNTHÈSE

*par le Secrétariat*

Il ressort des documents d'analyse et des discussions de la table ronde sur les mesures correctives dans les affaires de concentration que :

- (1) *Les autorités de la concurrence ont recours à des mesures correctives dans les affaires de concentration pour supprimer les atteintes à la concurrence pouvant résulter d'une opération de fusion. D'une manière générale, les mesures correctives sont considérées comme structurelles ou comme comportementales. Ces deux catégories présentent chacune leurs avantages et inconvénients, qu'il convient d'examiner avec attention au moment de décider du type de mesure corrective le plus approprié.*

Les mesures correctives sont utilisées par les autorités de la concurrence pour faire cesser et empêcher les atteintes au processus concurrentiel pouvant résulter d'une opération de concentration. Elles permettent d'autoriser des concentrations qui seraient par ailleurs interdites, en éliminant les risques qu'une transaction donnée pourrait faire peser sur la concurrence. À ce titre, elles jouent un rôle essentiel dans la procédure de contrôle des fusions, et il est crucial que les autorités de la concurrence qui en sont chargées attachent le plus grand soin à leur élaboration.

Les mesures correctives dans les affaires de concentration sont le plus souvent considérées comme structurelles lorsqu'elles exigent une cession d'actifs, ou comportementales lorsqu'elles obligent la nouvelle entité à adopter – ou à ne pas se livrer à – un comportement donné. Les mesures correctives structurelles peuvent inclure la vente d'un élément corporel d'une entreprise et le transfert ou l'octroi de droits de propriété intellectuelle. On peut les imposer comme condition préalable à une concentration ou exiger qu'elles soient réalisées dans un certain délai à compter de l'autorisation de l'opération. Pour leur part, les mesures correctives comportementales sont toujours prospectives, en ce qu'elles limitent le comportement futur des entreprises ou prescrivent un comportement spécifique pendant une période donnée – parfois très longue – après la réalisation de la concentration. Elles comprennent souvent des obligations de non-discrimination, des dispositions de non représailles, des dispositions relatives à la cloison étanche ou à la transparence, ou encore des limitations relatives à la passation de contrats.

Les deux types de mesures correctives ont leurs avantages et leurs inconvénients. S'il est vrai que le choix doit d'abord et avant tout être guidé par la capacité de la mesure retenue à lutter contre le risque de concurrence à traiter, il convient également de peser soigneusement les avantages et les inconvénients des mesures structurelles et des mesures comportementales.

Parmi les avantages des mesures correctives structurelles, on notera qu'elles sont généralement ponctuelles (ce qui rend inutile tout suivi ultérieur sur le long terme) et relativement simples. D'un autre côté, elles comportent des inconvénients, comme les coûts élevés qui en découlent pour les parties à la fusion, les éventuelles perturbations des relations avec les clients, et leur irréversibilité (alors même que certains des risques concurrentiels redoutés sont transitoires).

Les mesures correctives comportementales posent, elles aussi, certaines difficultés. Lors de leur élaboration, il est souvent difficile d'appréhender toutes les éventualités possibles et un suivi s'impose en



outre pour en garantir le respect par la nouvelle entité dans les mois et années qui suivent la réalisation de la concentration. Généralement, les autorités de la concurrence n'ont pas suffisamment les moyens – et ne sont pas chargées – d'assurer le contrôle à long terme du comportement d'une entreprise. D'un autre côté, les mesures comportementales présentent des avantages indéniables dans les fusions verticales et conglomérales, pour lesquelles les mesures structurelles s'avèrent en général peu utiles. Elles préservent en outre les activités des parties à la fusion de l'importante perturbation qu'entraîne une cession d'actifs.

- (2) *Les fusions horizontales et verticales impliquent généralement différents types de préoccupations concurrentielles. Ces différences doivent être prises en compte lors de l'élaboration de la mesure corrective appropriée. Une mesure corrective structurelle est souvent plus à même de résoudre les problèmes de concurrence dans les fusions horizontales, alors que les fusions verticales se prêtent davantage aux mesures correctives comportementales ou à une combinaison des deux. Bien qu'une telle généralisation puisse constituer un bon point de départ, il convient d'évaluer chaque transaction au cas par cas. Pour élaborer des mesures correctives, les autorités de la concurrence demandent souvent l'avis de tierces parties afin d'adopter la meilleure mesure corrective possible.*

D'une façon générale, les transactions horizontales et verticales (ou conglomérales) donnent lieu à diverses préoccupations concurrentielles et présentent divers risques pour le processus concurrentiel. Les fusions horizontales comportent souvent des risques liés à l'accroissement du pouvoir de marché alors que les fusions verticales suscitent des préoccupations concernant un possible verrouillage en amont ou en aval.

Ces risques pour la concurrence se prêtent généralement à différents types de mesures correctives, ce qui explique que les autorités de la concurrence ont généralement recours aux mesures correctives structurelles pour les fusions horizontales et aux mesures correctives comportementales pour les fusions verticales. Cela étant, il existe quelques exceptions notables. L'Autriche, par exemple, a essentiellement imposé des mesures correctives comportementales. En revanche, en Nouvelle-Zélande, l'autorité de la concurrence ne peut imposer que des mesures correctives structurelles, ce qui n'a jusqu'à présent posé aucun problème.

Bien que ce modèle se soit avéré efficace par le passé, le type de mesure corrective appliqué intéresse désormais visiblement moins que ses résultats d'ensemble. Les autorités de la concurrence s'attachent davantage à l'efficacité d'une mesure corrective dans le traitement des risques de concurrence concernés qu'à sa nature structurelle ou comportementale. La récente mise à jour du guide des mesures correctives dans les affaires de concentration publié par le ministère américain de la justice illustre bien cette tendance, par ailleurs confirmée par un certain nombre d'autres États lors de la table ronde. Les autorités de la concurrence sont ainsi de plus en plus attentives à l'efficacité des mesures correctives, qu'elles élaborent souvent en combinant des éléments structurels et comportementaux pour éliminer tous les risques de concurrence à prendre en compte de la manière la plus efficace et la plus économique possible.

Les autorités de la concurrence soumettent souvent les mesures correctives préconisées à une consultation des acteurs du marché et font appel à des tierces parties, en particulier des fournisseurs, des clients et des concurrents, afin de mieux appréhender la structure concurrentielle du marché. Ces tiers peuvent également garantir l'efficacité des mesures correctives mises au point par les autorités pour lutter contre les préoccupations concurrentielles suscitées par la fusion. Par exemple, en cas de cession d'actifs, les tierces parties peuvent être les mieux placées pour savoir quels actifs permettront à l'entité cédée de soutenir efficacement la concurrence. La délégation allemande note que la durée des contrats de location et les autorisations nécessaires sont des exemples de risques cachés que les tierces parties ont permis de mettre en lumière. Cela étant, elle fait remarquer qu'il peut s'avérer difficile d'obtenir des informations utiles en temps voulu pour élaborer et imposer une mesure corrective. Elle rappelle également que l'avis

des tierces parties peut être biaisé par leurs intérêts commerciaux qui ne sont pas nécessairement conformes à l'intérêt général du marché.

- (3) *Une fois élaborée la mesure corrective appropriée, les autorités doivent définir le meilleur moyen de surveiller sa mise en œuvre par les parties. Les autorités de la concurrence ont recruté des mandataires et d'autres tiers intéressés pour les aider à garantir le respect des mesures correctives dans les affaires de concentration.*

Que les mesures correctives adoptées soient structurelles, comportementales ou une combinaison des deux, l'autorité doit assurer un certain contrôle pour veiller à ce que les mesures correctives soient effectivement mises en œuvre. À cet effet, et pour alléger quelque peu la charge qui pèse sur l'autorité, des tiers sont souvent appelés à participer au processus de mise en œuvre. Lorsque les mesures correctives sont structurelles et qu'une cession d'actifs est nécessaire, l'autorité peut ainsi désigner un mandataire expérimenté, compétent et impartial, comme une banque d'investissement ou une société de conseil. Ce mandataire peut aider les parties à la fusion à localiser les acheteurs intéressés et à organiser une vente qui préserve la valeur des actifs. Parfois, la désignation d'un mandataire n'intervient qu'ultérieurement, lorsque les parties à la fusion n'ont pas procédé à temps à la cession d'actifs. Lorsque les mesures correctives sont comportementales, un mandataire chargé du contrôle se voit le plus souvent confier la mission de surveillance.

Pour alléger le coût induit par le suivi de la mise en œuvre des mesures correctives, certaines autorités ont recours à des clauses d'arbitrage, aux termes desquelles l'entité issue de la concentration doit soumettre à l'arbitrage tout différend relatif à la mise en œuvre des mesures correctives. Le recours à l'arbitrage s'avère particulièrement utile lorsque la mesure corrective élaborée vise à accorder des droits à des tiers, tels que l'accès à un établissement ou à une infrastructure contrôlés par la nouvelle entité. Le groupe spécial d'arbitrage est habilité à proposer à la partie lésée des mesures correctives de droit privé, tandis que l'autorité conserve la faculté d'imposer des sanctions classiques de droit public comme les amendes. À l'inverse, comme on peut le voir dans la contribution de la Corée, l'autorité peut simplement confier la mission de contrôle du respect des dispositions et de l'efficacité à un comité composé de tierces parties intéressées comme les concurrents et les clients.

Deux obstacles soulignés par le Secrétariat s'opposent à la mise en œuvre de mesures correctives dans le cas des concentrations internationales. En premier lieu, une autorité peut avoir du mal à obtenir l'accès aux informations nécessaires pour déterminer si les parties respectent leurs engagements. En second lieu, les décisions d'une autorité nationale peuvent être dépourvues d'effet coercitif dans un autre pays. Autrement dit, en cas de non-conformité, il peut être juridiquement impossible de forcer une vente ou d'exiger un certain comportement dans un pays étranger.

- (4) *Les autorités de la concurrence sont en train d'étudier le meilleur moyen de collaborer dans le domaine de la gestion des mesures correctives dans des affaires de concentration internationale. Une communication efficace facilite la négociation, l'élaboration et la mise en œuvre des mesures correctives dans l'intérêt des autorités, des parties à la fusion et des clients.*

Les concentrations sont de plus en plus multinationales, et de plus en plus de pays se sont dotés de systèmes élaborés de contrôle des fusions. De ce fait, la communication et la coordination entre les autorités de la concurrence sont essentielles pour que chacune d'entre elles réalise son objectif général de promotion de la concurrence loyale sur son territoire. Une des raisons pour lesquelles une telle coopération est nécessaire tient à ce que la mesure corrective d'une autorité peut avoir des effets extraterritoriaux sur d'autres États, ce qui peut priver ladite mesure d'effet utile ou aggraver les pratiques anticoncurrentielles dans un autre pays. Outre la baisse évidente des coûts administratifs pour les autorités et les parties, la coopération profite également aux clients et aux marchés locaux. Une coopération fructueuse permettra

aux autorités de mieux appréhender la structure concurrentielle en jeu et par là même d'élaborer une mesure corrective efficace, qui prenne en compte les préoccupations concurrentielles des parties prenantes.

Les moyens de communication et le calendrier de communication ont également été examinés lors de la table ronde. La délégation de l'UE suggère l'adoption d'un mécanisme d'alerte précoce et le maintien d'un contact régulier entre les organismes de réglementation afin de pouvoir concrètement faciliter la coopération. Le Secrétariat souligne la possibilité de conclure des accords de mutualisation des travaux aux termes desquels les autorités négocient conjointement avec les parties à la concentration, ou désignent une juridiction chef de file pour négocier les mesures correctives. Même en l'absence d'un tel accord formel, la communication peut réduire le temps passé à l'étude d'un marché. Plusieurs délégations attirent l'attention sur les contacts réguliers formels et informels qu'elles entretiennent avec d'autres autorités de la concurrence sur certaines affaires précises de concentration.

La coordination peut également s'avérer utile lors de la mise en œuvre et de l'application des mesures correctives. La mise en adéquation des calendriers peut réduire les coûts pour les parties, en leur permettant dans certains cas de faire appel à un mandataire commun. Si une cession d'actifs est sollicitée, les autorités devront s'entendre sur le repreneur. Ces questions se posent dans les cas de concentration internationale et exigent la coopération des autorités compétentes.

## ISSUES PAPER

*By the Secretariat*

At its meeting on February 2011, Working Party No. 3 (WP3) agreed to host a roundtable on “Remedies in Merger Cases.” The Roundtable will take place on Tuesday, 28 June 2011. As outlined by the WP3 Chair in her letter of 23 March 2011, “[t]he purpose of the June roundtable is to review current policies in OECD member and non-member countries *vis-à-vis* remedies in merger cases and to discuss a number of policy questions, such as: the relative advantages and disadvantages of structural and behavioural remedies, the need for a different approach to remedies in horizontal and vertical mergers, *ex post* review of remedies effectiveness and international co-operation in the design, enforcement and monitoring of remedies.” In the Annex to this Note, we report the non-exhaustive list of topics that the Chair suggested could be addressed by the country contributions together with any other relevant issue that describes country experiences in designing remedies in merger cases.

To inform the Working Party roundtable discussion, the Secretariat has prepared this short Note which focuses on two aspects related to the roundtable topic and raised by the Chair in her letter calling for country contributions: 1) the relative advantages and disadvantages of structural and behavioural remedies; and 2) international co-operation in the design, enforcement and monitoring of remedies. In addition, following the interesting discussion which took place at the WP3 Hearing in the relationship between competition and arbitration which took place on October 2010, this Note will also discuss briefly an interesting development in the area of merger remedies, *i.e.* the use of arbitration clauses as a monitoring and enforcement tool in merger remedies.

As background reference, delegates are reminded that the OECD Competition Committee has addressed the issue of remedies in merger cases in 2003 [DAF/COMP(2004)21] and reference is made to that document for a more detailed and comprehensive analysis of the legal and policy issues related to identifying effective remedies for anti-competitive mergers. Other work in this area was done by WP3 in 2005 in the context of a roundtable discussion on Cross-border Remedies in Merger Cases [DAF/COMP/WP3(2005)1].

### **1. The relative advantages and disadvantages of structural and behavioural remedies**

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 remedies that are designed to modify or constrain the behaviour of merging firms (in some jurisdictions, behavioural remedies are referred to also as “conduct remedies”). In many jurisdictions there is a strong presumption, at least for horizontal mergers, that a structural remedy is preferable to behavioural remedies. Many jurisdictions believe that a structural remedy, such as divestiture, is likely to be more effective, as it addresses the cause of the competitive detriment directly, and will incur lower ongoing costs of monitoring or possible market distortion.

Competition authorities nevertheless acknowledge the usefulness of behavioural remedies in certain circumstances, in particular to complement structural remedies. Most competition authorities have a strong preference for structural remedies in the form of divestitures. Given that mergers bring about structural changes in the market, a structural remedy frequently will be the most appropriate solution when the

merger gives rise to competition concerns. In addition to being more effective, many jurisdictions believe structural remedies are also typically easier to administer because they do not require ongoing monitoring by the authority.

The structural/behavioural dichotomy should not be taken to imply that the two sorts of remedies are mutually exclusive. It is sometimes necessary to use a combination drawn from both categories, and some behavioural measures can be regarded as quasi-structural. Some behavioural remedies, such as irrevocable licenses in intellectual property right, may have effects that are very similar to the effects of structural remedies. Some competition authorities find that structural remedies in the form of divestitures are not always more efficient and less costly than behavioural remedies. In particular where divestiture would be impracticable or disproportionate in order to remedy the adverse effects arising from a merger, behavioural remedies might sometimes be preferable. This will apply especially in the case of mergers with vertical elements, and where markets are quickly developing and future developments are difficult to anticipate.

The 2005 ICN report on Merger Remedies Review Project has identified three instances where, despite the presumption in many jurisdictions in favour of structural relief, behavioural remedies may be appropriate:

- when a divestiture is not feasible or subject to unacceptable risks (*e.g.* absence of suitable buyers) and prohibition is also not feasible (*e.g.* due to multi-jurisdictional constraints) or
- when the competitive detriments are expected to be limited in duration owing to fast changing technology or other factors, or
- when the benefits of the merger are significant (*e.g.* in some vertical mergers behavioural remedies are substantially more effective than divestitures in preserving these benefits in the relevant case).

The success of a structural divestiture depends largely (if not exclusively) on the existence of suitable purchasers interested in acquiring the assets to be divested. The recent financial and economic turmoil has emphasised the fact that there may be circumstances when there are simply no purchasers interested in these assets. According to many jurisdictions this deprives the reviewing agency of a structural solution to the concerns identified during the investigation, and leaves it with the only option of prohibiting the transaction. Similar issues can arise in small economies where structural remedies might sometimes be more difficult to implement than behavioural remedies, simply because the consolidated nature of certain industries excludes most incumbents from considering the purchase of the divested assets.

In light of these constraints that may limit the use of structural remedies, agencies have started increasingly to consider the possibility of accepting behavioural remedies, particularly if offered as part of a remedy package with structural elements.

### Box 1. Use of behavioural remedies in recent US merger cases

Behavioral remedies are being increasingly applied by US enforcement agencies in merger cases. As the Assistant Attorney General Christine Varney explained, in cases where enforcement is required, the Division aims at identifying a “*tailored resolution*” that targets competitive concerns. Some recent examples illustrate this new approach to remedies:

- In *Comcast Corp.’s / NBC* (2011), the Department of Justice expressed concerns that the deal would disadvantage Comcast’s video programming distribution competitors, giving Comcast the power to deny access to, or raise the cost of, NBC’s programming. Among other things, the settlements required Comcast (i) to make available to online video distributors (OVDs) the same package of broadcast and cable channels that it sells to traditional video programming distributors, (ii) to offer an OVD broadcast, cable and film content that is similar to, or better than, the content the distributor receives from any of the joint venture’s programming peers, and (iii) prohibits Comcast from retaliating against any broadcast network (or its affiliate), cable programmer, production studio or content licensee for licensing content to a Comcast/NBC competitor, or for raising concerns with the Federal Communication Commission. Additionally, Comcast is required to give other firms’ content equal treatment under any of its broadband offerings that involve usage-based pricing. Comcast, finally, may not (with certain narrow exceptions) require programmers or video distributors to agree to licensing terms that seek to limit online distributors’ access to content.
- The Antitrust Division adopted the tailored approach to the settlement of the *Ticketmaster / Live Nation* (2010) acquisition whereby both structural and behavioral remedies were used. Under the terms of the decree, Ticketmaster agreed (i) to license its ticketing software to its competitor AEG, (ii) to divest certain recently acquired ticketing assets, allowing the purchaser of such assets to compete head-to-head with the merged entity, and (iii) to comply with a 10-year anti-retaliation provision that prohibit the merged firm from engaging in conduct, such as certain types of bundling, against any venue that chooses to use another company’s ticketing services. The decree also required firewalls to protect confidential and valuable competitor data, preventing the merged firm from using information from its ticketing business in the operation of its promotions or artist management business.
- In *PepsiCo Inc. / Pepsi Bottling* (2010) - PepsiCo’s USD 7.8 billion acquisition of PepsiCo of its two largest bottlers and distributors - the Federal Trade Commission decree required that PepsiCo restrict its access to confidential competitive information of rival Dr Pepper Snapple Group, as the acquired companies also distributed Dr Pepper Snapple Group carbonated soft drinks. Under the order, PepsiCo is required to set up a firewall to ensure that its ownership of these bottlers does not give PepsiCo’s employees access to commercially sensitive and confidential information of Dr Pepper Snapple marketing and brand plans.

Behavioral remedies are particularly effective to address vertical facets to horizontal mergers, and vice versa. In these cases, enforcers must ensure that such remedies do not adversely affect vertical issues, or they need to apply vertical remedies in combination. Similarly, behavioral remedies can be effective to deal with disclosure of or access to information. Third-party monitoring and use of arbitration and/or other alternative dispute resolution (see further below) may become more important to relieve the strain on agencies, courts, and the government in enforcing and monitoring these remedies.

## 2. International co-operation in the design, enforcement and monitoring of remedies

Over the last years, merger enforcement has become increasingly more cross-border and which remedial actions should be taken to counteract the anti-competitive effects of cross-border mergers is a key element of the decision-making process. In cross-border cases, the competition authorities involved in the review of the transaction face significant challenges. In particular, if they identify anti-competitive effects in their jurisdiction, they may have to consider adopting cross-border remedies in order to address domestic concerns.

The term “cross-border remedy” is used to refer to a situation where a competition authority is seeking a remedy in a merger case, but the merging parties and/or their assets are located abroad and therefore a

remedy would require the sale of assets or certain conduct of the merged entity in another jurisdiction. Issues which could arise with cross-border remedies involve mainly (i) co-operation and co-ordination of enforcement actions among competition authorities reviewing the same transaction and seeking remedies; and (ii) monitoring and enforcing remedies that are not purely domestic.

## **2.1 Co-operation and co-ordination**

Consultation and co-operation between competition authorities on the question of remedies in cross-border merger cases is especially important in light of the serious potential for conflict which can arise in a number of contexts. These contexts include:

- first, the relevant competition authorities might reach conflicting conclusions concerning the need for remedies in the same cross-border merger case, particularly if the “centre of gravity of the merger” is located in a jurisdiction which has decided not to take action against the merger
- second, two competition authorities could identify competitive concerns with respect to different aspects of the same merger operation in which case the remedies deemed necessary by one authority might not match the remedies sought by the other authority.

Bilateral co-operation in these contexts brings a number of important benefits to both the competition authorities and the merging parties. The benefits to competition authorities are not limited exclusively to benefits in administrative terms, but in practice, translate into benefits also for consumers and for local markets. This is the case when co-operation enhances the prospects for effective design and implementation of a remedy in a particular case. Co-operation between competition authorities in the remedies phase is, therefore, of critical importance. This is especially so for the purposes of enhancing consistency between these authorities. International discussion at the OECD and in other fora explored different options for co-operation, most notably the idea of ‘work sharing arrangements’ between competition authorities. This idea might deserve further examination, although so far there has been a lack of consensus over the best way forward in this case. This can be seen in light of the difference in views over the viability and practicability of the ‘lead jurisdiction’ idea.

In particular, the ICPAC Report in 2000 examined the possibility of work sharing arrangements in the remedies phase in great detail and concluded that employing these co-operative approaches more frequently could have significant benefits. It considered different scenarios in which these arrangements could be used: (i) joint negotiation, where each interested jurisdiction would identify its concerns regarding the likely anticompetitive effects of a proposed transaction, and separately implement jointly negotiated remedies; and (ii) designating one jurisdiction as “lead jurisdiction” which negotiates remedies with the merging parties that will address the concerns of the “lead jurisdiction” as well as other interested jurisdictions. The second case can include a situation in which the competitive concerns of all jurisdictions involved in the review are identical, but also a situation in which the “lead jurisdiction” seeks remedies that go beyond what it necessary to satisfy its own concerns in order to address competitive concerns of other co-operating jurisdictions.

It could be worth exploring under what circumstances such arrangements might work (or have worked in the past), whether such arrangement could be applied more frequently in the future, and which (legal and practical) obstacles exist to such arrangements. For example, the other jurisdictions reviewing the same merger might not be able to suspend their own merger review process and deadlines in order to grant another competition authority “lead agency” status in the remedies phase. Or because of *ultra vires* concerns, the jurisdiction that is designated as “lead jurisdiction” might not be able to impose remedies that address competitive concerns that exist only in other jurisdictions reviewing the same merger, but not in its own jurisdiction.

**Box 2. Co-operation and co-ordination in the Agilent / Varian Merger (2010)**

Agilent Technologies, Inc., which manufactures and distributes analytical instruments, planned to acquire 100% ownership of Varian, Inc.. Both Agilent and Varian were active in the design, development, manufacture and sale of bio-analytical measurement products, including analytical and life science instruments as well as associated services, consumables and software. Both companies have their headquarters in the United States, operating sales of analytical instruments all over the world. The planned merger was notified and subject to review in a number of jurisdictions, including the European Union, the United States, Japan and Australia. Each agency reviewed the transaction and its effects in its own jurisdiction but the discussion on which remedies would meet the concerns raised by the various reviewing agencies was co-ordinated. The parties offered to the US Federal Trade Commission and to the European Commission a remedy where they agreed to divest the overlapping businesses to a third party which was expected to be a competitor to the concerned companies after the transfer. This remedy was also proposed to the Japanese Fair Trade Commission and to the Australian ACCC. Based on this commonly agreed remedy package, the acquisition obtained conditional clearance in all jurisdictions.

## **2.2 *Monitoring and enforcing***

In the context of cross-border remedies, a competition authority might be concerned about its ability to effectively monitor compliance with remedies, and to enforce its decision (or a court order) in the event of non-compliance. This concern is particularly acute when behavioural remedies are used as a condition to clear a merger. It is therefore important that the relevant competition authority puts in place a means for the effective monitoring of the remedies implementation. This is vital for ensuring full compliance by merging firms and guaranteeing the effectiveness of the relevant behavioural remedy. Monitoring is also important, though to a lesser extent, in the case of structural remedies. The same is true for enforcement: competition authorities must have the necessary power and tools to be able to take enforcement actions where merging parties fail to comply with conditions or obligations featuring in remedies agreed with the parties.

There could be two kinds of concerns:

- First, a competition authority might find access to necessary information more difficult to obtain than in purely domestic cases, as the relevant information might be of a different nature. It may be more difficult to review the sales process and sales documents. In the case of conduct remedies, prohibitions against certain conduct or certain obligations may be more difficult to monitor to ensure compliance.
- Second, if a merged entity fails to comply with a remedy, there may be limits on the use of enforcement measures that have coercive effects in another jurisdiction. In other words, even if it is lawful for a jurisdiction to order a remedy that requires the sale of assets and/or certain conduct in another country, it could arguably violate international law to enforce such an order by government measures (including court orders) that have coercive effects abroad.



### Box 3. The Boeing / McDonnell Douglas merger

The European Commission's *Boeing/McDonnell Douglas* decision (1997) illustrates some of these problems. As the Commission in the course of its review considered prohibiting the transaction, the question was raised as to how such a prohibition decision could be enforced, given that neither merging party had assets within the European Union. The Commission would have been able to impose penalties had the parties not complied with a prohibition decision, but attempting to recover those penalties most likely would have required coercive measures outside of the EU's jurisdiction, which arguably could have raised concerns under international law. Ultimately the merger was not prohibited after the parties agreed to several remedies. The enforcement of these remedies, however, could have been difficult as well. For example, as part of the remedies package, Boeing agreed to terminate long-term exclusive purchase agreements with certain U.S. airlines and not to enter into new exclusivity arrangements for ten years. One could ask how in these circumstances a prohibition decision or conduct remedy could have been enforced, for example, if the Commission had discovered after clearing the transaction that Boeing and the airlines had renewed their exclusivity agreements.

One way to overcome limitations of enforcement powers could be co-operation among competition authorities where the same merger is reviewed under the merger control laws of several countries, and competition authorities identify similar competitive concerns. So long as the jurisdiction in which the merged entity and its assets are located seeks remedies as a condition for clearance, and those remedies satisfy the competitive concerns of other jurisdictions, the other jurisdictions might either no longer require remedies or accept the same remedy and be satisfied that the domestic jurisdiction will supervise and enforce its implementation.<sup>1</sup> Co-operation among competition authorities may have to be particularly extensive in these cases, and could involve, for example, discussion of the appropriateness of a particular trustee or monitoring mechanisms.

### 3. Monitoring and enforcing behavioural remedies: the use of arbitration clauses

The use of behavioural remedies, either on a stand-alone basis or as part of a complex remedies package, to address anti-competitive issues arising from mergers requires some form of monitoring with a view to guaranteeing the correct implementation of the commitment by the merger entity. The need for ongoing monitoring of the implementation of behavioural remedies, which makes these type of remedies more burdensome to administer, is one of the reasons why agencies tend to view structural remedies as the preferred type of remedy. As discussed above, however, structural remedies may not always be more efficient and less costly to administer than behavioural remedies.

It is not surprising therefore that the use of behavioural remedies has been accompanied by the use of arbitration clauses, whereby the merged entity undertakes *erga omnes* to submit to an arbitration panel questions related to the implementation of the remedies attached to the conditional merger decision, i.e. any litigation arising from an alleged infringement of the obligations under the remedy package. These types of remedies have proved particularly successful with so-called "access commitment", i.e. in cases involving remedies providing for the granting of access for third parties to a particular facility or infrastructure controlled by the merged entity, such as access to a physical network, a key technology, film content or more generally access to any important infrastructure or asset.

The peculiarity of arbitration clauses used as remedies in merger decision is that the merging parties take obligations towards those third parties (normally competitors or customers) which are intended to benefit from the remedy and countervail the increase in the merging party's market power as a result of the merger. Thus, in addition to relations between the merging firm and the competition agency, which

<sup>1</sup> See *Cisco/Tandberg*, [http://www.justice.gov/atr/public/press\\_releases/2010/257173.htm](http://www.justice.gov/atr/public/press_releases/2010/257173.htm) and <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/377>.

remains responsible for the effective enforcement of the remedies, the commitments also give rise to obligations for the merging firm towards private parties and to corresponding rights for the latter. The arbitrator's jurisdiction is limited to adjudicating the civil law consequences of the incorrect or non-implementation of the remedies in question. In other words, the arbitrator is only empowered to award private law remedies. The competition agency, on the other hand, preserves its prerogative to impose the traditional public law sanctions on a merged entity which does not comply with its obligations under the merger decision (*e.g.* the imposition of fines).

The advantage of these forms of dispute resolution is that through the arbitration process the competition authority can ensure the monitoring of the relevant behavioural commitments, without having to overstrain public resources. Essentially, the option to resort to arbitration offers all potential third-party beneficiaries an incentive to ensure the accurate implementation of the remedies by the merged entity and directly to enforce the rights they derive from those remedies before an arbitral tribunal. Hence, the potential beneficiaries' private interest will serve as a monitoring mechanism, which could potentially be more effective than monitoring by the competition authority.

Experiences with the use of arbitration clauses in merger remedies have indicated that the procedure for the dispute resolution should be speedy and efficient. This reflects the manner in which arbitration clauses are drafted as well as the overall features of such procedures. In particular, the following issues have become "standard" features in arbitration clauses:

- *Adoption of "fast track procedures"*: in order to reflect the urgency of such proceedings, it is not uncommon for arbitration clauses in this context to shorten the time limits set for the filing of the parties' various submissions and to impose on the arbitral tribunal an obligation to shorten all applicable procedural time-limits "as far as admissible and appropriate in the circumstances". Similarly, the timetable of the arbitration is usually very fast, as clauses usually provide for an oral hearing (*i.e.* the main evidentiary hearing) within three weeks of the confirmation of the arbitral tribunal and a deadline for final award within one to three months from the adoption of the terms of reference. In order to speed up the process, the parties often agree to the use of email for the exchange of documents.
- *Assistance by a Trustee*: The arbitral tribunal is usually entitled to ask for assistance by the Monitoring Trustee in all stages of the procedure, if the parties to the arbitration so agree. The Trustee can also be asked by the parties to act as a mediator with a view to resolving the respective disputes between them before recurring to the arbitral tribunal. The Trustee can also be asked to be an expert witness to resolve the issues at stake before the arbitral tribunal.
- *Prima facie evidence rule*: Many arbitration clauses stipulate that a third party need only to establish a *prima facie* case. Therefore, if the third-party beneficiary can prove a *prima facie* case, the tribunal is bound to make an award in favour of the beneficiary, provided the merged entity cannot present evidence to the contrary.
- *Role of the competition agency*: arbitration clauses should allow for the competition authority to be an active participant to the arbitration proceedings, even on its own initiative, *e.g.* by submitting *amicus curie* briefs on specific issues such as its own interpretation of the commitments. The arbitral tribunal may also seek the assistance of the competition authority, *e.g.* by asking to provide information relevant for the arbitral tribunal adjudication. Access to such information may certainly contribute to an efficient and speedy arbitration proceeding.
- *Publication requirements*: Finally, the competition authority should be free to publish a non-confidential version of the arbitration award. This represents an important departure from the

strictly private and confidential nature of the arbitral process, where there is normally no publication requirement with regards to arbitral awards.

**Box 4. The use of arbitration clauses under the EU Merger Regulation**

The European Commission has a relatively long-standing expertise with the use of arbitration clauses in merger remedies packages. The first instance in which these clauses were included in a conditional merger clearance dates back to 1992 (case Elf/Aquitaine-Thyssen/Minol). This experience is reflected in the 2008 Merger Remedies Notice, which states at paragraph 66:

*“Access commitments are often complex in nature and necessarily include general terms for determining the terms and conditions under which access is granted. In order to render them effective, those commitments have to contain the procedural requirements necessary for monitoring them (...). Measures allowing third parties themselves to enforce the commitments are in particular access to a fast dispute resolution mechanism via arbitration proceedings (together with trustees) or via arbitration proceedings involving national regulatory authorities if existing for the markets concerned.”*

Recent examples of arbitration clauses in EU conditional merger decisions include<sup>2</sup>:

- *Access commitments and arbitration clauses:* Lufthansa/Austrian, Lufthansa/SN, Iberia/Vueling/Clickair 5 (Airline cases with access to slots commitments); Deutsche Bahn/EWS – (access in the railway sector); Axalto/Gemplus (access to patents and inter-operability information concerning smart cards); SFR/Télé2 (non-discriminatory access to pay-TV channels)
- *Alternative dispute resolution by Trustee and appeal to Commission/regulatory authority:* SNCF/LCR/Eurostar
- *Access commitments and dispute resolution by regulatory authorities:* Newscorp/Telepiù (Italian AGCOM); Alcatel/Finmeccanica (appointment of arbitrators by ESA/NASA); T-Mobile Austria/tele.ring (Austrian telecoms regulator RTR)
- *Arbitration within contractual relationships:* GdF/Suez (arbitration over gas storage transfer with purchaser); DFDS/Norfolk (arbitration over “Space Charter Agreement”); Akzo/ICI and Schering-Plough/Organon (arbitration over transitional arrangements and trademarks); Friesland/Campina (arbitration over supply agreements concerning Dutch Milk Fund); Newscorp/Premiere (arbitration over access to technical Pay-TV platform).

<sup>2</sup> Recent U.S. DOJ merger consent decrees have also included arbitration provisions; see *Google/ITA*, <http://www.justice.gov/atr/cases/f269600/269620.pdf>, and *Comcast/NBC*, <http://www.justice.gov/atr/cases/f266100/266158.htm>.

## ANNEX

In her letter of 23 March 2011, the WP3 Chair invited the delegates to submit written contributions and identified a number of possible issues that the delegations might want to address.

These included the following questions.

- What is your process for considering possible remedies for mergers that present competitive problems? Are parties responsible for proposing remedies, and are they required to follow particular procedures or time lines in order to do so? If your merger review system involves a 2-phase process, are there different procedures and standards for reviewing proposed remedies in the 2 phases?
- When crafting merger remedies, does your agency employ structural remedies? Do you employ behavioral remedies or hybrid remedies? How do you decide what remedy or combination of remedies best cures the competitive harm of concern? Is the approach different in horizontal and vertical mergers?
- When seeking structural relief, under what circumstances do you require the divestiture of a stand-alone business? Do you ever require the divestiture of identified assets that are not a stand-alone business? Do you ever require the divestiture of intellectual property in lieu of the divestiture of a stand-alone business or a collection of physical assets? When do you use each type of divestiture remedy?
- What types of behavioral remedies does your agency use? In what circumstances have you used firewalls, fair dealing clauses, transparency requirements, anti-retaliation provisions or prohibitions on anticompetitive contracting practices?
- Do you have experience protecting the to-be-divested assets or businesses prior to divestiture? Have you required that assets or businesses be held separate or otherwise preserved? Have you employed monitoring trustees?
- How do you ensure an expeditious and successful divestiture? Do you require divestitures be finalized before a merger closes? If not, how quickly do you require divestiture? What happens if the divestiture has not timely occurred? Do you use sales trustees? Do you insist on enhanced asset packages when sales are not timely? How do you ensure that a sale to a proposed divestiture buyer and the terms of the divestiture will accomplish your remedial goals?
- How do you ensure that parties comply with your remedy order? Do you include reporting requirements or inspection clauses in your orders? Do you have staff dedicated to enforcement of remedies?
- Is your experience in enforcing remedies reflected in documents describing your best practices or in other guideline documents? If not, are you planning to issue guidance in the near future?

- What role do third parties and the public have in commenting on proposed remedies? How have your courts assessed the agencies' remedies and efforts to enforce them?
- Feel free to comment on other issues that arise in relation to the assessment of merger remedies.

## NOTE POUR DISCUSSION

*par le Secrétariat*

À sa réunion de février 2011, le Groupe de travail n° 3 a accepté d'accueillir une table ronde sur les « mesures correctives dans les affaires de concentration ». La table ronde se tiendra le mardi 28 juin 2011. Comme l'a indiqué la Présidente du Groupe de travail dans sa lettre du 23 mars 2011, « [1] l'objet de la table ronde du mois de juin est de permettre d'examiner les politiques actuellement appliquées dans les pays membres de l'OCDE et les pays non membres en termes de mesures correctives dans les affaires de concentration et de débattre d'un certain nombre de questions relevant de l'action publique, à savoir : les avantages et les inconvénients relatifs des remèdes structurels et des remèdes comportementaux, la nécessité d'une approche différenciée des recours selon qu'il s'agit de fusions verticales ou horizontales, l'examen *a posteriori* de l'efficacité des mesures correctives ou encore la coopération internationale en matière de conception, de mise en œuvre et de suivi des mesures correctives ». L'annexe à la présente note contient une liste non exhaustive des sujets que la Présidente suggère aux pays d'aborder dans leurs contributions, parallèlement à tout autre aspect pertinent de l'expérience des différents pays quant à l'élaboration de mesures correctives dans les affaires de concentration.

En vue de nourrir les discussions du Groupe de travail, le Secrétariat a préparé cette note succincte qui porte essentiellement sur deux aspects du thème de la table ronde, mentionnés par la Présidente dans son appel à contributions adressé aux pays, à savoir : 1) les avantages et inconvénients relatifs des remèdes structurels et des remèdes comportementaux et 2) la coopération internationale en matière de conception, de mise en œuvre et de suivi des mesures correctives. Par ailleurs, suite au débat intéressant qui a eu lieu lors d'une audition du Groupe de travail consacrée à la relation entre concurrence et arbitrage en octobre 2010, cette note examine brièvement une évolution notable des mesures correctives, à savoir le recours à des clauses d'arbitrage pour assurer le suivi et l'application des mesures correctives dans les affaires de concentration.

S'agissant de l'autre point évoqué dans la lettre de la Présidente (examen *a posteriori* de l'efficacité des mesures correctives), les délégués sont également informés que le Comité de la concurrence de l'OCDE tiendra, le jeudi 30 juin, une table ronde sur l'« Évaluation de l'impact des décisions de concentration ». Le Comité étudiera en particulier les méthodes employées pour déterminer si les prévisions d'une autorité de la concurrence quant aux effets de ses décisions de concentration sur le bien-être des consommateurs sont justes ou non. Le débat portera sans doute aussi sur le suivi *a posteriori* de l'efficacité des mesures correctives imposées par les autorités de la concurrence.

Pour ce qui est des documents de référence, il est rappelé aux délégués que le Comité de la concurrence de l'OCDE a abordé la question des mesures correctives dans les affaires de concentration en 2003 [DAF/COMP(2004)21] et qu'il convient de se reporter à ce document pour une analyse plus détaillée et plus complète des questions juridiques et stratégiques liées à la définition de mesures correctives efficaces applicables aux concentrations anticoncurrentielles. Le Groupe de travail n° 3 a mené d'autres travaux dans ce domaine en 2005 dans le cadre d'une table ronde sur les mesures correctives transfrontalières dans les affaires de concentration [DAF/COMP/WP3(2005)1].

## **1. Les avantages et désavantages respectifs des mesures correctives structurelles et comportementales**

Traditionnellement, les mesures correctives sont considérées soit comme structurelles, soit comme comportementales. Les mesures correctives structurelles sont le plus souvent des mesures ponctuelles qui visent à restaurer la structure concurrentielle du marché, tandis que les mesures correctives comportementales sont en principe des mesures durables qui ont pour objet de modifier ou d'encadrer le comportement des entreprises issues d'une concentration (dans certains pays, les *behavioural remedies* – mesures comportementales – sont également appelées *conduct remedies*). Dans bon nombre de pays, il est largement admis, au moins dans le cas des concentrations horizontales, que les mesures correctives structurelles sont préférables aux mesures correctives comportementales. Beaucoup de pays estiment qu'une mesure corrective structurelle, comme la cession d'actifs, est probablement plus efficace dans la mesure où elle s'attaque directement aux causes de l'atteinte à la concurrence et où elle n'exige pas de suivi coûteux ou risque moins de provoquer des distorsions du marché.

Les autorités de la concurrence reconnaissent néanmoins l'utilité des mesures comportementales dans certaines circonstances, notamment en complément de mesures structurelles. La plupart des autorités de la concurrence marquent une nette préférence pour les mesures correctives structurelles sous la forme de cessions d'actifs. Dans la mesure où les concentrations entraînent des modifications de la structure du marché, les mesures correctives structurelles constituent souvent la solution la mieux adaptée lorsqu'une concentration entraîne des problèmes de concurrence. Outre leur plus grande efficacité, de nombreux pays estiment que les mesures correctives structurelles sont aussi généralement plus faciles à administrer du fait qu'elles ne nécessitent pas de suivi continu de la part des autorités.

La dichotomie entre mesures correctives structurelles et comportementales ne signifie pas que les deux types de mesures s'excluent mutuellement. Il est parfois nécessaire de recourir à une combinaison des unes et des autres, et certaines mesures comportementales peuvent être considérées comme quasi structurelles. Quelques mesures correctives comportementales, comme les licences irrévocables en matière de droit de propriété intellectuelle, peuvent avoir des effets très similaires à ceux des mesures correctives structurelles. Certaines autorités de la concurrence estiment que les mesures correctives structurelles avec cession d'actifs ne sont pas toujours plus efficaces et moins coûteuses que les mesures correctives comportementales. En particulier, là où une cession d'actifs serait irréalisable ou disproportionnée par rapport aux effets négatifs d'une concentration, des mesures correctives comportementales peuvent parfois être préférables. C'est le cas en particulier des concentrations qui présentent des aspects verticaux et des situations dans lesquelles les marchés connaissent un développement rapide, ce qui rend les évolutions à venir difficilement prévisibles.

Le rapport de 2005 du Réseau international de la concurrence sur le projet d'examen des mesures correctives dans les affaires de concentration a recensé trois cas dans lesquels, même si beaucoup de pays reconnaissent que les mesures structurelles peuvent atténuer les risques de distorsion de la concurrence, les mesures correctives comportementales peuvent s'avérer plus appropriées :

- lorsqu'une cession d'actifs n'est pas réalisable ou qu'elle engendre des risques inacceptables (absence de repreneur approprié, par exemple) et qu'une interdiction n'est pas envisageable (contraintes de nature multijuridictionnelle, par exemple)
- lorsque la durée de l'atteinte à la concurrence semble devoir être limitée en raison de mutations technologiques rapides ou d'autres facteurs

- lorsque les avantages de la concentration sont significatifs (par exemple, dans certaines concentrations verticales, les mesures correctives comportementales sont nettement plus efficaces que les cessions d'actifs pour préserver ces avantages).

Le succès d'une cession d'actifs structurelle dépend largement (voire exclusivement) de l'existence de repreneurs appropriés intéressés par le rachat desdits actifs. La crise financière et économique récente a montré qu'il peut arriver qu'aucun repreneur potentiel ne soit intéressé. Selon certains pays, l'autorité de contrôle des concentrations se trouve ainsi dans l'impossibilité d'apporter une solution structurelle aux problèmes qu'elle a identifiés et n'a alors pas d'autre option que d'interdire la transaction. Des problèmes similaires peuvent se présenter dans les petites économies, où des mesures structurelles peuvent parfois être plus difficiles à mettre en œuvre que des mesures comportementales, du simple fait que la concentration existant dans certaines branches d'activité empêche la plupart des entreprises en place d'envisager l'acquisition d'actifs.

En raison de ces contraintes qui peuvent limiter le recours aux mesures correctives structurelles, les institutions se tournent de plus en plus vers des mesures correctives comportementales, en particulier si celles-ci font partie d'une série de mesures correctives comportant des éléments structurels.



### Encadré 1. Recours aux mesures correctives comportementales dans de récentes affaires de concentration américaines

Les autorités américaines chargées du contrôle des affaires de concentration ont de plus en plus recours à des mesures correctives comportementales. Comme l'a expliqué le Procureur général adjoint Christine Varney, dans les cas où des mesures doivent être prises, la Division s'efforce de concevoir une « *solution sur mesure* » qui réponde aux préoccupations relatives à la concurrence. Quelques récents exemples illustrent cette nouvelle approche en matière de mesures correctives :

- Dans l'affaire *Comcast Corp. / NBC* (2011), le ministère de la Justice craignait que l'opération nuise aux intérêts des concurrents de Comcast dans le domaine de la distribution de programmes vidéo, en donnant à Comcast la faculté de leur refuser l'accès aux programmes de NBC ou d'en augmenter le prix. En vertu de l'accord qui a été conclu, la société Comcast s'est engagée à i) mettre à la disposition des distributeurs de programmes vidéo en ligne le même ensemble de canaux radiodiffusés et câblodistribués que celui qu'elle fournit aux distributeurs traditionnels, ii) offrir aux distributeurs de programmes vidéo en ligne un ensemble de programmes hertziens, câblodistribués et cinématographiques identique ou supérieur à celui que le distributeur reçoit de chacune des parties à la coentreprise et iii) ne pas user de mesures de rétorsion à l'encontre de tout groupe de radiodiffusion hertzienne (ou société affiliée à un tel groupe), producteur de programmes pour le câble, studio de production ou titulaire de licence de contenu pour avoir attribué des licences de contenu à un concurrent de Comcast/NBC ou pour avoir saisi la *Federal Communication Commission*. Comcast est par ailleurs tenue d'accorder l'égalité de traitement au contenu des autres entreprises dans ses offres à haut débit facturées à l'utilisation. Enfin, Comcast ne peut pas (à quelques rares exceptions près) demander aux producteurs ou aux distributeurs de programmes vidéo d'accepter des conditions d'octroi de licence qui visent à limiter l'accès des distributeurs en ligne à des contenus.
- La Division Antitrust a adopté une « solution sur mesure » en ce qui concerne l'acquisition *Ticketmaster / Live Nation* (2010), pour laquelle des mesures correctives à la fois structurelles et comportementales ont été employées. Aux termes de la décision de la Division, Ticketmaster a accepté i) de concéder sous licence ses logiciels de billetterie à son concurrent AEG, ii) de céder certains actifs récemment acquis dans le cadre de son activité de billetterie, permettant ainsi à l'acquéreur de ces actifs de concurrencer la nouvelle entité dans des conditions équitables et iii) de ne prendre pendant 10 ans aucune mesure portant préjudice, par le biais de certains types de ventes groupées par exemple, à tout organisateur de manifestations choisissant d'utiliser les services de billetterie d'une autre entreprise. La décision impose également l'installation de « cloisons étanches » pour protéger les données confidentielles et importantes concernant des concurrents, afin d'empêcher l'entreprise issue de la fusion d'utiliser les informations provenant de ses activités de billetterie pour ses activités de promotion ou d'agence artistique.
- Dans l'affaire *PepsiCo Inc. / Pepsi Bottling* (2010) – acquisition par PepsiCo de deux de ses principaux embouteilleurs et distributeurs pour 7.8 milliards USD – la décision de la *Federal Trade Commission* a imposé à PepsiCo de restreindre son accès aux renseignements concurrentiels confidentiels de l'entreprise rivale Dr Pepper Snapple Group, du fait que les entreprises acquises distribuaient aussi des boissons gazeuses de Dr Pepper Snapple Group. Aux termes de la décision de la Commission, PepsiCo a dû installer une « cloison étanche » pour veiller à ce que l'acquisition de ces embouteilleurs ne donne pas aux salariés de PepsiCo accès à des informations confidentielles et sensibles concernant les stratégies de commercialisation et de marque de Dr Pepper Snapple.

Les mesures correctives comportementales sont particulièrement efficaces en ce qui concerne les aspects verticaux des concentrations horizontales, et inversement. Dans ces cas, les autorités doivent veiller à ce que ces mesures correctives ne nuisent pas aux aspects verticaux, ou doivent les appliquer conjointement avec des mesures correctives verticales. De la même façon, les mesures comportementales peuvent s'avérer efficaces pour régler des problèmes de diffusion d'informations ou d'accès aux informations. Le suivi par des tierces parties et le recours à l'arbitrage et/ou à d'autres modes de règlement des différends (voir ci-après) pourraient devenir plus fréquents compte tenu de la charge de travail que représentent l'application et le suivi de ces mesures correctives pour les institutions, les tribunaux et les pouvoirs publics.

## 2. **Coopération internationale dans l'élaboration, la mise en œuvre et le suivi des mesures correctives**

Ces dernières années, l'application de la réglementation en matière de concentrations est devenue de plus en plus transnationale et il est désormais indispensable, dans tout processus de décision, d'identifier les mesures correctives à prendre pour contrebalancer les effets anticoncurrentiels des concentrations transfrontalières. Dans les affaires transfrontalières, les autorités de la concurrence concernées sont confrontées à d'importants problèmes. En particulier, si elles constatent des effets anticoncurrentiels dans les limites de leur juridiction, elles peuvent être amenées à envisager des mesures correctives transfrontalières pour répondre à des préoccupations nationales.

L'expression « mesure corrective transfrontalière » s'emploie lorsqu'une autorité de la concurrence souhaite appliquer une mesure corrective dans une affaire de concentration, mais que les parties à la concentration et/ou leurs actifs sont situés à l'étranger, ce qui implique la vente d'actifs de la nouvelle entité ou l'adoption de certaines mesures par celle-ci dans une autre juridiction. Les difficultés que peuvent soulever des mesures correctives transfrontalières concernent surtout : i) la coopération et la coordination des mesures d'exécution entre autorités de la concurrence exerçant leur contrôle sur la même transaction et cherchant à mettre en œuvre des mesures correctives et ii) le suivi et l'application des mesures correctives qui ne sont pas strictement nationales.

### 2.1 *Coopération et coordination*

La consultation et la coopération entre autorités de la concurrence sur les mesures correctives dans des affaires de concentration transfrontalière sont particulièrement importantes, compte tenu des sérieux risques de conflit qui peuvent exister dans certains cas. C'est ainsi que :

- d'une part, les autorités de la concurrence concernées peuvent parvenir à des conclusions contradictoires quant à l'opportunité de mesures correctives dans une même affaire de concentration transfrontalière, notamment si le « centre de gravité » de la concentration est situé dans un pays qui a choisi de ne pas adopter de mesures contre la concentration ;
- d'autre part, deux autorités de la concurrence peuvent identifier des problèmes se rapportant à des aspects différents d'une même concentration, auquel cas les mesures correctives jugées nécessaires par une autorité peuvent ne pas coïncider avec celles souhaitées par l'autre autorité.

En pareil cas, la coopération bilatérale présente des avantages substantiels pour les autorités de la concurrence et pour les parties à la concentration. Pour les autorités de la concurrence, les avantages ne se limitent pas seulement à des aspects administratifs, mais ont aussi des aspects concrets pour les consommateurs et les marchés locaux, par exemple lorsque la coopération améliore la perspective d'élaboration et de mise en œuvre de mesures correctives efficaces dans une affaire donnée. La coopération entre les autorités de la concurrence au stade des mesures correctives est dès lors essentielle, en particulier pour assurer une plus grande cohérence entre ces autorités. Dans le cadre des discussions internationales qui ont eu lieu au sein de l'OCDE et d'autres instances, diverses possibilités de coopération ont été envisagées, notamment l'idée d'un « partage des tâches » entre les autorités de la concurrence. Cette idée mériterait un examen plus approfondi, même si aucun consensus ne s'est encore dégagé sur la façon de procéder à cet égard, comme le confirment les divergences de vues sur la viabilité et la mise en pratique de la notion de « juridiction chef de file ».

En particulier, le rapport présenté en 2000 par l'ICPAC a examiné de façon approfondie la possibilité de recourir à des dispositifs de partage des tâches au stade des mesures correctives et a conclu qu'un recours plus fréquent à ce type de coopération pourrait offrir des avantages substantiels. Le rapport

envisage différents scénarios dans lesquels ces dispositifs pourraient être utilisés : i) des négociations conjointes, durant lesquelles chaque juridiction intéressée exposerait ses propres préoccupations quant aux effets anticoncurrentiels probables d'une transaction proposée et mettrait en œuvre individuellement des mesures correctives négociées conjointement et ii) la désignation d'une seule juridiction, dite « juridiction chef de file », qui négocierait avec les parties à la concentration des mesures correctives répondant à ses propres préoccupations et à celles des autres juridictions intéressées. Ce second scénario pourrait correspondre, par exemple, à une situation dans laquelle les préoccupations de toutes les juridictions concernées seraient identiques, mais aussi à une situation dans laquelle la « juridiction chef de file » exigerait des mesures correctives allant au-delà de ses propres préoccupations, afin de répondre aux inquiétudes exprimées par les autres juridictions coopérantes.

Il serait sans doute utile d'examiner dans quelles conditions ces dispositifs pourraient fonctionner (ou ont déjà fonctionné dans le passé), s'ils pourraient être utilisés plus fréquemment à l'avenir et à quels obstacles (juridiques et pratiques) ils se heurtent. A titre d'exemple, les juridictions engagées dans le contrôle d'une fusion pourront ne pas être en mesure de suspendre leur propre procédure et de repousser leurs propres délais pour accorder à une autre autorité le statut de « chef de file » dans la mise en œuvre de mesures correctives. Ou bien, en raison d'un risque d'abus de pouvoir, la juridiction désignée comme « chef de file » pourra ne pas être à même d'imposer des mesures correctives répondant aux préoccupations d'autres juridictions qu'elle à propos d'une même fusion.

#### **Encadré 2. Coopération et coordination dans la concentration Agilent / Varian (2010)**

Agilent Technologies, Inc., qui fabrique et distribue des instruments de mesure et d'analyse, projetait d'acquérir 100 % de Varian, Inc. Agilent et Varian opèrent toutes deux dans les secteurs de la conception, du développement, de la fabrication et de la commercialisation d'instruments de bioanalyse, y compris d'instruments d'analyse et de biomédecine, ainsi que dans les secteurs des services, consommables et logiciels qui y sont associés. Les deux sociétés ont leur siège aux États-Unis, d'où elles organisent la vente d'instruments d'analyse à travers le monde. Le projet de concentration a été notifié et a fait l'objet d'un examen dans un certain nombre de pays ou groupes de pays, dont l'Union européenne, les États-Unis, le Japon et l'Australie. Chaque institution a examiné la transaction et ses effets pour son propre pays, tout en examinant de façon coordonnée quelles mesures correctives répondraient au mieux aux préoccupations formulées par les différentes autorités de contrôle. Les parties ont proposé à la *US Federal Trade Commission* et à la Commission européenne une mesure corrective par laquelle elles acceptaient de renoncer aux activités qui se chevauchaient au profit d'un tiers, qui deviendrait en principe un concurrent des sociétés en question après le transfert d'activités. La même mesure corrective a été proposée à la Commission japonaise de la concurrence (JFTC) et à la Commission australienne de la concurrence et de la consommation (ACCC). Sur la base de cet ensemble de mesures correctives convenues d'un commun accord, l'acquisition a fait l'objet d'une autorisation conditionnelle dans tous les pays.

## **2.2 *Contrôle et application***

Dans le contexte des mesures correctives transfrontalières, une autorité de la concurrence peut se demander si elle a la capacité de contrôler efficacement le respect des mesures correctives et de faire appliquer sa décision (ou une décision judiciaire) en cas de non-respect. Cette crainte se fait particulièrement sentir lorsque l'autorisation d'une concentration est subordonnée à des mesures correctives comportementales. Il est donc indispensable que l'autorité de la concurrence concernée se dote des moyens de contrôler efficacement l'application des mesures correctives, de manière à garantir le respect absolu des règles de la part des parties à la concentration et l'efficacité des mesures correctives comportementales applicables. Le contrôle est également important, bien que dans une moindre mesure, dans le cas des mesures correctives structurelles. Il en va de même pour les mesures coercitives : les autorités de la concurrence doivent disposer des compétences et des outils nécessaires pour adopter de telles mesures lorsque les parties à la concentration ne respectent pas les conditions ou les obligations découlant des mesures correctives qu'elles ont acceptées.

Les problèmes peuvent être de deux ordres :

- Premièrement, une autorité de la concurrence peut avoir plus de difficulté à accéder aux informations nécessaires que dans les affaires purement nationales, dans la mesure où les informations pertinentes peuvent être d'une nature différente. Il peut s'avérer plus difficile de contrôler la procédure de cession et les documents qui s'y rapportent. Dans le cas de mesures correctives comportementales, le respect de l'interdiction de certains comportements ou de certaines obligations peut être plus difficile à contrôler.
- Deuxièmement, en cas de non-respect d'une mesure corrective par l'entité issue de la concentration, les possibilités de recours à des mesures d'exécution ayant un effet coercitif dans un autre pays peuvent s'en trouver limitées. Autrement dit, même si une juridiction est légalement fondée à exiger une mesure corrective qui prescrit la cession d'actifs et/ou un certain comportement dans un autre pays, elle risque d'être accusée de violer le droit international si elle fait respecter une telle injonction par la voie d'une action publique (décision judiciaire, par exemple) ayant des effets coercitifs à l'étranger.

### Encadré 3. La fusion Boeing / McDonnell Douglas

La décision *Boeing/McDonnell Douglas* (1997) de la Commission européenne illustre certains de ces problèmes. Comme la Commission avait envisagé d'interdire l'opération dans le cadre de son examen, la question s'était posée de savoir comment une telle décision d'interdiction pourrait être mise en œuvre, étant donné qu'aucune des parties à la concentration n'avait d'actifs dans l'Union européenne. La Commission aurait pu imposer des amendes si les parties n'avaient pas respecté une décision d'interdiction, mais pour recouvrer ces amendes il aurait fallu très probablement prendre des mesures coercitives à l'extérieur de l'espace juridique de l'UE, ce qui aurait sans doute soulevé des problèmes de droit international. Finalement, la concentration n'a pas été interdite, les parties ayant accepté plusieurs mesures correctives. Cela étant, la mise en application de ces mesures correctives aurait pu elle aussi s'avérer difficile. À titre d'exemple, aux termes d'un ensemble de mesures correctives, Boeing a accepté de mettre fin à des accords d'achat exclusif à long terme conclus avec certaines compagnies aériennes américaines et de ne pas conclure de nouveaux accords d'exclusivité pendant une période de dix ans. On peut se demander comment, dans ces circonstances, une décision d'interdiction ou une mesure corrective comportementale aurait pu être appliquée, par exemple, si la Commission avait découvert, après avoir autorisé la transaction, que Boeing et les compagnies aériennes avaient reconduit leurs accords d'exclusivité.

La coopération entre autorités de la concurrence pourrait permettre de surmonter les limites des pouvoirs dont elles disposent individuellement lorsqu'un même projet de fusion est examiné au regard des lois de plusieurs pays et que les autorités de la concurrence ont des craintes similaires. Dès lors que la juridiction dans laquelle la nouvelle entité et ses actifs sont situés exige des mesures correctives avant toute autorisation et que ces mesures correctives répondent aux préoccupations concurrentielles des autres juridictions, ces dernières pourraient ne plus exiger de mesures correctives, ou accepter la même action corrective en étant assurées que la juridiction locale suivra et fera respecter son application<sup>1</sup>. Les autorités de la concurrence devront sans doute coopérer de façon particulièrement étroite dans ces cas et envisager, par exemple, de recourir à un mandataire ou à un mécanisme de contrôle spécifique.

### 3. Contrôle et application des mesures correctives comportementales : le recours aux clauses d'arbitrage

Le recours aux mesures correctives comportementales, que ce soit de manière individuelle ou en association avec d'autres mesures, pour répondre aux problèmes de concurrence posés par les concentrations exige une certaine forme de contrôle en vue d'assurer la bonne application des engagements

<sup>1</sup> Voir l'affaire *Cisco/Tandberg*, [http://www.justice.gov/atr/public/press\\_releases/2010/257173.htm](http://www.justice.gov/atr/public/press_releases/2010/257173.htm) et <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/377>.

de la nouvelle entité. La nécessité d'un contrôle continu de la mise en œuvre des mesures correctives comportementales, qui rend ce type de mesures plus lourd à gérer, est l'une des raisons pour lesquelles les institutions ont souvent tendance à privilégier les mesures correctives structurelles. Cependant, comme nous l'avons déjà indiqué, les mesures structurelles ne s'avèrent pas toujours plus efficaces et moins coûteuses à gérer que les mesures comportementales.

Il n'est dès lors pas surprenant que le recours à des mesures correctives comportementales s'accompagne d'un recours à des clauses d'arbitrage, au moyen desquelles la nouvelle entité s'engage *erga omnes* à soumettre à un groupe spécial d'arbitrage des questions relatives à la mise en œuvre des mesures correctives liées à une décision de concentration sous conditions, c'est-à-dire tout litige résultant d'une violation supposée des obligations découlant de l'ensemble des mesures correctives. Ces types de mesures correctives se sont avérés particulièrement efficaces dans ce que l'on appelle les « engagements en matière d'accès », à savoir dans les cas de mesures correctives permettant l'accès de tierces parties à un établissement ou une infrastructure spécifiques contrôlés par la nouvelle entité, comme l'accès à un réseau physique, à une technologie essentielle, à un contenu cinématographique ou plus généralement l'accès à des infrastructures ou actifs importants.

La particularité des clauses d'arbitrage utilisées comme mesures correctives dans les cas de concentration tient à ce que les parties à la concentration prennent des engagements envers des tiers (des concurrents ou des clients, en principe) qui sont censés bénéficier de la mesure corrective afin de compenser l'accroissement de la puissance commerciale des parties suite à la concentration. Ainsi, outre les relations entre les entreprises ayant fusionné et les autorités de la concurrence, qui restent chargées de la mise en œuvre effective des mesures correctives, les engagements font également naître des obligations des entreprises ayant fusionné envers les personnes privées et leurs droits correspondants. La compétence de l'arbitre se limite à se prononcer sur les conséquences civiles d'une mauvaise application ou d'un défaut d'application des mesures correctives en question. En d'autres termes, l'arbitre est uniquement habilité à décider de mesures correctives de droit privé. Les autorités de la concurrence, d'un autre côté, conservent leur pouvoir d'imposer des sanctions de droit public classiques à une nouvelle entité qui ne respecterait pas ses obligations aux termes de la décision relative à la concentration (comme l'imposition d'amendes).

L'avantage de ces formes de règlement des litiges tient à ce que, grâce au processus d'arbitrage, l'autorité de la concurrence peut assurer le contrôle des engagements comportementaux souscrits, sans avoir à grever les ressources publiques. Au fond, l'option de recourir à l'arbitrage incite tous les éventuels tiers bénéficiaires à veiller à la bonne mise en œuvre des mesures correctives par la nouvelle entité et à faire valoir directement les droits qu'ils peuvent tirer de ces mesures correctives devant un tribunal arbitral. Par conséquent, l'intérêt privé des éventuels bénéficiaires agira comme un mécanisme de surveillance, qui pourra s'avérer plus efficace que le contrôle de l'autorité de la concurrence.

Les données d'expérience sur le recours à des clauses d'arbitrage associées à des mesures correctives dans les cas de concentration révèlent que la procédure de règlement des litiges doit être rapide et efficace, ce qui dépend de la manière dont les clauses d'arbitrage sont rédigées ainsi que des caractéristiques générales de ces procédures. Les points ci-dessous sont notamment devenus des caractéristiques « classiques » des clauses d'arbitrage:

- *L'adoption de « procédures accélérées »* : Pour tenir compte de l'urgence de ces procédures, il n'est pas rare que les clauses d'arbitrage abrègent les délais fixés pour le dépôt des différentes observations des parties et imposent au tribunal arbitral l'obligation d'écourter l'ensemble des délais de procédure applicables « autant qu'il est jugé admissible et approprié en la circonstance ». De la même façon, les délais de la procédure d'arbitrage sont généralement très resserrés, une audition (c'est-à-dire la principale procédure contradictoire) ayant lieu dans les trois semaines de la confirmation du tribunal arbitral, tandis que la sentence définitive doit être

rendue dans un délai d'un à trois mois suivant l'adoption du mandat. Pour accélérer le processus, les parties conviennent souvent d'utiliser le courrier électronique pour l'échange de documents.

- *L'assistance d'un mandataire* : Le tribunal arbitral est généralement en droit de demander l'assistance du mandataire chargé du contrôle à tous les stades de la procédure, si les parties à l'arbitrage y consentent. Les parties peuvent également demander au mandataire de jouer le rôle de médiateur en vue de résoudre les différents litiges qui les opposent avant de recourir au tribunal arbitral. Il peut par ailleurs être demandé au mandataire d'intervenir comme témoin expert pour certaines questions soulevées devant le tribunal arbitral.
- *La règle du commencement de preuve* : Beaucoup de clauses d'arbitrage stipulent qu'un tiers doit seulement établir un commencement de preuve. Par conséquent, si le tiers bénéficiaire peut apporter un commencement de preuve, le tribunal est tenu de rendre une sentence arbitrale en faveur du bénéficiaire, sous réserve que la nouvelle entité n'apporte pas de preuve contraire.
- *Le rôle de l'autorité de la concurrence* : Les clauses d'arbitrage devraient permettre à l'autorité de la concurrence de participer activement à la procédure d'arbitrage, même de sa propre initiative, en soumettant par exemple des dossiers à titre d'*amicus curiae* sur des questions spécifiques, comme sa propre interprétation des engagements pris. Le tribunal arbitral peut en outre solliciter l'assistance de l'autorité de la concurrence, en lui demandant par exemple de fournir des informations susceptibles de l'intéresser. Il ne fait pas de doute que l'accès à ces informations peut contribuer à améliorer et accélérer la procédure d'arbitrage.
- *Prescriptions en matière de publication* : Enfin, l'autorité de la concurrence devrait pouvoir publier librement une version non confidentielle de la sentence arbitrale. Cela constitue une dérogation notable à la nature strictement privée et confidentielle de la procédure arbitrale, qui ne prévoit normalement aucune prescription en matière de publication pour les sentences arbitrales.

**Encadré 4. Le recours aux clauses d'arbitrage en vertu du règlement CE relatif aux contrôle des fusions**

La Commission européenne a une expérience relativement longue du recours aux clauses d'arbitrage dans le contexte des mesures correctives dans les affaires de concentration. La première affaire dans laquelle ces clauses ont été incluses dans une autorisation conditionnelle de concentration remonte à 1992 (affaire Elf/Aquitaine-Thyssen/Minol). Cette expérience est relatée dans la communication sur les mesures correctives de 2008, dont le paragraphe 66 indique ce qui suit :

*« Les engagements d'octroi d'accès présentent souvent un caractère complexe et comportent nécessairement une description en termes généraux des modalités et conditions dans lesquelles l'accès est autorisé. Afin d'assurer leur mise en œuvre effective, les engagements doivent prévoir les règles de procédure nécessaires à leur surveillance (...). Parmi les mesures permettant aux parties tierces elles-mêmes d'exécuter les engagements figure notamment l'accès à un mécanisme rapide de règlement des litiges par des procédures d'arbitrage (conjointement avec le mandataire) ou par des procédures d'arbitrage impliquant les autorités réglementaires compétentes lorsque celles-ci existent pour les marchés concernés ».*

Parmi les clauses d'arbitrage utilisées dans le cadre d'autorisations conditionnelles de concentration dans l'Union européenne, on peut citer les exemples récents suivants<sup>2</sup> :

- *Engagements d'octroi d'accès et clauses d'arbitrage* : Lufthansa/Austrian Airlines, Lufthansa/SN Airholding, Iberia/Vueling/Clickair (affaires d'engagements d'accès à des créneaux horaires impliquant des compagnies aériennes) ; Deutsche Bahn/EWS (accès au secteur ferroviaire) ; Axalto/Gemplus (accès à des brevets et informations d'interopérabilité concernant les cartes à puce) ; SFR/Télé2 (accès non discriminatoire à des chaînes télévisées à péage)
- *Autres modes de règlement des différends par le mandataire et recours à la Commission ou à l'organisme de régulation* : SNCF/LCR/Eurostar
- *Engagements d'octroi d'accès et règlement des litiges par les autorités réglementaires* : Newscorp/Telepiù (régulateur italien AGCOM) ; Alcatel/Finmeccanica (désignation d'arbitres par l'ESA et la NASA) ; T-Mobile Austria/Tele.ring (régulateur australien des télécommunications RTR)
- *Arbitrage dans le cadre de relations contractuelles* : GdF/Suez (arbitrage sur le transfert d'installations de stockage de gaz avec l'acquéreur) ; DFDS/Norfolk (arbitrage sur un accord d'affrètement d'espaces) ; Akzo/ICI et Schering-Plough/Organon (arbitrage sur des dispositions transitoires et des marques déposées) ; Friesland/Campina (arbitrage sur des accords d'approvisionnement concernant le Dutch Milk Fund) ; Newscorp/Premiere (arbitrage sur l'accès à une plateforme technique pour la diffusion de chaînes de télévision à péage).

<sup>2</sup> De récentes décisions de règlement amiable du ministère de la Justice américain prévoient également des clauses d'arbitrage ; voir *Google/ITA*, <http://www.justice.gov/atr/cases/f269600/269620.pdf>, et *Comcast/NBC*, <http://www.justice.gov/atr/cases/f266100/266158.htm>.

## ANNEXE

Dans sa lettre du 23 mars 2011, la Présidente du Groupe de travail n° 3 a invité les délégués à soumettre des contributions par écrit et a identifié un certain nombre de questions auxquelles les délégations souhaiteront peut-être apporter des réponses.

Ces questions sont les suivantes :

- Comment examinez-vous les mesures correctives éventuellement applicables aux concentrations qui posent des problèmes de concurrence ? Les parties sont-elles chargées de proposer des mesures correctives, et leur est-il demandé pour ce faire de respecter des procédures ou des délais particuliers ? Si votre système de contrôle des concentrations implique un processus en deux phases, les procédures et les normes d'examen des mesures correctives préconisées sont-elles différentes dans les deux phases ?
- Lors de l'élaboration des mesures correctives dans les cas de concentration, votre institution a-t-elle recours à des mesures correctives structurelles ? Avez-vous recours à des mesures correctives comportementales ou hybrides ? Comment déterminez-vous quelle mesure corrective ou quel ensemble de mesures correctives sont les plus à mêmes de remédier aux atteintes possibles à la concurrence ? L'approche est-elle différente selon que la concentration est horizontale ou verticale ?
- Lorsque vous cherchez à atténuer les risques de distorsion par le recours à des mesures structurelles, dans quels cas exigez-vous la cession d'une activité autonome ? Exigez-vous parfois la cession d'actifs qui ne constituent pas une activité autonome ? Exigez-vous parfois la cession des droits de propriété intellectuelle à la place de la cession d'une activité autonome ou d'un ensemble d'actifs physiques ? Quand avez-vous recours à chacun de ces types de cessions en guise de mesure corrective ?
- Quels types de mesures correctives comportementales votre institution applique-t-elle ? Dans quels cas avez-vous recours à des « cloisons étanches », à des clauses de traitement équitable, à des prescriptions en matière de transparence, à des dispositions anti-représailles ou à l'interdiction de pratiques anticoncurrentielles en matière de passation de contrats ?
- Avez-vous déjà eu à protéger des actifs ou des entreprises à céder avant leur cession ? Avez-vous demandé que lesdits actifs ou entreprises soient traités séparément ou soient protégés d'une autre manière ? Avez-vous eu recours à des mandataires pour effectuer des contrôles ?
- Comment vous assurez-vous de la conclusion rapide et de la réussite d'une cession d'actifs ? Exigez-vous que les cessions d'actifs soient achevées avant la conclusion d'une concentration ? Dans la négative, à quel moment exigez-vous la cession d'actifs ? Que se passe-t-il si la cession d'actifs n'a pas lieu dans les délais prévus ? Avez-vous recours à des mandataires pour les cessions ? Demandez-vous une augmentation des actifs à céder si la cession n'a pas lieu dans les délais prévus ? Comment vous assurez-vous que la cession à un acquéreur proposé et les conditions dans laquelle elle s'effectue sont conformes aux objectifs de vos mesures correctives ?



- Comment vous assurez-vous que les parties respectent les mesures correctives que vous décidez ? Vos décisions comportent-elles des obligations déclaratives ou des clauses d'inspection ? Certains membres de votre personnel sont-ils expressément chargés de veiller à l'application des mesures correctives ?
- L'expérience que vous avez acquise dans l'application de mesures correctives vous a-t-elle servi à établir des bonnes pratiques ou d'autres formes de lignes directrices ? Dans la négative, envisagez-vous de formuler des recommandations dans un avenir proche ?
- Les tierces parties et le public formulent-ils des observations sur les mesures correctives préconisées ? Quelle appréciation les tribunaux de votre pays ont-ils porté sur les mesures correctives prises par les institutions et leurs efforts pour les mettre en œuvre ?
- N'hésitez pas à faire part de vos observations sur d'autres questions relatives à l'analyse des mesures correctives dans les affaires de concentration.

## AUSTRALIA

### 1. Introduction

Under the voluntary merger review system in Australia,<sup>1</sup> the ACCC cannot require firms to provide remedies to address competition concerns raised by a merger. In reviewing mergers under *section 50 of the Competition and Consumer Act (2010)*, the decision to oppose a merger made by the ACCC is not binding on any party, but instead represents that the ACCC will apply to the court for an injunction to prevent the merger from proceeding on the basis that it is likely to result in a substantial lessening of competition.

When competition concerns are identified by the ACCC, merger parties may choose to put forward remedies either during the review process or following the decision in order to address the competition concerns identified by the ACCC. These remedies are in the form of a court enforceable undertaking governed by section 87B of the Competition and Consumer Act 2010. Section 87B(1) of the Act states: “The Commission may accept a written undertaking given by a person for the purposes of this section in connection with a matter in relation to which the Commission has a power or function under this Act .....

Typically merger parties will begin discussing potential remedies with the ACCC to address competition concerns identified by the ACCC during the merger review—these discussions may involve ‘in-principle’ remedies and/or the proffering of draft remedies. The ACCC and the merger parties then negotiate the terms of the draft remedy until the ACCC considers that the remedy is in a suitable form for consultation and potentially capable of addressing the competition concerns identified, albeit generally subject to further consultation and investigation. The ACCC will generally then conduct market consultation on the draft remedy. Following consultation, there may be further negotiation of the terms of the draft remedy between the merger parties and the ACCC. The ACCC then decides whether to accept the remedy in light of any additional information coming from the ACCC’s market consultation process.

The ACCC’s recent experience in negotiating and subsequently rejecting a remedy in a high profile, complex merger in the financial services sector highlights the potential risks that regulators face between trying to balance the desire to assist merger parties to develop remedies while at the same time managing and avoiding any false expectation implied by this assistance.

### 2. Background to the merger and competition issues

In January 2010, the ACCC commenced a public review of the proposed acquisition by one of the four major Australian banks, National Australia Bank Ltd (NAB) of the wealth management business of AXA Asia Pacific Holdings limited.

The ACCC’s inquiries identified competition concerns in the national market for the supply of retail investment platforms for investors with complex investment needs. Retail investment platforms provide the central link in the chain between investment product providers, financial planners and retail investors.

These competition concerns were based on the following key findings:

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<sup>1</sup> Information about the voluntary merger review system in Australia can be found on the ACCC’s website: <http://www.accc.gov.au/content/index.phtml/itemId/6204>.

- market was highly concentrated with three large providers of investment platforms for investors with complex needs (Westpac, NAB and Macquarie) and barriers to entry were very high. In particular, effective competitors would require a strong industry reputation, sufficient scale to justify the substantial initial and on-going investment in technology and access to a sufficiently large network of financial planners.
- price competition was weak between the major platform providers and the key basis of rivalry was innovation competition.
- the counterfactual analysis indicated that AXA was on the cusp of providing vigorous and effective competition to the major incumbent providers as a result of its implementation and development of a next generation full service platform, known as the “North platform”.

The ACCC concluded that the removal of AXA as a likely vigorous and effective competitor with significant distribution, scale and reputation would reduce the incentives of the incumbent providers to continue to invest in platform innovation. As a result, on 19 April 2010 the ACCC made a decision to oppose the proposed acquisition on the basis that it would be likely to result in a substantial lessening of competition.

### **3. The remedy negotiation phase**

Following the ACCC’s decision to oppose the proposed acquisition, NAB and AXA began discussions with the ACCC with the intention of exploring whether remedies could be proposed that would overcome the competition concerns and allow the acquisition to be cleared by the ACCC.

These discussions first explored ‘in-principle’ remedy options. While the ACCC received an initial draft divestiture proposal from NAB in the period following the ACCC decision, market consultation on the proposed remedies were not commenced until 9 August 2010 when the ACCC was satisfied they were in an acceptable form and sufficiently detailed for third parties to make informed comment.

The remedy proposed related to the divestiture of the North platform administration business to an identified acquirer, including a package of rights which would enable the acquirer to operate and further develop the platform.

The ACCC conducted market inquiries with a range of industry participants, including dealer groups, financial planners, investment product providers and industry associations. Concerns and risks identified by market participants are outlined below. The majority of these participants raised concerns that the proposed remedies, including the proposed purchaser, would not provide an effective competitive constraint on a merged NAB-AXA or other existing key players.

#### **3.1 Risks identified**

##### **3.1.1 *The proposed remedies did not include any distribution network.***

The proposed remedies did not include the divestiture of any distribution network of financial planners which supported the North platform. This raised considerable uncertainty as to whether the proposed purchaser operating the divestiture business would be able to offer aggressive competition to restore the competition lost by the proposed acquisition. The lack of distribution assets would directly impact the ongoing viability and competitiveness of the divestiture business, including a reliance upon the proposed purchaser having sufficient distribution capability to provide an effective competitive constraint upon existing key players in the foreseeable future.

*3.1.2 The proposed remedies did not include the North products which provided scale of funds under management (FUM).*

The proposed remedies did not include the divestiture of the North products which have been important in attracting inflows to the North platform. The North products also provide the North platform scale of FUM to ensure its ongoing viability and competitiveness. Market inquiries confirmed the importance of the North products to attracting scale on the North platform. The omission of the North products from the proposed remedy raised considerable uncertainty that the proposed purchaser operating the divestiture business would be able to maintain and attract sufficient scale in a timely manner to enable ongoing investment to maintain and develop the North platform.

*3.1.3 The proposed remedies were uncertain and dependent on third parties.*

The proposed remedies were dependent on parties other than NAB and AXA including reliance upon an external software provider (DST) and the AXA North product issuers. The proposed remedies were reliant on a number of separate agreements between different parties. Market inquiries expressed concern regarding the complex nature of the behavioural obligations in the remedies and noted that effectiveness of the remedies was critically dependent on third parties to complete actions that would directly impact on the ability of the proposed purchaser to provide an effective competitive constraint, and therefore, uncertain. Despite certain incentives being built into the proposed remedies, the uncertainty and dependency on third parties would directly impact the ongoing viability and potential competitiveness of the divestiture business.

Following market inquiries where these concerns were reinforced, the ACCC considered that the proposed remedies did not provide an acceptable remedy to alleviate its competition concerns, but rather involved complex and long term behavioural obligations that presented risks and uncertainty.

#### **4. Problems in crafting the remedy – the devil in the detail**

While the ACCC had reservations about the remedy proposal from the beginning and informed the parties of its concerns about the risks associated with the remedy proposal regularly throughout the negotiation process, it was difficult to fully make an assessment of the workability and effectiveness of the remedy and the suitability of the proposed purchaser without getting into the detail of the remedy. Further, given the detail of the proposed remedy, it was important that the ACCC consult the market place to test the veracity of the arguments being put in favour of the remedy by the merger parties. It was not until the proposed remedy was in a final form and the ACCC had completed its market consultation process that the extent of the complexity, uncertainty and risk associated with the divestiture proposal became clear.

For example, NAB's proposed remedies relied on a third party, who would not be signatory to the undertaking and therefore would not be bound by its obligations, to perform certain behavioural obligations (completing platform enhancements and the purchaser product capability). During the negotiation of the proposed remedies, staff recognised that the continued viability, effectiveness and competitiveness of the divestiture relied heavily on the third party completing the platform enhancements and the purchaser product capability in the required timeframe.

ACCC staff sought to mitigate this asset risk by suggesting the inclusion into NAB's proposed remedy incentives and safeguards which aimed to ensure that the enhancements to the North platform were completed in the agreed timeframe. However, NAB's proposed remedy ultimately involved a lengthy set of complex behavioural obligations that would require long term ongoing monitoring by the ACCC and which the ACCC ultimately concluded raised unacceptable uncertainty in terms of resolving its concerns.

#### **4.1 *Highly complex industry***

The complexity of the wealth management industry added to the difficulty of developing a suitable remedy to address the ACCC's competition concerns. Consideration had to be given to the inter-relatedness of financial planners, retail investment platforms and the products that are available on retail investment platforms to the effectiveness of any proposed remedy.

#### **4.2 *Remedy had to be crafted to the proposed purchaser***

Given the high degree of purchaser risk, it was important that a proposed purchaser was nominated by the acquirer up front, so that the remedy could be considered and consulted upon, having regard to the specific scenario of that purchaser operating the divestiture business. A number of third party obligations and incentives had to be built into the proposed remedy to enable the proposed purchaser to operate the divestiture business. For example, enhancements and technology development (carried out by third parties not party to the remedy) to the underlying software supporting the divestiture assets were required to enable the proposed purchaser to support its own products through the divestiture business.

The need for the technology to be built and adapted to the proposed purchaser also meant that the proposed purchaser would not, in the ACCC's view, be a viable and effective stand alone competitor to the merged entity from day one of the assets being divested – which is contrary to the objective of the divestiture remedy. The divestiture proposal also relied on the proposed purchaser having the incentive and ability to innovate and continue to invest in the divestiture assets, which added to the uncertainty and risk associated with the proposed remedy.

### **5. Conclusion**

The proposed remedy, and in particular NAB's proposed remedy, is arguably the most complex remedy that the ACCC has ever considered.

The ACCC considered that the proposed remedy did not provide a complete structural remedy to alleviate its competition concerns, but rather involved complex and long term behavioural obligations that presented risks and uncertainty.

The ACCC's negotiation with and assistance provided to the parties in developing a proposed remedy created an expectation that what was being proposed would be accepted, despite repeated cautions that assistance was not indicative of ultimate acceptance. Added to this, the high level of media interest in the ACCC's review of the proposed acquisition was unprecedented. While this did not influence the ACCC's decision on either the proposed acquisition or the proposed remedy, the apparent use of the media by those that appeared to be associated with the merger parties only fuelled the commentary and expectations as to the outcome.

ACCC assistance is provided to enable the parties an opportunity to put forward their best remedy proposal, as often such assistance can result in an acceptable remedy to all parties. However, it will not always be the case that, after consultation and further consideration, that a proposed remedy will be accepted. The ACCC will continue to strongly and repeatedly caution merger parties that they should not develop expectations premised on ACCC involvement or assistance in remedy development that the ACCC will ultimately accept a proffered s.87B undertaking.

## AUSTRIA

This submission briefly summarises the way remedies are considered in Austria. It will however mainly focus on the BWB's current project on compliance with remedies and their effectiveness.

### 1. Background

In 2002 the independent Federal Competition Authority (*Bundswettbewerbsbehörde, BWB*) was established as well as a “Federal Public Prosecutor” (*Bundeskartellanwalt*) was set up within the Federal Ministry of Justice. While only the BWB has broad investigative powers, both BWB and Public Prosecutor in Cartel Matters are competent for taking up competition cases. The Cartel Court however remains as the decision making body.

With regard to mergers, both the BWB and the Federal Public Prosecutor investigate in phase I and might file an application for in-depth review with the Cartel Court which is the decision body in phase II. Decisions of the Cartel Court might be appealed and are then finally decided by the Supreme Cartel Court. In nearly all cases and especially in merger cases, the Cartel Court as the decision-making body relies on advisory opinions of independent economic experts of its own choice.

### 2. Process for considering remedies

Like in probably most jurisdictions also in Austria remedies might be imposed if they are necessary and capable to eliminate competition problems. There is **no formal procedure** which has to be followed:

- They can be **proposed** by the parties, by the official parties (i.e. the BWB or the Federal Cartel Prosecutor), by the independent economic expert who is usually employed by the Cartel Court or by the Cartel Court itself. Most frequently however, they are discussed between the parties and the official parties before being presented to the Cartel Court.
- Parties can commit themselves to specific conditions or obligations vis à vis the official parties<sup>1</sup> (e.g. in **phase I**, but also in **phase II**) or remedies can be imposed by the Cartel Court in a formal decision.<sup>2</sup>
- Depending on the content of the remedy, sometimes the Competition Authority **tests** the remedy **in the market**.

### 3. Structural vs behavioural remedies

Remedies oblige the parties to do, to tolerate or to refrain from doing something. They can be imposed for a determined or an undetermined time. Therefore, they may also end up in controlling the behaviour of a company for an unspecified time.

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<sup>1</sup> § 17 para 2 Cartel Act.

<sup>2</sup> § 12 para 3 Cartel Act.

**Structural** remedies are in general preferred over behavioural ones as they are more clear-cut and easier to monitor. However, a project of the BWB on compliance and effectiveness of remedies (see below point 4) confirmed our assumption that the majority of remedies imposed are **behavioural**. The reasons for this fact are not completely clear yet but might be found in the small size of the country making it sometimes difficult to impose structural remedies. Furthermore, - although not explicitly specified in the Cartel Act - it is well understood that remedies must be proportionate which sometimes make behavioural remedies seem to be more appropriate. This might also be due to a still young competition enforcement system which has to further the general acceptance of substantial remedies.

Remedies therefore range from the divestiture of company parts over licensing agreements, the reduction of influence on decisions to non-discrimination clauses, Chinese walls and the obligation to continue separate editorial departments in the media sector to ensure diversity of media.

#### **4. BWB's project on compliance and effectiveness of remedies**

In 2010 the BWB started a comprehensive project on the compliance with and the effectiveness of remedies.

##### **4.1 Objectives and process**

The **background** for the project is the simple understanding that the huge efforts in terms of time and manpower put into complex merger cases would be rather useless unless 1) the remedies are complied with and 2) the remedies are effective. 2010 seemed to be a good date to start this project: As the BWB was created in 2002 enough time passed to examine the effectiveness while there was a sufficient, but still manageable number of cases to be analysed.

For a small authority like the BWB with only about 20 case handlers this is however a comprehensive and time-consuming exercise as the majority of the work has to be done by the individual case handlers just in addition to their normal work. The BWB however decided that it is worth the effort.

The project covers **all cases** where remedies were imposed **since** the creation of the BWB in **2002**, irrespective of the type of case (merger, cartel, abuse of dominant position) and the legal type of the remedy (in phase I or II, commitment vis à vis the official parties or imposition by Cartel Court). The vast majority however are merger cases.

The first step was a stock-taking exercise followed by an examination of the compliance with the remedies. Once this comprehensive exercise will be completed, the BWB will try to draw conclusions of what worked well and what did not and why. Finally, we will evaluate to what extent it is feasible for a small authority to examine the effectiveness of the remedies at least in some particular cases. This might end in the formulation of guidelines or best practices concerning the content, the wording of the remedies and the monitoring process.

##### **4.2 Results**

The **stock-taking exercise** revealed the following facts:

- In about 55 cases about 135 remedies were imposed.
- The vast majority of remedies are behavioural remedies, only a small part are structural ones. Also in terms of cases the vast majority of cases solely imposes behavioural remedies, in only 10 % of the cases solely structural remedies were imposed, in additional 15 % both structural and behavioural remedies were imposed.

- About 60 % of the remedies were imposed in phase II, 40 % in phase I.
- In 50 % of the cases a monitoring mechanism was laid down as part of the remedies (e.g. obligation to report in specific time intervals, monitoring trustee).

In about **60 % of the cases** it was deemed that the compliance has been **monitored sufficiently** or a monitoring is not useful anymore (eg as the merger was never implemented or the business was already re-sold again).

In the remaining **40 % of cases**, i.e. in 23 cases, **questionnaires** were sent out to check if the parties have complied with the remedies. 9 cases could already be closed as parties complied with the remedies. While the majority of cases is still being examined, the BWB brought **one case of non-compliance** to the Cartel Court which ended in a **fine of €200.000** imposed by the Cartel Court. In another case it became clear that - although being relatively detailed - remedies still left room for interpretation to the parties. After intensive discussions of the limits of interpretation, parties agreed to adapt their behaviour even retrospectively. As the potential non-compliance was due to possible interpretations of the remedy which was clarified and changed even for the past, the BWB refrained from filing an application for a fine.

Although most of the cases are still being examined and therefore the structured analysis of what worked well and what did not, is not yet possible, **first conclusions** can be drawn:

- **The project is worth the efforts.** In one case it was shown that remedies were not complied with which ended in a fine of €200.000. In another case the interpretation of the remedies were clarified and parties changed their behaviour even retrospectively. It is very probable that other cases of non-compliance will follow. Irrespective of the concrete results, the business community is alerted and more aware of the need of strict compliance.
- **Structural remedies are much easier to monitor:** all of the structural remedies have been monitored sufficiently already before the start of the project and therefore did not need any further control of compliance. In contrast, it became obvious that compliance with some of the behavioural remedies could either not be monitored at all (at least without dawn raid) or the monitoring is very cumbersome, nearly necessitating a sector inquiry. The long time needed in the project to monitor the compliance is another good indicator for this assumption.

### 4.3 *Next steps*

Once the examination of compliance is finished, the BWB will draw conclusions of what worked well and what did not and why.

Furthermore, we will evaluate to what extent it is feasible for a small authority to analyse the effectiveness of remedies. For that reason we will continue to study how other competition authorities have tackled this issue. We already studied the US FTC's "study of the commission's divestiture process" of 1999 and the European Commission's merger remedies study of October 2005. Both studies concentrate however on the design of remedies rather than their effectiveness. We are in contact with other agencies and are eager to learn about their approaches. Also this OECD's roundtable is of special interest for us and will hopefully contribute to our understanding, as it is partially focusing on the effectiveness of remedies.

Finally, the BWB will think about developing internal or publicly available guidelines or best practices on the content of remedies, their wording and the monitoring process.





## CANADA

### 1. Introduction

The practice of the design and implementation of merger remedies is never static; it evolves with changes in process and policy of the relevant competition agency, as well as changes in the legislative framework in which that agency operates. It is within this context that the Competition Bureau's (the "Bureau") approach to merger remedies continues to develop.

Since its 2003 OECD submission on merger remedies,<sup>1</sup> the Bureau has obtained remedies in 37 cases,<sup>2</sup> and obtained one remedy as a result of a contested proceeding.<sup>3</sup> In 2006, the Bureau published an *Information Bulletin on Merger Remedies in Canada* (the "Remedies Bulletin"),<sup>4</sup> which provides guidance on the goals of remedial action and the general principles applied by the Bureau when it seeks, designs and implements merger remedies. Additional guidance on the Bureau's approach to the design and implementation of merger remedies can be found in public statements made by the Commissioner of Competition (the "Commissioner"), which are available on the Bureau's website. The Bureau has also undertaken an in-depth *ex-post* study of merger remedies obtained by the Bureau between 1995 and 2005, which has contributed to its learning. A concise public version of that study is expected to be released in the second quarter of 2011.

Merger provisions were included in the *Competition Act* (the "Act") in 1986. Since that time, only five merger cases have been contested at the Competition Tribunal (the "Tribunal"),<sup>5</sup> and the Bureau has obtained merger remedies in more than 60 cases. Although the majority of merger remedies sought by the Bureau have been effective, some have been less so. As a result, the process of designing and implementing merger remedies has been, and continues to be, fine-tuned.

This paper outlines the Bureau's general approach to the design and implementation of merger remedies, which strongly favours structural remedial measures, whether alone or in conjunction with behavioural or quasi-structural elements that complement the primary structural remedial measure.

<sup>1</sup> *Roundtable on Merger Remedies – Note by Canada*, [DAFFE/COMP/WD\(2003\)29](#) (October 7, 2003).

<sup>2</sup> This includes remedies obtained via consent order or registered consent agreement, undertakings, and cases in which foreign remedies resolved Canadian competition concerns.

<sup>3</sup> *The Commissioner of Competition v. Canadian Waste Services Holdings* 2001, Comp. Trib. 35.

<sup>4</sup> Competition Bureau Canada, *Information Bulletin on Merger Remedies in Canada* (September 22, 2006), available online at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Mergers\\_Remedies\\_PDF\\_EN1.pdf/\\$FILE/Mergers\\_Remedies\\_PDF\\_EN1.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Mergers_Remedies_PDF_EN1.pdf/$FILE/Mergers_Remedies_PDF_EN1.pdf) [Remedies Bulletin].

<sup>5</sup> *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Canada (Director of Investigation and Research) v. Hillsdown Holdings Ltd.* (1992), 41 C.P.R. (3d) 289 (Comp. Trib.); *The Commissioner of Competition v. Superior Propane Inc.* (2000), 7 C.P.R. (4<sup>th</sup>) 385; *The Commissioner of Competition v. Canadian Waste Services Holdings Inc.* (2004), 33 C.P.R. (4<sup>th</sup>) 275; *The Commissioner of Competition v. CCS Corporation, Complete Environmental Inc., Babkirk Land Services Inc., Karen Louise Baker, Ronald John Baker, Kenneth Scott Watson, Randy John Wolsey, and Thomas Craig Wolsey* (at the time of writing this paper, proceedings at the Competition Tribunal were ongoing in this case).

## 2. Design and implementation of merger remedies

The standard employed by the Bureau for achieving an acceptable remedy in either a contested or consent proceeding is the elimination of the substantial lessening or prevention of competition in the relevant markets.<sup>6</sup> All mergers are reviewed using the criteria set out in sections 92 and 93 of the Act, and each transaction is considered on its own merits.<sup>7</sup>

### 2.1 Structural remedies

The Bureau strongly prefers structural remedial measures, whether alone or in conjunction with behavioural or quasi-structural elements that complement the primary structural remedial measure. Structural remedies are seen as being more effective than behavioural remedies for a number of reasons, including the cost and certainty associated with the remedy. Generally, the terms of structural remedies are clearer, more certain and often readily enforceable, and less costly to administer than those of behavioural remedies. Although the divestiture of assets is the most common form of structural remedy used by the Bureau, alternate structural remedies include the prohibition or dissolution of a merger, which may be required when divestiture(s) or other less intrusive remedies are unavailable. Between 2006 and 2011, approximately 80% of registered consent agreements contained a structural remedy.<sup>8</sup>

The Bureau recognizes that, in order to be effective, divestitures must not only be of sufficient quality, but must also be of sufficient breadth and scope, in that they include all assets necessary for the purchaser to be a long-term competitor that will compete effectively in the relevant market(s). Structural remedies observed by the Bureau to have been of sufficient scope tend to involve the divestiture of stand-alone businesses<sup>9</sup> and/or clean sweeps.<sup>10</sup>

To ensure that a divestiture includes all assets necessary for a purchaser to be an effective long-term competitor, the Bureau employs a variety of mechanisms to preserve the competitive viability of the assets to be divested during the sales period. These include: timely initial sales periods; hold separate, maintenance and reporting requirements; the appointment of a hold separate manager; and the appointment of a monitor to ensure the merged entity and hold separate manager comply with the terms of the consent agreement.

To encourage the merged entity to divest the assets in a timely manner, the Bureau also typically ensures that the Commissioner is able to appoint, in her sole discretion, a divestiture trustee to divest the

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<sup>6</sup> Remedies Bulletin, *supra* note 4 at para. 2; *Canada (Director of Investigation and Research) v. Southam Inc.* [1997] 1 S.C.R. 748; Note that this same standard applies regardless of whether the competition concerns raised by the proposed merger are horizontal or vertical in nature. This is because both horizontal and vertical mergers are reviewed using the same criteria set out in sections 92 and 93 of the Act.

<sup>7</sup> Section 92 of the Act sets out the various orders the Tribunal may issue upon a finding that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially. Section 93 of the Act sets out the factors to which the Tribunal may have regard in determining, for the purpose of section 92, whether a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially.

<sup>8</sup> The remaining percentage of registered consent agreements contained either purely behavioural or behavioural and quasi-structural remedies.

<sup>9</sup> A business is considered “stand-alone” when it can effectively operate independently from the vendor’s other businesses.

<sup>10</sup> A “clean sweep” remedy is one where the divestiture package comprises a stand-alone operating business or businesses from one of the merging parties.

assets should the assets not be divested during the initial sale period. When appointed, a trustee may sell assets at no minimum price and may also include additional assets in the divestiture package, typically referred to as crown jewels, to improve the marketability of the divestiture package and the incentive on the merging parties to divest in a timely way. Lastly, the merged entity will also be required to provide the purchaser with standard representations and warranties relating to the quality of assets.

### 2.1.1 *Hold separate arrangements*

Hold separate provisions preserve the Bureau's ability to achieve an effective remedy pending its implementation. The Bureau may consider the use of hold separate arrangements in the following three scenarios:<sup>11</sup>

- *Upon registration of a consent agreement:* Where the Bureau determines that a merger is likely to lessen or prevent competition substantially and identifies the scope of remedies necessary to address the competition concerns, the Bureau will normally require the merging parties to hold separate those assets that could be the subject of an order of the Tribunal until the divestiture is completed.
- *Pending completion of the Bureau's review:* The Bureau will not normally agree allow the closing of a transaction, subject to a hold separate arrangement, prior to the completion of its review of the transaction; however, the Bureau recognizes that, prior to the conclusion of the Bureau's review, hold separate arrangements may have limited application. Where such an arrangement is at issue, the Bureau will undertake a principled consideration of the viability and effectiveness of the proposed arrangement to protect the competitiveness of the assets in question pending the review, and the likely impact on competition in the short, medium and long term. To be accepted by the Bureau, these hold separate provisions must, at a minimum, include: (i) requirements that protect the independent operating viability of the held separate business; and (ii) assurances that proprietary and confidential business information is protected and not shared between the merging parties.<sup>12</sup>
- An example of a case in which a hold separate arrangement was entered into pending the conclusion of the Bureau's review is Saskatchewan Wheat Pool Inc. - James Richardson International Ltd.<sup>13</sup> Following an extensive review of the proposed joint venture between Saskatchewan Wheat Pool Inc. and James Richardson International Ltd., the Bureau concluded that the joint venture would likely substantially lessen or prevent competition for grain-handling services at West Coast ports in Canada. The Bureau filed an application with the Tribunal challenging the joint venture. The Bureau continued its investigation of the potential competitive implications of integrating certain marketing efforts and declined the parties' request to implement them. At the same time, the Bureau agreed that the companies could close on the operational elements of the joint venture (involving the joint use of certain rail facilities, with no

<sup>11</sup> Speaking Notes for Melanie L. Aitken, Senior Deputy Commissioner of Competition, "An Update on Merger Remedies Policy in Canada", British Institute for International and Comparative Law Annual Merger Control Conference Panel on Merger Remedies, London England, November 16, 2007, available online at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02554.html>.

<sup>12</sup> Hold separate arrangements pending the conclusion of the Bureau's review were more likely to be considered by the Bureau prior to the 2009 amendments to the Act, as under the previous regime there was no bar to closing a proposed transaction upon the expiry of the statutory waiting period.

<sup>13</sup> *The Commissioner of Competition v. Saskatchewan Wheat Pool Inc.*, 2005 Comp. Trib.51.

alteration and no exchange of confidential information), since it was unlikely that any material and lasting harm to competition would result in an interim period from them doing so.

- *Injunctions*: Injunctions sought in the context of ongoing litigation typically include hold separate elements that seek to preserve some measure of competition pending the outcome of a contested Tribunal hearing.

### 2.1.2 *Hold separate manager*

In cases where a consent agreement has been entered into, it is normally necessary to immediately appoint an independent manager (“hold separate manager”) to operate the asset(s) to be divested until the divestiture is complete. The Bureau requires that a hold separate manager have extensive experience in the market(s) in question and operates independently (*i.e.*, at arm’s length from the vendor). In addition, the vendor must transfer to the hold separate manager all rights, powers, and authority necessary to perform his or her duties and responsibilities under the consent agreement. To this end, the vendor must not exercise any direction or control over the management of the asset(s) to be divested. The hold separate manager will be responsible for the day-to-day management of the asset(s) to be divested and, if necessary, will report directly to an independent monitor.

### 2.1.3 *Monitor*

The Bureau will normally require the appointment of an independent third party to monitor compliance with the consent agreement (a “monitor”).<sup>14</sup> A monitor should have no ties, financial or otherwise, with the merging parties. The monitor will have complete access to all personnel, books, records, documents, facilities, and to any other relevant information that he or she requests. The monitor will ensure that the vendor uses its best efforts to fulfill its obligations under the consent agreement. The monitor will report, in writing, to the Bureau, as set out in the consent agreement.

In cases involving multijurisdictional merger review, the Bureau retains discretion as to whether it will use the same monitor as that used in the other reviewing jurisdictions.

An example of a case in which the Bureau used the same monitor as another reviewing jurisdiction is Novartis AG - Alcon, Inc.<sup>15</sup> As discussed in more detail below under *Divestiture of Standalone Business*, competition concerns were raised by the proposed acquisition of control of Alcon, Inc. by Novartis AG. To resolve these issues, the Bureau co-ordinated its remedy package with the European Commission Directorate-General for Competition (“EC”) and the United States Federal Trade Commission. In this case, the Bureau agreed to the same monitor as the EC; however, the Bureau used the Canadian branch of the monitor’s firm, while the EC used the firm’s European branch.

### 2.1.4 *Maintenance provisions*

The Bureau typically requires that the merging parties ensure the maintenance of the asset(s) to be held separate pending divestiture. Typically, such maintenance provisions will require that the vendor provide sales, managerial, administrative, operational, and financial support, as necessary in the ordinary course of business, to promote the continued effective operation of the asset(s). The vendor may also be required to honour all material contracts (*e.g.*, sales and employment contracts) and agree to other

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<sup>14</sup> A monitor is required when either hold separate provisions or maintenance provisions are part of the remedy.

<sup>15</sup> *The Commissioner v. Novartis AG* (Consent Agreement dated August 6, 2010) [*Novartis*].

provisions to ensure the ongoing viability of the asset(s), including those provisions relating to maintaining employment.

Clean Harbors Inc. – Eveready Inc<sup>16</sup> is an example of a case in which the consent agreement included maintenance provisions. Following an extensive review of the proposed acquisition by Clean Harbors Inc. of Eveready Inc., the Bureau concluded that the proposed transaction would likely substantially lessen or prevent competition for the disposal of Class I solid hazardous waste in Alberta. The Bureau entered into a consent agreement with Clean Harbors Inc. requiring the divestiture of the Pembina Area Landfill. The consent agreement required that Clean Harbors maintain the viability, competitiveness and marketability of the assets. In particular, provide sufficient financial resources to ensure that the assets to be divested would continue to be operated at the existing rate of operation and including the continuation of all capital projects, research and development plans, business plans and promotional plans found in the assets' most recent budgets.

#### 2.1.5 *Divestiture of standalone business*

The Bureau prefers the divestiture of standalone operating business(es) to the divestiture of one or more component parts of an operating business. The divestiture of a standalone business increases the level of certainty that the remedy will be effective, as the business has already proven its ability to compete in the relevant market and survive independently. Additionally, the Bureau prefers the divestiture of a standalone operating business from one merging party, normally the target company being acquired in the merger to one buyer. This approach, commonly referred to as a “clean sweep”, reduces the uncertainty associated with both the viability of the divestiture and integration issues, and limits the detrimental effects that could arise from the acquiring party in the merger obtaining confidential information about the asset(s) to be divested.

The divestiture of component parts of a standalone business may be acceptable when some of the components required to operate the business are otherwise available. Given the lack of a proven track record that the components of the business will be able to operate effectively and competitively, the Bureau will apply greater scrutiny to divestitures of less than a standalone business, and will typically need to be satisfied, in advance of consenting to a remedy, that willing purchasers with the necessary capabilities are available to purchase the assets.

The Bureau has accepted the divestiture of less than a standalone operating business in certain industries, such as the pharmaceutical industry, where the divestitures of specific overlapping product lines have been determined to be sufficient to resolve the substantial lessening or prevention of competition in the relevant market(s).

Two recent examples of cases where the Bureau has accepted the divestiture of less than a standalone business are Novartis AG - Alcon, Inc.<sup>17</sup> and Pfizer Inc. – Wyeth.<sup>18</sup> In Novartis AG-Alcon, Inc., competition concerns were raised by the proposed acquisition of control of Alcon, Inc. by Novartis AG (“Novartis”). The Bureau concluded that the proposed transaction was likely to result in a substantial lessening or prevention of competition in Canada for the supply of certain ophthalmic products; namely, multi-purpose solution contact lens cleaners/disinfectants, injectable miotics, and ocular conjunctivitis drugs. In this case, the divestiture of less than a standalone business was sufficient to resolve competition concerns in the relevant markets - the Bureau and Novartis entered into a consent agreement whereby

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<sup>16</sup> *The Commissioner of Competition v. Clean Harbors, Inc.* (CT 2009-012).

<sup>17</sup> *Novartis, supra* note 15.

<sup>18</sup> *The Commissioner of Competition v. Pfizer Inc.* (Consent Agreement dated October 14, 2009) [*Pfizer*].

Novartis agreed to sell certain assets and associated licences related to the sale in Canada of three products to a third party purchaser.

In Pfizer Inc. – Wyeth, to resolve the serious competition concerns raised by the proposed acquisition by Pfizer Inc. of Wyeth, the Bureau and the parties entered into a consent agreement requiring, among other obligations, the divestiture of a significant number of animal pharmaceutical and vaccine products.

## 2.2 *Quasi-structural remedies*

In certain circumstances, an effective remedy may require the merging parties to take some action, in addition to or other than a divestiture, to remedy competition concerns. While allowing the merged entity to retain ownership of the asset(s) acquired in the merger, certain actions may have structural implications for the marketplace. This includes those actions that reduce barriers to entry, provide access to necessary infrastructure or key technology, or otherwise facilitate entry or expansion. While such measures may help to preserve a competitive environment, it is necessary to fully examine their effects in the context of the particular industry as a whole. The Bureau will only accept a quasi-structural remedy if, once fully implemented, it adequately eliminates the substantial lessening or prevention of competition arising from the merger in the relevant market(s) on a continuing basis without the need for future intervention or monitoring.

Where intangible assets are involved, remedial action is sometimes accomplished through licensing rather than through outright divestitures. In such cases, prior to accepting a licensing agreement as a remedy, the Bureau will first determine the scope of the licence, *i.e.*, whether it will be exclusive to the licensee, co-exclusive (allowing the merged entity to retain certain rights), or non-exclusive. This determination of scope will depend on the nature of the competitive harm and the particular facts of the case.

Two recent examples of quasi-structural remedies are Ticketmaster Entertainment, Inc. – Live Nation, Inc.<sup>19</sup> and Pfizer Inc. – Wyeth.<sup>20</sup> In Ticketmaster Entertainment, Inc. – Live Nation, Inc., following a detailed review of the proposed merger between Ticketmaster and Live Nation, the Bureau concluded that the proposed merger raised serious competition concerns. To resolve these concerns, the parties made certain commitments to both the Bureau and U.S. antitrust authorities in January 2010, whereby Ticketmaster would sell its subsidiary ticketing business (Paciolan) to a leading venue management company and license its ticketing system for use by the second largest promoter of live events in North America. (Ticketmaster and Live Nation also consented to abide by certain behavioural commitments to preclude any anti-competitive bundling of their services.)

In Pfizer Inc. – Wyeth, to resolve the serious competition concerns raised by the proposed acquisition by Pfizer of Wyeth, in addition to the divestiture of a significant number of animal pharmaceutical and vaccine products, as discussed above under *Divestiture of Standalone Business*, Pfizer was also required to amend an arrangement with Paladin Labs Inc. governing the supply in Canada of a human pharmaceutical product marketed under the name of “Estring” to ensure continued competition in the supply of hormone replacement therapy products in Canada.

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<sup>19</sup> *The Commissioner of Competition v. Ticketmaster Entertainment, Inc. and Live Nation Inc.* (CT 2010-001).

<sup>20</sup> *Pfizer*, *supra* note 18.

### 2.3 *Behavioural remedies*

Standalone behavioural remedies are seldom accepted by the Bureau because of difficulties associated with their design and implementation. These remedies are typically more difficult to enforce than structural remedies and generally impose an ongoing burden on the Bureau and market participants. Additionally, the Bureau has found that standalone behavioural remedies rarely provide a permanent solution to the competition concern(s) they are designed to address.

The Bureau will consider the use of standalone behavioural remedies only in cases where the remedy is sufficient to eliminate the identified substantial lessening or prevention of competition arising from a merger and there is no appropriate structural remedy available. In such instances, the Bureau will only agree to a standalone behavioural remedy when it is certain that the remedy will require either no or minimal future monitoring by the Bureau and it will be enforceable by either the Bureau or the Tribunal.

An example of a case involving a standalone behavioural remedy is *The Coca-Cola Company – Coca-Cola Enterprises Inc.*<sup>21</sup> Competition concerns were identified with regard to the proposed merger between The Coca-Cola Company (“TCCC”) and Coca-Cola Enterprises Inc. (“CCE”). The Bureau concluded that the transaction would have substantially lessened competition by allowing TCCC to access commercially and competitively sensitive information of third parties who obtain bottling services from CCE. The Bureau and the merging parties entered into a consent agreement that prevented the merged entity from accessing third party commercially and competitively sensitive information outside the contract-bottling context.

### 2.4 *Combination remedies*

The Bureau recognizes that the use of combination remedies, that is, the combination of certain behavioural terms with structural relief, may help to ensure the implementation of an effective remedy, particularly where such behavioural remedies are used during transition periods until a competitive market structure has developed. The inclusion of behavioural elements in a remedy may contribute to the success of a buyer of divested assets by providing the buyer with the ability to operate effectively and as quickly as possible in the relevant market. As with standalone behavioural remedies, the Bureau will not agree to such behavioural measures, unless they require minimal on-going monitoring by the Bureau and are enforceable by either the Bureau or the Tribunal.

The types of behavioural remedies commonly used by the Bureau to supplement structural remedies include short-term supply agreements for the buyer of divested assets, agreements to provide technical assistance for a limited time, waivers by the merged entity of restrictive contract terms, and codes of conduct. In a specific case in the pharmaceutical industry, a structural divestiture was complemented by a short-term supply agreement, a transition services agreement, and by ensuring that the purchaser had access to key personnel of the acquired business.

An example of the use of a combination remedy is *Suncor Energy Inc. – Petro-Canada*.<sup>22</sup> The Bureau concluded that the proposed merger between Suncor Energy Inc. and Petro-Canada would likely result in a substantial lessening or prevention of competition in the retail marketing of gasoline in southern Ontario and in respect of the wholesale supply of gasoline in the Greater Toronto Area.

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<sup>21</sup> *The Commissioner of Competition v. The Coca-Cola Company and Coca-Cola Enterprises Inc.* (Consent Agreement dated September 27, 2010).

<sup>22</sup> *The Commissioner of Competition v. Suncor Energy Inc. and Petro-Canada* (CT 2009-011).



To resolve the competition issues raised by the proposed merger, the Bureau entered into a consent agreement with Suncor and Petro-Canada requiring the parties to divest and provide supply to (at the purchaser's option) 104 retail gas stations in southern Ontario and to sell approximately 1.1 billion litres of terminal storage and distribution capacity, annually, to be used for wholesale distribution at their terminals in the Greater Toronto Area for a period of 10 years. The merged company is also required to supply 98 million litres of gasoline each year, for 10 years, to independent gasoline marketers.

### **3. Conclusion**

The Bureau is conscious of the importance of ensuring that its approach to remedies remain current and continue to improve as a result of its experiences and those of foreign competition agencies. Going forward, the Bureau will continue to insist on structural and combination remedies where possible. The Bureau remains committed to the refinement of its practice and policies with respect to merger remedies, and will continue to do so in a manner that is both principled and transparent.

## CHILE

### 1. Chile's merger control regime: the legal framework

Chilean Competition Act<sup>1</sup> ("the Act") does not address mergers or acquisitions directly. However, several sections of the Act provide the substantive basis for merger control by the Competition Tribunal ("TDLC").<sup>2</sup>

The procedure for merger review is voluntary and non-adversarial, most of the times.<sup>3</sup> Merging parties or the FNE may request the review by the TDLC. There is no general pre-merger notification and review requirement.<sup>4</sup> However, mergers that may raise antitrust concerns are increasingly being voluntarily submitted to the TDLC by the parties involved.<sup>5</sup> In this case, the Competition Agency ("FNE"<sup>6</sup>) submits a report with its opinion after analysing the operation at issue. The report is not binding for the TDLC. The TDLC may decide to clear the transaction, block it or imposing conditions for the approval. The merger cannot be completed until the TDLC completely clears the merger. The TDLC's final decision issued in a non-adversarial proceeding may be challenged before the Supreme Court. The Court mainly reviews the measures and conditions imposed by the TDLC, generally acting with deference.

This review procedure has several advantages. If the transaction is approved and the merging parties comply with the conditions the TDLC sets, there is no further liability in respect to the specific transaction. Also, after a non-adversarial proceeding begins, an adversarial procedure (e.g. seeking an injunction to suspend the transaction) may not be initiated by the FNE, or third legitimated parties.

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<sup>1</sup> Decree Law N° 211/1973.

<sup>2</sup> TDLC stands for *Tribunal de Defensa de la Libre Competencia*. TDLC is a judicial body with specific jurisdiction on competition law issues.

<sup>3</sup> DL 211, articles 3, 18 N°2 and 31. The TDLC has issued instructions aimed at regulating the procedure in case of conflicting proceedings (adversarial and non-adversarial) regarding the same issue (*Auto Acordado N° 5/2004*) and about the information that parties must provided in these proceedings (*Auto Acordado N° 12/2009*).

<sup>4</sup> Mandatory pre-merger notification to the competition institutions is required only for transactions involving television and radio. Banks and some other financial institutions must notify the Bank Superintendency before merging, and the Superintendency could ask the competition institutions to review a matter. Transactions in certain industries, such as media, banking, and electricity require approval by other governmental agencies for regulatory purposes. The TDLC has ordered mandatory pre-merger consultation for certain firms and markets, as remedies following its decisions about anticompetitive restraints (e.g. in the supermarket industry).

<sup>5</sup> The voluntary procedure do not consider submission fee. Since 2004, the TDLC has decided 7 transactions voluntary submitted.

<sup>6</sup> FNE stands for *Fiscalía Nacional Económica* (Competition Agency), an administrative and autonomous body in charge of competition law enforcement (investigation, and litigation) and competition advocacy. The FNE also acts as an independent technical body on competition law issues (drafting technical reports).

Due to an amendment to the Competition Act in 2009 the FNE is allowed to request the TDLC the review future mergers.<sup>7</sup>

What follows elaborates on the described non-adversarial procedure only.

## 2. Remedies design

As was said above, non-adversarial procedure for merger review is a voluntary process before the TDLC, and it is a 1-phase process. Very often, in their submission, interested parties themselves include a proposal of mitigation remedies. Alternatively, the FNE when issuing its report proposes remedies. Whether proposed by the FNE, the interested parties or even by a third party, the TDLC has the power to impose the remedies it deem appropriate.

According to the TDLC's Internal Regulation N°12, which regulates the information required in order to initiate a merger review proceeding, if merging parties propose remedies, their sufficiency and opportunity should be justified and the way the remedies will be implemented should be clearly specified.

During the non-adversarial proceeding for merger review, third parties, government agencies, and anybody who has interest on the subject can comment on the proposed merger itself, as well as on proposed remedies –and they can even propose new remedies. However, once the TDLC has issued its decision, challenging it before the Supreme Court is the only way of changing remedies.

So far, the TDLC has used both structural and behavioral remedies in horizontal mergers. No vertical mergers have been submitted to review since the establishment of the TDLC.

If merger's effects on competition can be adjusted via structural remedies, in a way that facilitates competition in the relevant market, then structural remedies will be considered –and eventually used– as well as behavioral remedies.

For the TDLC, there are two kind of structural remedies:

1. Forward-looking structural remedies: such as a prohibition to participate in a related market, which potentially could compete with the market in which the merger takes place –e.g., prohibition to a cable TV merged company to participate in the property of satellite TV companies.
2. Divestitures: this remedy has been used in three cases so far; the first time, it was imposed in the merger of 2 (out of 4) mobile telecommunications companies, where they were forced to sell part of the electromagnetic spectrum that had been assigned to them separately; the second time, it was imposed in the context of a takeover of a radio broadcasting chain, ordering divestiture of broadcasting licenses in several cities; the third time it was imposed in the context of the stocks acquisition of a foreign parent company of a competitor by a gas stations chain in Chile, where a divestiture of all businesses in Chile of the target company was ordered.

The TDLC has never required divestiture of a stand-alone business, but only of specific assets. This took place in the three cases mentioned above.

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<sup>7</sup> Before Act N° 20.361/2009, only the parties were able to request the review of future transactions. The FNE had only the power to request the review of completed transactions. The amendment aimed at broadening the FNE's powers.

Similarly, for the TDLC, there are two kind of behavioral remedies:

- General remedies: such as prohibition of bundling products and prohibition of price discrimination.
- Specific remedies: such as a prohibition to increase prices and/or decrease quality of products for a certain period of time.

The TDLC does not always rely on behavioral remedies, since it considers that monitoring compliance with behavioral remedies is much harder than monitoring compliance with structural remedies. Behavioral remedies have been used only when the TDLC has expected that potential anticompetitive effects will be overcome in a short term.

For instance, when the merger between two cable TV, telephonic service and internet providers was analyzed, the TDLC imposed a behavioral remedy, consisting in a prohibition to increase prices and/or reduce quality, for 3 years. This was done because the TDLC expected new competition in these markets, coming from new ways of providing these services –such as satellite TV, IP telephony, among others.

Behavioral remedies used by the TDLC have included transparency requirements, uniform prices, prohibition of bundling, and other non-discrimination requirements, limitations to further concentration of assets, obligation to notify new mergers before the TDLC for review, and facilitating switch for consumers who wish to stop contracting with the merged company (particularly, in a merger of two cell phone companies, the merger company had to implement an automatic message informing the new phone number of users who wished to change companies). Usually, whenever a merger has potential anticompetitive risks, behavioral measures are used in order to mitigate them.

### **3. Monitoring and enforcement**

In the above mentioned cases where divestiture was ordered, in order to ensure expeditious and successful divestiture, the TDLC gave merging parties a timeframe of 18 months for performing it in the first and third cases, and 6 months for the second. For the first and second cases, the assets were sold within that timeframe. In the other case we are still within the timeframe. If parties do not perform the divestiture within the timeframe and merger closes, parties would commit an infringement that may be punished by the TDLC.

The FNE is the body in charge of monitoring compliance of ordered remedies and may initiate proceedings in case of infringement.



## ESTONIA

The Estonian Competition Act regulates the general principles for proposing remedies. As in many countries, also according to the Estonian legislation the idea is that remedies should be proposed by the parties to a concentration, not imposed by the Competition Authority.

Under Article 27 (3), in order to avoid restriction of competition, the Competition Authority may grant permission to concentrate, provided that the parties to the concentration take upon themselves to perform the obligations which they have assumed. So, it gives the parties to the concentration the possibility to propose remedies also during the Phase 1 proceedings and in some cases that possibility has also been used.

The procedure for proposing remedies in the course of Phase 2 investigation has been regulated a little bit more specifically (Article 28 of the Competition Act).

If the Competition Authority finds that a concentration is likely to significantly restrict competition in the goods market, the parties to the concentration shall be informed thereof not later than one month before the termination of the term of the supplementary (Phase 2) proceedings. The notice shall indicate the term for submission of objections or for making a proposal for assumption of the obligations.

The parties to a concentration must describe the obligations assumed thereby in sufficient detail to enable the Competition Authority to determine the suitability of the assumed obligations in order to avoid restriction of competition on the goods market. The Competition Authority shall prohibit a concentration if in the opinion of the Competition Authority the assumed obligations are not suitable in order to avoid restriction of competition on the goods market and the parties to the concentration do not agree to change those obligations, or if the parties to the concentrations have not made a proposal on assuming obligations within the term.

What comes to monitoring the implementation of remedies, there is a reporting clause in the Competition Act according to which the parties to a concentration are required to inform the Competition Authority of performance of the assumed obligations within 10 calendar days after the date of performance of the obligations or after the expiry of the term for performance of the obligations referred to in the decision concerning grant of permission to concentrate.

Since July 2006 there is also a possibility to modify the obligations in the Competition Act. According to Article 27(4) of the Competition Act, based on a reasoned written application of a party to a concentration, the Competition Authority may amend the conditions for performance of the obligations contained in the decision to grant permission to concentrate or to revoke such conditions if the situation on the goods market affected by the concentration has changed to a significant extent or another good reason exists therefor. The need for such a provision was related to a decision to grant permission to concentrate, where obligation had later to be amended using more indirect possibilities provided for in the Code of Administrative Procedure.

In the history of the Estonian Competition Authority (merger control since 2001) the number of decisions including remedies is 6, which is probably quite small when comparing to Authorities in larger countries. In 2 cases remedies were proposed in the course of Phase 1 proceedings and in 4 cases remedies

were proposed in the course of Phase 2 proceedings. In 4 cases the proposed remedies were behavioral and in 2 cases structural.

The Estonian Competition Authority realizes that structural remedies are generally preferable, but in case of a small country it has sometimes been impossible to find suitable structural remedies. And as the Estonian Competition Authority has examined the suitability of a remedy on a case-by-case basis, also behavioral remedies have been used.

A short overview shall be given of the case law regarding remedies.

**1. *Decision of June 12, 2003, No 19-KO AS Tootsi Turvas / AS Puhatu Turvas (behavioral remedy in the Phase 2 proceedings)***

The parties to the concentration were active in mining and distributing of peat (as a raw material) and production of peat products. In this case, the Competition Authority identified possible vertical foreclosure concerns in the market for production of peat briquette. There were 3 producers in the market, including AS Tootsi Turvas, and only one them, Kiviõli Keemiatööstuse OÜ, did not have any peat mining entities of its own and had prior to the concentration obtained raw material from the Target company, AS Puhatu Turvas. After the concentration, AS Tootsi Turvas was a dominant undertaking in the market for mining of milled peat and at the same time a competitor in the market for production and sale of peat briquette.

In order to remedy the competition concerns, the Competition Authority recommended the parties to the concentration to assume an obligation to conclude a long-term supply agreement with Kiviõli Keemiatööstuse OÜ to guarantee continued supplies of the raw material (milled peat) in the required amount. This condition was set, as Kiviõli Keemiatööstuse OÜ was an important supplier of peat briquette in the Estonian market, but it did not have its own peat fields. The decision to grant permission to concentrate was made conditional upon the parties' compliance with the obligation.

**2. *Decision of August 7, 2003, No 26-KO HeidelbergCement Northern Europe AB / part of NCC Roads Holding AB (behavioral remedy in the Phase 1 proceedings)***

In Estonia, the parties to the concentration were active in the market for production and sale of ready-mixed concrete. In addition to that, a subsidiary of the acquiring company (AS Kunda Nordic Tsement) had a dominant position in the market for the production and sale of cement in Estonia, which is an upstream market for ready-mixed concrete market.

The Competition Authority came to the conclusion that the concentration did not significantly restrict competition in the market for the production and sale of ready-mixed concrete, but expressed general concerns regarding vertically affected markets. The Competition Authority was of the opinion that although there were no direct restrictions for entering the market for production of cement, substantial sunk cost and existing production overcapacity would make entry difficult and unlikely. It would be possible to enter the market for sale of cement with cheaper imported cement from Latvia and Russia, but the question of quality would arise.

The Competition Authority did not perhaps very clearly specify the competition concerns related to vertically affected market, but as AS Kunda Nordic Tsement was a dominant undertaking in the market for the production and sale of cement, the Competition Authority recommended AS Kunda Nordic Tsement to assume an obligation to comply with the restrictions set forth in the Competition Act and treat the buyers belonging to the group and the buyers not belonging to the group equally in equivalent transactions. The parties to the concentration agreed to propose a remedy recommended by the Competition Authority.

It should be mentioned that the remedy was proposed already in the course of Phase 1 proceedings and although it was not referred to as a condition for granting permission to concentrate in the operative part of the decision, the Competition Authority at that time considered it necessary to include the obligation in the decision as a kind of public promise not to abuse a dominant position.

**3. *Decision of November 11, 2003 No 38-KO AS A.LeCoq / OÜ Finelin (behavioral remedy in the Phase 2 proceedings)***

The parties to the concentration had horizontally overlapping business activities in Estonia in the markets for production and sale of soft drinks, bottled water, long drink and cider. The Competition Authority identified possible competition concerns in the market for the production and sale of cider, as the market share of the parties to the concentration was 54%. The market for the production and sale of cider had been developing fast and grown for 68% during the last three years.

During the analyses of the competitive situation, the Competition Authority found out that the competitors of the parties to the concentration had enough capacity to expand their production volumes and to compete for their market share. There were no substantial barriers to entering the market and there were also potential competitors (such as wine and beer producers) who did not exclude the possibility to enter the market. About 80% of the customers of the parties to the concentration (large retail chains were of the opinion that despite of the high market share, the parties to the concentration could not act independently of their competitors and customers.

The Competition Authority was of the opinion that the parties to the concentration would not have had the possibility to significantly restrict competition in the market for production and sale of cider. But in order to maintain and promote competition, the parties proposed to assume an obligation not to increase the production volumes of cider for a period of two years after the concentration. The parties were not to distribute more than 2.5 million liters of cider in 2004 and not more than 2.7 million liters in 2005. The decision to grant permission to concentrate was made conditional upon the parties' compliance with the obligation.

But sometimes even the Competition Authority cannot predict what is going to happen in the market. During the year after the concentration, the market growth was 53% instead of the forecasted 4% and due to the restriction on the production volume, the main competitor of the parties to the concentration was able to increase its market share significantly. AS A.Le Coq requested the Competition Authority to reopen to proceedings of the case and amend the production volume limits to 3.4 million liters.

At that time, there were no provisions in the Competition Act for modifying an obligation and as mentioned above, the obligation had to be amended using more indirect possibilities provided for in the Code of Administrative Procedure.

**4. *Decision of August 25, 2004, No 28-KO Philip Morris Products S.A. / part of Amer-Tupakka Oy, part of Amer-Yhtymä Oyj and part of Amernet B.V. (structural remedy in the Phase 2 proceedings)***

The concentration was part of transaction that took place in Finland and parties to the concentration had subsidiaries also in Estonia. The Estonian transaction consisted in the acquisition of three trademarks of cigarettes (Trend, Form and Barres).

The parties to the concentration had horizontally overlapping business activities in Estonia in the market for import and wholesale of industrially produced cigarettes. The Competition Authority identified possible competition concerns in the market, as Philip Morris Products S.A., through its Estonian



subsidiary (hereinafter Philip Morris) had a dominant position already prior to the concentration and market shares of its competitors were widely dispersed.

During the proceedings of the case the Competition Authority found out that there were several barriers for entering the market, for example

- A need for substantial investments in order to achieve distribution of goods among retailers and to introduce new products in a situation where advertising of tobacco products was forbidden.
- Complicated procedures related to tax stamps and excise warehouses.
- Small size of the Estonian market.
- High import taxes (57%) on products from non-EU countries.
- A need to prove the successfulness of new products and to carry out a market research to determine the target group of the products, in order for the products to be included in the assortment of a retailer.

The Competition Authority was of the opinion that the acquisition of trademarks by Philip Morris would significantly restrict competition in the Estonian market for import and wholesale of industrially produced cigarettes. The parties to the concentration proposed a remedy – to divest three trademarks of industrially produced cigarettes (Trend, Form and Barres) to an undertaking not belonging to the same group as Philip Morris. The decision to grant permission to concentrate was made conditional upon the parties' compliance with the obligation and the Competition Authority also assessed the suitability of the proposed buyer in its decision.

The decision was appealed by a competing producer of cigarettes, but as it was withdrawn later on, there is no court ruling regarding the matter.

#### **5. Decision of October 21, 2005, No 14-KO Elion Ettevõtted AS / MicroLink AS (structural remedy in the Phase 2 proceedings)**

Elion Ettevõtted AS (hereinafter Elion) and MicroLink AS (hereinafter MicroLonk) were both providing telecommunications and IT-services. The Competition Authority identified competition concerns in two relevant markets, where the market share of the parties to the concentration exceeded 40%, namely wholesale market for broadband access (access provided to operators that in turn provide broadband access retail services to the end-users) and retail market for broadband access for internet (internet access provided to the consumers).

96% of all of the functioning access lines were owned by Elion in the territory of Estonia. It was technically possible to use 85% of these lines to provide different services, including broadband access services. MicroLink owned a fiber-optic broadband access network based on Ethernet technology in the three largest cities of Estonia. Through the mentioned network MicroLink provided broadband access services to other operators.

The Competition Authority came to the conclusion that as a result of the concentration Elion's dominant position in the wholesale market for broadband access and in the retail market for broadband access would have strengthened and the competition would have significantly been harmed due to the following reasons:

- As entry to both the affected markets required access to Elion's and MicroLink's networks and MictoLink was the only significantly independent competitor of Elion (primarily due to having its own access network), then the competition between the two largest competitors would have disappeared and other operators would not have had even a potential choice in case of purchasing broadband access in the wholesale market.
- As a result of the concentration and strengthening of the dominant position in the wholesale market, Elion's possibility to act to an appreciable extent independently of competitors in the retail market would also have strengthened, as competition in the retail level was dependent on the activities of the undertakings in the wholesale level.
- Compared to its closest competitors, Elion had a large share in the retail market already prior to the concentration and as a result of the concentration the dominant position would have strengthened even more (mainly with respect with providing services to business customers).

The Competition Authority was of the opinion that the concentration would have raised serious competition concerns in the wholesale and retail market for broadband access. In order to remove the competition concerns, the parties to the concentration proposed a remedy – Elion committed to divest MicroLink's fiber-optic electronic communications network, including all agreements and also documents necessary to operate the infrastructure. The decision to grant permission to concentrate was made conditional upon the parties' compliance with the obligation.

The divestiture of the network to an independent purchaser (a competitor) was approved by the Competition Authority and thereafter completed about a year after the decision. In the commitments proposed by the parties there was a clause that Elion could not acquire sole control of the divested network for [0-5] years. At that time it was quite complicated to assess what the appropriate time limit would be.

As mentioned above, the Estonian Competition Authority has used behavioral remedies on more occasions than structural ones and in a small economy, the suitable remedies are sometimes quite complicated to find, starting with the difficulties of finding an acceptable purchaser in case of divestment. In case when the first concentration in the history of the Estonian Competition Authority was prohibited (in the pharmaceuticals' sector), the parties to the concentration did not even propose a remedy, which again indicates that sometimes there might not exist suitable ones.



## FINLAND

- 1. What is your process for considering possible remedies for mergers that present competitive problems? Are parties responsible for proposing remedies, and are they required to follow particular procedures or time lines in order to do so? If your merger review system involves a 2-phase process, are there different procedures and standards for reviewing proposed remedies in the 2 phases?**

The Finnish Competition Act establishes a pre-notification system on mergers exceeding certain turnover thresholds. The legislator has laid down a strict timetable for assessing the notified mergers. A first phase investigation shall take one month at most, during which the Finnish Competition Authority (FCA) shall decide whether further investigations are required. Phase II shall take three months at most. Throughout the merger control procedure, the FCA is in direct communication with the merging parties. Competition concerns are signalled to the merging parties in a timely manner in order to allow them to form an adequate remedy proposal in good time before the expiry of the procedural time limits. However, no particular procedure or time line for this has been specified in the Competition Act.

After the identification of the possible competition concerns at issue the FCA may negotiate with the parties on appropriate remedies, based on which the parties may deliver their remedy proposal to the FCA. However, the FCA emphasises the parties' responsibility in the building of a remedy package. A radical intervention by the FCA in the content of the package may unnecessarily lower the sales price of the part to be sold or in the worst case cripple both the remaining business operations and the one to be divested.

First phase remedies are rarely accepted by the FCA. During the one-month investigation period the competition concerns are seldom precisely identified by the FCA. Besides, the short time-limit does not usually allow sufficient analysis of the proposed remedies or carrying out of an adequate market testing. In principle, though, the procedures and standards for reviewing proposed remedies are the same in both first and second phase investigations.

- 2. When crafting merger remedies, does your agency employ structural remedies? Do you employ behavioural remedies or hybrid remedies? How do you decide what remedy or combination of remedies best cures the competitive harm of concern? Is the approach different in horizontal and vertical mergers?**

The commitments accepted by the FCA are generally structural in nature. A structural commitment may, for instance, be an obligation to divest assets or a business, a patent or a trademark. In some occasions, the FCA may also require to dissolve a co-operation agreement or to resign from it in order to remove links between the merging parties and their competitors.

The commitments can also be other than structural. A commitment may target the future behaviour of a merging party, e.g. an obligation related to licensing and distribution. These types of commitments are typically useful when the restriction of competition is of short-term. The FCA may also accept hybrid remedies where the commitment package includes a combination of different types of commitments.

The FCA prefers structural remedies over behavioural remedies, as the latter require constant monitoring once they have been implemented and generally result in extra workload for the FCA. The

FCA finds that a good package of commitments ensures that the commitments reintroduce competition into the market in a way that the premerger competition will be restored. However, the nature of the remedies varies from case to case and typically the remedy package includes both structural and behavioural elements.

The effect of each remedy type is also dependent on the business sector in question. For example, in case Elisa/Saunalahti – a horizontal merger between two telecom operators in 2006 – the FCA stated that especially in the telecom sector, the infrastructure plays a significant role and therefore the concentration could not be accepted without structural remedies. On the other hand, in two cases, where Finland's major dairy products company Valio has acquired smaller dairy co-operatives, the commitments have consisted of only behavioural remedies (access to raw milk supply, packaging services etc.) and this has been considered sufficient without any structural elements. As regards behavioural commitments, the FCA requires that also the conduct remedies remove the competition concern at issue and restore competition in the market. It must also be relatively unproblematic for the FCA to monitor the compliance of the merging parties with the behavioural commitments.

In practice, each remedy package is different and its contents vary according to the degree of gravity of the competition concern and the nature of the conditions. However, the FCA has set forth that the following outline may in some cases be recommended for a successful package of commitments:

- short introduction, which lists the market effects of the commitments,
- account of the business activities to be divested or other measures,
- the measures are singled out for a later monitoring of the commitments,
- time limit and procedure whereby the commitments are made,
- possible supplementary commitments, which ensure that the business to be divested gets on its feet,
- commitments on the sales procedure of the package of commitments (e.g. retaining the competitiveness of the part to be sold, demands on the buyer such as independence and significance as a competitor, informing the FCA about the sales negotiations and the buyer's approval procedure),
- facts related to the monitoring of the package of commitments (deadlines for the fulfilment of the conditions, appointment of a trustee to monitor the following of the conditions or to look after the sales, a detailed definition of the trustee's mandate, and the consequences and alternative solutions to situations where the package of commitments cannot be realised for one reason or another).

**3. When seeking structural relief, under what circumstances do you require the divestiture of a stand-alone business? Do you ever require the divestiture of identified assets that are not a stand-alone business? Do you ever require the divestiture of intellectual property in lieu of the divestiture of a stand-alone business or a collection of physical assets? When do you use each type of divestiture remedy?**

Depending on the features of the case, the FCA has accepted divestments of both stand-alone-businesses and individual assets. In both cases, it has been required that the assets are sold to a suitable purchaser. A suitable purchaser must be independent of and unconnected to the parties to the

concentration, and a significant and viable undertaking that is capable of restoring effective competition. For instance, in the acquisition of E.ON Finland by Fortum in 2006, the commitments consisted of, among others, the divestiture of three power plants. It was required that "the buyer shall be a competitor or a potential competitor of Fortum on the commercial electricity market and be autonomous and independent of Fortum and possess the expertise, financial resources, motive and other basic requirements to maintain the transferring business as viable and functional." In addition, Fortum was required to lease its share in another power plant until 30 June 2010 and to offer to the Finnish market an annual 1 TWh of so-called virtual capacity until 31 March 2011. The latter conditions were temporary because the situation in the Finnish electricity market was expected to change by the end of the decade e.g. when a new Finnish nuclear power plant and new transmission capacity between the Finnish and Swedish electricity networks were about to be completed.

In the divestitures of a stand-alone-business, it may be required that also the intellectual property rights connected to the divested business are transferred to the purchaser. This has been the case at least in one of the conditional approval decisions of the FCA (Metsäliitto/Vapo, in 2004).

In some occasions, the FCA has accepted divestitures of identified assets that do not as such form a stand-alone-business. The FCA has, for instance, investigated mergers between telecom operators, which have been approved on a condition that the parties relinquish some important telecom infrastructure to a suitable purchaser. In the divestitures of identified assets the requirements for the suitable purchaser play even more significant role than in the divestitures of a stand-alone-business.

**4. What types of behavioural remedies does your agency use? In what circumstances have you used firewalls, fair dealing clauses, transparency requirements, anti-retaliation provisions or prohibitions on anticompetitive contracting practices?**

In some of the remedy packages approved by the FCA, the commitments have consisted of only behavioural remedies without any structural elements. Usually the behavioural remedies have consisted of access requirements and fair dealing clauses (e.g. non-discrimination). These types of remedies have often been accepted in cases where the competition concern in question has been related to a vertical relationship between the acquirer and the target company. In order to avoid harmful exclusionary market effects resulting from the merger, the FCA has approved behavioural remedies, if a divestiture or a prohibition of the merger has not been considered appropriate.

Firewalls, transparency requirements or anti-retaliation provisions have so far not been commonly used in the Finnish merger control regime.

**5. Do you have experience protecting the to-be-divested assets or businesses prior to divestiture? Have you required that assets or businesses be held separate or otherwise preserved? Have you employed monitoring trustees?**

As a part of the divestiture package, the FCA has usually required that parties ensure that the assets or businesses to be divested remain separate from the rest of the parties' business so as not to endanger their divestment. However, the parties have to maintain the transferring business in a manner retaining its value. The parties may also be required not to actively recruit the personnel or management of the transferring business for as long as the divestiture process is going on (and often a certain period after the divestiture has been accomplished).

In most cases, the FCA requires that a monitoring trustee reviews the parties' compliance with the commitments to sell the assets or businesses in question. An independent expert often has technical or

other expertise that helps the FCA to examine if the assets or a business are appropriately kept in isolation with the rest of the parties' business and if the assets are preserved viable during the interim period.

**6. How do you ensure an expeditious and successful divestiture? Do you require divestitures be finalized before a merger closes? If not, how quickly do you require divestiture? What happens if the divestiture has not timely occurred? Do you use sales trustees? Do you insist on enhanced asset packages when sales are not timely? How do you ensure that a sale to a proposed divestiture buyer and the terms of the divestiture will accomplish your remedial goals?**

The FCA requires that the main commitments are implemented in a fairly short time. There are two reasons for this; the competition concerns raised by the merger should be cured as soon as possible and secondly, a proposal to the Market Court on the cancellation of the concentration due to commitments not being followed shall be made within a year of the date of issue of the decision.

There is no barrier to the closing of the merger after the FCA has given its conditional approval decision. However, the FCA requires that the divestiture shall be completed within a fixed period after the FCA's decision. The parties have often given a period (e.g. 6 months) during which they may seek a suitable buyer for the divestiture package themselves. If the parties do not succeed to divest the business, a divestiture trustee obtains the mandate to divest the assets or business in question.

**7. How do you ensure that parties comply with your remedy order? Do you include reporting requirements or inspection clauses in your orders? Do you have staff dedicated to enforcement of remedies?**

The FCA has cleared 26 mergers with commitments out of a total of 748 investigated mergers. The agency has a merger control team consisting of four to five regular case handlers and a Head of Research. All team members participate in the enforcement of remedies on a case-by-case basis. Because of the scarce resources and the fairly small amount of commitment decisions the FCA has no staff dedicated to remedies enforcement only.

The regular practice of appointing a selling and/or a monitoring trustee ensures that the burden of monitoring and implementing the remedies does not fall solely on the FCA officials. In case of behavioural remedies (e.g. access remedies), it is normally required that the monitoring trustee reports once or twice a year to the FCA on the compliance of the merging parties with the commitments.

It is usually an essential part of the remedies package that the merging parties shall provide the monitoring trustee with all documents and information necessary to fulfil the monitoring task. The trustee is also entitled to full assistance and co-operation from the merging parties and their personnel. Additionally, the trustee may resort to outside technical, judicial and other experts in order to perform his tasks.

If the parties do not follow the commitments the parties may be subject to a fine or a decision on approval of the concentration may be revoked.

**8. Is your experience in enforcing remedies reflected in documents describing your best practices or in other guideline documents? If not, are you planning to issue guidance in the near future?**

The FCA has published Merger Guidelines in 1998 at the introduction of merger control regime in Finland. The Guidelines contain a brief description of the remedies discussions with the FCA and an overview of different types of remedies. The section concerning remedies is, however, partially outdated

and does not provide detailed guidance on remedies. The FCA has recently prepared new Merger Guidelines, which will be published later this year (along with the new Competition Act). The new Guidelines will include a more detailed section on merger remedies and the key features of remedies process.

**9. What role do third parties and the public have in commenting on proposed remedies? How have your courts assessed the agencies' remedies and efforts to enforce them?**

The FCA always market tests the remedies proposed by the parties in order to examine if the proposed remedies are an effective and appropriate way to solve the competition concerns at issue. Usually this is done by sending a questionnaire to selected third parties, like customers, competitors and suppliers of the merging parties. Other stake-holders and industry experts may also be heard. The market testing is directed in particular to those third parties who have expressed their concerns in the earlier stage of merger control investigation.

The parties to the concentration have only once appealed the FCA's conditional approval decision to the Market Court. In 2006 the FCA imposed conditions to the acquisition of E.ON Finland by Fortum, because it found that Fortum was in a dominant position at the market of production and wholesale of electricity and that the acquisition strengthened this position resulting in significant impediment of efficient competition in Finland. On the basis of Fortum's appeal, the Market Court found in its ruling in 2008 that the FCA had had no grounds for requiring remedies because Fortum cannot be considered to have a dominant position in the production and wholesale of electricity neither before nor after the merger. According to the Market Court, the relevant geographic market for the production and wholesale of electricity is wider than national covering at least Finland and Sweden. The FCA appealed to the Supreme Administrative Court, which rejected the appeal in its decision given in August 2010. The Supreme Administrative Court confirmed that the relevant geographic market is broader than Finland and that Fortum did not have a dominant market position in the production and wholesale market of electricity.

The Finnish Parliament has approved the new Finnish Competition Act, which will enter into force in autumn 2011. After the amendments to the law, the parties will no more have a right of appeal from a decision whereby the FCA has ordered the commitments given by the parties to be carried out.





## FRANCE

### 1. The institutional context of the adoption of merger remedies in France

Merger control in France was reformed in March 2009, when merger control was transferred from the Minister for the Economy to the Autorité de la concurrence. Since the reform, the Autorité de la concurrence is in charge of reviewing merger notifications, assessing their competitive effects and prohibiting or authorizing merger transactions, subject to commitments made to the Autorité by the companies concerned. However, the Minister for the Economy may deviate from the position taken by the Autorité by invoking, in a reasoned and transparent manner, the public policy grounds underlying its decision. The use of this power is meant to be strictly confined to exceptional circumstances.

The Autorité de la concurrence has thus been responsible for merger control since March 2009. Pursuant to Article L. 430-5 II of the French Commercial Code, merging parties may offer commitments to the Autorité to obtain clearance at the initial stage of a review (“Phase I”). Article L. 430-7 II of the Code also allows the parties to offer commitments to remedy anticompetitive effects identified in an in-depth examination of the proposed transaction (“Phase II”). In all procedural scenarios, commitments are assessed by the Autorité on the basis of the same criterion; namely to remedy the transaction’s potential anticompetitive effects. The difference is that Phase I commitments merely aim to withdraw any serious competition doubts and Phase II commitments are designed to rectify an established risk that the merger will significantly lessen competition.

The Autorité de la concurrence assesses the suitability commitments and their ability to remedy anticompetitive effects effectively by soliciting opinions from relevant market players (competitors, suppliers) and the merged entity’s customers. The results of these inquiries, insofar as they are relevant, serve a useful purpose for the Autorité which may, where necessary, require the parties to change the nature or scope of the commitments proposed.

The Autorité has implemented these provisions eleven times to date, clearing nine mergers subject to Phase I commitments and two in Phase II. These provisions are applied by the Autorité since March 2009 in line with the Minister’s past decisions, on which the Autorité builds upon to define its own decision-making practice. The Autorité is also in charge of monitoring the implementation of commitments accepted in past decisions, including ministerial decisions prior to 2009. The accomplishment of these missions has enabled the Autorité to acquire an experience such that it is fully able to develop and implement its own merger remedies policy in a new institutional context.

### 2. The respective advantages and disadvantages of structural and behavioural remedies

#### 2.1 *The priority given to structural commitments*

The provisions of the French Commercial Code do not specify the nature of the measures that the Autorité de la concurrence may adopt in order to remedy a merger’s anticompetitive effects. Commitments are offered by the merging parties, who are required to provide adequate solutions to address the anticompetitive effects identified. It is only when these remedies are insufficient and unable to eliminate the adverse effects on competition identified that the Autorité can reject them.

However, several criteria are used to assess the suitability of commitments: the commitments must be effective and actually remedy restrictions to competition; their implementation should not raise doubts; it must be swift; and the commitments must be controllable, which means that the Autorité must ensure their effective implementation. The application of these criteria justifies the adoption by the Autorité, in line with European authorities, of a marked preference for “structural” measures, i.e. measures that usually focus on divestitures and have a direct impact on markets’ structures and the implementation of which does not depend on the merging firms’ behaviour. The priority given to such measures is justified both in terms of the efficiency criterion, because the transfer of assets guarantees the maintenance of competitive market structures, and with regard to the effectiveness and controllability criteria because such commitments do not normally need to be monitored once the divestiture is achieved.

“Behavioural” measures, i.e. measures which consist in the merging firms adopting a certain behaviour, may be useful as well, especially when they are adopted together with structural measures to regulate the merged entity’s competitive behaviour. The Autorité may also accept commitments consisting solely of behavioural measures, if such measures effectively remedy the transactions’ anticompetitive effects and are appropriate given the market circumstances. However, such measures involve disadvantages that limit their attractiveness and contribute to the priority given by the Autorité to structural measures:

- behavioural measures consist of determining a behaviour that the parties agree to adopt after the merger on the basis of terms, contractual or otherwise, that the Autorité, which suffers from information asymmetries vis-a-vis the merging parties, can only control imperfectly. Testing commitments with market players and the merging firms’ customers may serve as a “safety net” by pointing to terms that are likely to allow the parties to circumvent their obligations or to avoid solving competition problems, but the Autorité is still dependent on the expertise and vigilance of third parties whose primary role is not to preserve markets’ competitive structures;
- behavioural measures require the Autorité to make a considerable effort to monitor commitments since they force the parties to adopt a certain behaviour over time. Unlike structural measures, controlling the effective implementation of a given behaviour requires making judgment-calls that the Autorité is ill equipped to make.

The emphasis placed on structural measures is thus borne out in practice: out of a group of 62 mergers authorised subject to commitments since 2001 in France, 53% have involved structural commitments and 47% have included behavioural commitments only. The complementarity of the two types of measures is also clear from the French decision-making practice, given that 64% of authorisations on structural commitments since 2001 have also included behavioural commitments.

## **2.2 *The approach to remedies in horizontal and vertical mergers***

Whenever possible, structural commitments are generally regarded as particularly appropriate to remedy anticompetitive effects that are due to the accumulation of significant market shares. They are preferred over behavioural commitments, which are necessarily limited in time and the monitoring of which is likely to be complicated by significant information asymmetries between the competition authorities and the firms that offer such commitments as well as between these firms and the market.<sup>1</sup>

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<sup>1</sup> Decision of the Autorité de la concurrence, No. 09-DCC-16 of 22 June 2009 on the merger between Caisse d’Épargne and Banque Populaire, Section 402.

Behavioural remedies are better suited to remedy competition impediments that result from vertical or conglomerate integration.<sup>2</sup>

Thus, out of a group of 36 decisions taken in France since 2001 on purely horizontal effects, structural remedies were adopted in 61% of cases (two thirds of these remedies also included behavioural measures). Conversely, out of a group of nine decisions during the same period that raised strictly vertical or conglomerate effects, almost all of the remedies adopted were behavioural measures; only one decision adopted both behavioural and structural commitments. Finally, in situations that raise simultaneously horizontal, vertical and/or conglomerate effects, out of a group of 17 decisions, commitments were structural in 53% of cases (of which just under half were commitments that included both structural and behavioural measures).

### **3. Experience with the effectiveness of remedies**

The Autorité de la concurrence monitors the effectiveness of remedies in two ways. Firstly, the implementation of remedies offered by merging parties must not raise any doubts. Secondly, the implementation of corrective measures must be effective in addressing the restrictions to competition that have been identified.

#### **3.1 *Experiences with the corrective effectiveness and effective implementation of remedies***

The Autorité de la concurrence monitors the effective implementation of remedies adopted in merger decisions. There is, however, no formal control mechanism by the Autorité of the effectiveness of remedies to address competition issues after clearances that are subject to commitments. This assessment is made by the Autorité *ex ante*, by submitting commitments offered by merging firms to a review by their competitors, suppliers and customers. The issue of the corrective effectiveness of remedies is nevertheless likely to arise incidentally, after the adoption of clearance decisions by the Autorité, when the commitment's implementation raises issues and call for modifications, or when the parties request a review of commitments undertaken.

Although the applicable rules allow the Autorité, and prior to 2009 the Minister for the Economy on the basis of an opinion by the Conseil de la concurrence, to ascertain and punish breaches of commitments, few decisions have been adopted on this basis. The feedback from these precedents, however, shows that implementation difficulties arise in both structural and behavioural commitments. Thus, the Conseil de la concurrence, in Opinion No. 07-A-03 of 28 March 2007 concerning the implementation of divestiture commitments entered into by the Carrefour group, found that it had breached the terms of its commitments by using a trustee who had not been subjected to the Minister's approval, pursuant to a mandate that was not in line with its commitments, and by selecting a buyer without ensuring its viability or subjecting it to the Minister's approval. In doing so, the group prevented the Minister from controlling the remedy's effectiveness in correcting the competition problems that had been identified in the course of the merger's review. As concerns behavioural commitments, the Conseil de la concurrence found, in Opinion No. 08-A-01 of 28 January 2008 concerning the implementation of commitments entered into during the takeover of TMC by the TF1 and AB groups, that the latter had not met their commitment to run TMC's advertising management operation independently and to market advertising space independently from TF1, since TF1 had been involved in certain strategic and operational decisions relating to the said management, and had participated in management meetings and had included TF1 employees in the advertising staff.

A similar conclusion can be drawn from the Autorité de la concurrence's experience since March 2009. To ensure the effectiveness of remedial measures adopted, the Autorité closely monitors the

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<sup>2</sup> Merger Control Guidelines of the Autorité de la concurrence, Section 553.

implementation of commitments in merger control. Its track record shows that issues arise in the implementation of both structural and behavioural commitments.

With regard to structural commitments, the case concerning the Carrefour group's commitments shows that, by disregarding the formal conditions for carrying out divestitures, merging firms can frustrate the effectiveness of the remedy, and in particular prevent monitoring by the Autorité and leading to transferring assets to operators lacking competitive viability. More recent experience also raises the question of what the Autorité can do when faced with the merged entity's inability to carry out divestitures for lack of buyers. This question is particularly serious in situations where the assets concerned lose their value or when their value diminishes, either as a result of the termination of the activity concerned or due to factual circumstances. To date, this type of difficulty has required revising divestiture commitments; changes that have been accepted have involved extending the deadlines for completing the divestiture, cancelling the divestiture where increased competition had helped restore sufficient competition or even expanding of the scope of the divestiture.

The fact remains that most of the difficulties that are encountered in implementing commitments concern behavioural measures. Assessing the effectiveness of such measures to resolve the problems identified is difficult because this assessment takes place in the presence of information asymmetries between the Autorité and the parties. Such commitments therefore require that the terms of the commitments be sufficiently defined, precisely to avoid circumvention. Thus, the Autorité's recent experience with trademark license commitments or with access to essential facilities shows that parties are able to circumvent their obligations by adopting behaviours that the Autorité cannot anticipate at the time of its decision, or by taking advantage of the commitments' imprecise wording .

### **3.2 *The consequences of experience gained in developing remedies***

Experience in the area of corrective measures has led the Autorité de la concurrence to include provisions designed either to facilitate implementation and control or to ensure effectiveness in the commitments it accepts from merging parties.

Provisions designed to facilitate implementing and controlling commitments include systematically appointing independent monitoring trustees to control the implementation of commitments. Acting as an intermediary between the Autorité's staff and the merged parties, the appointment of a trustee ensures that the parties' behaviour is continually monitored. This policy is a result of lessons drawn by the Autorité from the Minister for the Economy's practice up to 2009. Thus, while ministerial commitments decisions only provided for the appointment of using a trustee in half of the cases until 2005, the minister's merger unit increasingly tended to resort to this measure in the period 2006 to 2008, although not providing for such appointments systematically. Yet recent experience shows that the absence of trustees has in some cases contributed to facilitating the emergence of difficulties in implementing commitments, which are now monitored by the Autorité and that, conversely, their presence in other cases has made it possible to deal swiftly with attempts by parties to circumvent their obligations.

The Autorité de la concurrence's remedies practice relies on other measures to improve the effectiveness of the measures adopted. The first consists in limiting the risk of a remedy proving to be ineffective by adopting an alternative measure in the event that the remedy initially envisaged fails. This mechanism is particularly relevant where the alternative commitments are more attractive than the ones initially envisaged ("*crown jewels*"). At the very least, the Autorité only adopts such mechanisms for alternative commitments which are at least as attractive as those initially implemented. Thus, for example, by allowing the merger of Caisse d'Epargne and Banque Populaire in its Decision No. 09-DCC-16 of 22 June 2009, the Autorité imposed the adoption of structural measures in the event that the behavioural measures originally proposed proved to be ineffective. This solution appeared relevant in that case since

the merger took place in the context of a banking crisis such that the attractiveness of bank assets divestitures was affected. The Autorité therefore agreed that the parties should undertake to manage three networks of bank branches independently in the geographic area concerned (La Réunion), provided, however, that if this commitment turned out to be ineffective in view of the deterioration of the competition position of these three networks, the divestiture of one of these networks would take place automatically.

The Autorité has also had occasion to verify the effectiveness of divestitures or behavioural commitments entered into by parties, the execution of which depended, at least in part, on the behaviour of third parties, by contemplating alternative divestitures or measures in the event of a failure to implement the commitments attributable to these third parties. This type of measure in particular concerns the divestiture of assets subject to the approval of third parties or of behaviour that is contingent on authorisation by a third party. The existence of these alternatives, which are usually kept confidential at the request of the parties, allows the Autorité to anticipate potential difficulties in their implementation.

Finally, the Autorité recognizes that changing market circumstances may justify altering the competitive analysis of mergers, and hence the need for the commitments or their scope. In order to take such changes into account, commitments may contain revision clauses or rendez-vous clauses.

#### **4. International co-operation in developing, implementing and monitoring remedies**

Drawing up commitments to remedy effects of mergers notified before several competition authorities requires international co-operation because the commitments required are likely to have effects beyond national markets. However, the extra-territoriality of measures taken in the context of national merger control has no bearing on a national authority's jurisdiction and authority to enforce commitments. Yet, for merging firms, which are bound by commitments made before a national authority regardless of their geographic scope, whereas various authorities may assess the transaction differently, the level of interventionism derived from merger control is determined by the policy of the most demanding authority.

A case that concerned the acquisition of Marine Harvest by Pan Fish in markets for the production and sale of salmon, and where the merger notification was filed with both the French and British authorities, illustrates this dynamic.<sup>3</sup> In that case, the transaction was reviewed simultaneously in the UK by the Competition Commission, following a referral from the Office of Fair Trading, and in France by the Minister for the Economy and the Conseil de la concurrence. The Minister issued its decision prior to the completion of the British review proceedings, since merger control by the Competition Commission is subject to longer statutory periods than those applicable to the French authorities. Consultations between the French and British authorities nevertheless took place during the case's investigation. The Minister for the Economy thus cleared the transaction subject to divestiture commitments concerning production sites located in Scotland. The Competition Commission then approved the transaction without commitments, considering that the transaction was not likely to lessen competition. The Conseil de la concurrence and the Competition Commission teams subsequently took part in exchanges to gather shared feedback.

Finally, the integration of the Autorité de la concurrence and its participation in international organizations, such as the International Competition Network, the OECD and the ECA, has made it possible to compare its approach to other authorities' practices. Such co-operation, and the lessons learnt from shared experience, plays an important role in the convergence of French merger remedies policy with that of other jurisdictions.

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<sup>3</sup> Opinion of the Conseil de la concurrence No. 06-A-20 of 20 October 2006 concerning the acquisition of Marine Harvest NV by Pan Fish ASA, the Minister's Letter No. C2006-47, 1 December 2006.



## FRANCE

### 1. Le contexte institutionnel de l'adoption de remèdes en contrôle français des concentrations

Le contrôle français des concentrations a été réformé en mars 2009, date à laquelle la responsabilité du contrôle a été transférée du ministre de l'économie à l'Autorité de la concurrence. Depuis la réforme, il revient à l'Autorité de la concurrence d'examiner les demandes d'autorisation en matière de concentration, d'en effectuer le bilan concurrentiel et de les interdire, ou de les autoriser sous réserve d'engagements éventuels pris devant elle par les entreprises concernées. Le ministre chargé de l'économie a toutefois la faculté de s'écarter de la position prise par l'autorité en invoquant de manière motivée et transparente les raisons d'intérêt général qui l'y conduisent, ce pouvoir ayant vocation à demeurer exceptionnel.

L'Autorité de la concurrence est ainsi responsable du contrôle des concentrations depuis mars 2009. En application de l'article L. 430-5 II du code de commerce, les parties peuvent proposer des engagements à l'Autorité pour obtenir une décision d'autorisation dès la phase initiale d'examen (« phase I »). L'article L. 430-7 II du code permet également aux parties de proposer des engagements pour remédier aux effets anticoncurrentiels identifiés lors de l'examen approfondi de l'opération (« phase II »). Dans toutes les hypothèses procédurales, les engagements proposés sont appréciés par l'Autorité à l'aune du même critère, c'est-à-dire remédier aux possibles effets anticoncurrentiels de l'opération. La différence est que les engagements de phase I visent simplement à lever les doutes sérieux d'entrave à la concurrence et que les engagements de phase II visent à corriger un risque d'entrave établi.

L'Autorité de la concurrence évalue l'adéquation des engagements et leur efficacité correctrice en sollicitant l'avis des opérateurs concernés (concurrents, fournisseurs) et des clients de l'entité qui sera issue de la concentration. Les résultats de ces consultations, dans la mesure où ils sont pertinents, sont utiles aux services de l'Autorité qui, si cela s'avère nécessaire, peuvent demander aux parties de modifier la nature ou le périmètre des engagements proposés.

L'Autorité a mis en œuvre ces dispositions à onze reprises à ce jour, en autorisant neuf concentrations sous réserve d'engagements en phase I et deux en phase II. La mise en œuvre de ces dispositions par l'Autorité s'effectue depuis mars 2009 dans la continuité de la pratique antérieure du ministre, sur laquelle l'Autorité s'appuie pour construire sa propre pratique décisionnelle. L'Autorité est également en charge du suivi de la mise en œuvre des engagements adoptés dans des décisions passées, y compris des décisions ministérielles antérieures à 2009. L'accomplissement de ces missions a permis à l'Autorité d'acquérir une expérience de nature à lui permettre d'élaborer et de mettre en œuvre sa propre politique de remèdes dans un nouveau contexte institutionnel.

### 2. Les avantages et désavantages respectifs des remèdes structurels et comportementaux

#### 2.1 *La priorité donnée aux engagements structurels*

Les dispositions du code de commerce ne précisent pas la nature des mesures que l'Autorité de la concurrence est susceptible d'accepter pour corriger les effets anticoncurrentiels d'une opération de concentration. Les engagements sont proposés par les parties qui sont tenues à apporter des solutions suffisantes pour remédier aux entraves identifiées. Ce ne sont que si les remèdes sont insuffisants et ne



permettent pas de supprimer les atteintes à la concurrence identifiées que l'Autorité est fondée à les refuser.

Cela étant, l'adéquation des engagements proposés répond à plusieurs critères : les engagements doivent être efficaces et remédier effectivement aux atteintes à la concurrence ; leur mise en œuvre ne doit pas soulever de doutes ; elle doit être rapide ; et les engagements doivent être contrôlables, ce qui implique que l'Autorité doit pouvoir s'assurer de leur réalisation effective. L'application de ces critères justifie l'adoption par l'Autorité, en ligne avec les autorités européennes, d'une préférence marquée pour les mesures « structurelles », c'est-à-dire des mesures, portant généralement sur des cessions d'activités, entraînant un impact direct sur la structure du marché et dont la réalisation ne dépend pas du comportement des parties. La priorité donnée à ce type de mesures est justifiée tant au regard du critère d'efficacité, les cessions d'actifs permettant de garantir le maintien de structures de marché compétitives, qu'au regard du critère d'effectivité et de contrôlabilité, de tels engagements ne nécessitant normalement pas de suivi une fois la cession réalisée.

Les mesures « comportementales », c'est-à-dire qui impliquent que les parties adoptent un comportement donné, peuvent également être utiles, notamment lorsqu'elles interviennent en complément de mesures structurelles afin de réguler le comportement concurrentiel de l'entreprise résultant de l'opération. L'Autorité peut aussi accepter des engagements qui consistent uniquement dans des mesures comportementales lorsque ceci est adapté à l'entrave identifiée et aux circonstances de marché. Néanmoins, ce type de mesures comporte des désavantages qui en limitent l'intérêt et contribuent à la priorité donnée par l'Autorité aux mesures structurelles :

- les mesures comportementales consistent en la définition d'un comportement que les parties s'engagent à adopter après la concentration sur la base de termes, contractuels ou non, que l'Autorité, placée vis-à-vis des parties dans une situation d'asymétrie d'information, ne peut qu'imparfaitement maîtriser. Si le test des engagements permet de jouer un rôle de « garde fou » en attirant l'attention de l'Autorité sur des termes qui pourraient permettre aux parties de contourner leurs obligations ou de ne pas résoudre le problème de concurrence identifié, l'Autorité n'en reste pas moins tributaire de l'expertise et de la vigilance de tiers dont le rôle premier n'est pas de préserver la structure concurrentielle des marchés ;
- les mesures comportementales imposent à l'Autorité un effort significatif dans le suivi des engagements, parce qu'elles obligent les parties à adopter un certain comportement dans la durée. Au contraire d'une mesure structurelle, le contrôle de la mise en œuvre effective d'un comportement nécessite de faire des appréciations que l'Autorité est imparfaitement armée à conduire.

La priorité donnée aux mesures structurelles se vérifie donc en pratique : sur un panel de 62 concentrations autorisées sous condition d'engagements depuis 2001 en France, 53 % ont comporté des engagements structurels et 47 % des engagements uniquement comportementaux. La complémentarité entre les deux types de mesures ressort également de la pratique décisionnelle française puisque 64 % des autorisations sur engagements structurels depuis 2001 comportent également des engagements comportementaux.

## **2.2 L'approche des remèdes dans les concentrations horizontales et verticales**

Lorsque cela est possible, des engagements structurels sont généralement considérés comme particulièrement adaptés lorsqu'il s'agit de remédier à une atteinte portée à la concurrence du fait du cumul de parts de marché importantes. Ils sont préférés à des engagements comportementaux, nécessairement limités dans le temps, et dont le suivi peut être rendu difficile par d'importantes asymétries d'informations,

entre les autorités de concurrence et les entreprises souscrivant ces engagements, comme entre ces entreprises et le marché<sup>1</sup>. Ces remèdes comportementaux sont plutôt adaptés pour remédier à des atteintes à la concurrence résultant d'une intégration verticale ou conglomérale<sup>2</sup>.

Ainsi, sur un panel de 36 décisions adoptées en France depuis 2001 portant sur une entrave à la concurrence de nature strictement horizontale, des remèdes structurels ont été adoptés dans 61 % des cas (les deux tiers de ces remèdes comportant également des mesures comportementales). A l'inverse, sur un panel de 9 décisions durant la même période et soulevant des problèmes de concurrence strictement verticaux ou congloméraux, la quasi-totalité des remèdes adoptés ont consisté dans des mesures comportementales, une seule décision adoptant des engagements à la fois comportementaux et structurels. Enfin, dans les situations soulevant des entraves à la concurrence de nature à la fois horizontale, verticale et/ou conglomérale, soit un panel de 17 décisions, les engagements adoptés ont été structurels dans 53 % des cas (dont un peu moins de la moitié d'engagements comportant des mesures à la fois structurelles et comportementales).

### 3. Expérience relative à l'efficacité des remèdes

L'Autorité de la concurrence s'assure de l'efficacité des remèdes de deux manières. Premièrement, la mise en œuvre des remèdes proposés par des parties à une concentration ne doit pas soulever de doutes. Deuxièmement, la mise en œuvre des mesures correctives doit permettre effectivement de remédier aux atteintes à la concurrence identifiées.

#### 3.1 Expériences relatives à l'efficacité correctrice et à la mise en œuvre de remèdes

L'Autorité de la concurrence contrôle la bonne mise en œuvre des remèdes adoptés dans les décisions de concentrations. Il n'existe en revanche pas de mécanisme formel de contrôle par l'Autorité de l'efficacité des remèdes pour corriger les problèmes de concurrence postérieurement à l'autorisation de concentrations sous réserve d'engagements. Cette évaluation est faite par l'Autorité *ex-ante*, en soumettant les engagements proposés par les parties à la critique de leurs concurrents, fournisseurs et clients. La question de l'efficacité correctrice des remèdes est néanmoins susceptible de se poser à l'Autorité après l'adoption de ses décisions de manière incidente, soit lorsque la mise en œuvre des engagements des parties pose des difficultés et nécessite leur modification, soit lorsque les parties sollicitent une révision des engagements souscrits.

Si les règles applicables permettent à l'Autorité, et avant 2009 au ministre de l'économie sur avis du Conseil de la concurrence, de constater et de sanctionner l'inexécution d'engagements, peu de décisions ont cependant été prises sur ce fondement. Le retour d'expérience de cette pratique décisionnelle limitée permet néanmoins de constater que les difficultés d'exécutions concernent aussi bien les engagements structurels que les engagements comportementaux. Ainsi, le Conseil de la concurrence a constaté dans un avis n° 07-A-03 du 28 mars 2007 relatif à l'exécution d'engagements de cession souscrits par le groupe Carrefour que ce dernier avait enfreint les termes de ses engagements en utilisant un mandataire sans le soumettre à l'agrément du ministre, en application d'un mandat qui n'était pas conforme à ses engagements, et en sélectionnant un repreneur sans s'assurer de sa viabilité et sans le soumettre à l'agrément du ministre. Ce faisant, le groupe empêchait le ministre de s'assurer de l'efficacité du remède apporté aux problèmes de concurrence identifiés. S'agissant en revanche d'engagements comportementaux, le Conseil de la concurrence a constaté, dans un avis n° 08-A-01 du 28 janvier 2008 relatif à l'exécution d'engagements souscrits lors de la prise de contrôle de TMC par les groupes TF1 et

<sup>1</sup> Décision de l'Autorité de la concurrence, n° 09-DCC-16 du 22 juin 2009 relative à la fusion entre les groupes Caisse d'Épargne et Banque Populaire, § 402.

<sup>2</sup> Lignes directrices de l'Autorité de la concurrence relatives au contrôle des concentrations, §553.

AB, que ces derniers n'avaient pas respecté leur engagement d'exploiter de manière autonome la régie publicitaire de TMC et d'en commercialiser indépendamment les espaces publicitaires, TF1 étant intervenu dans certaines décisions stratégiques et opérationnelles relatives à la régie, ayant participé à des réunions concernant la régie et ayant constitué le personnel de la régie par des salariés de TF1.

Un constat similaire peut être tiré de l'expérience de l'Autorité de la concurrence depuis mars 2009. Pour garantir l'efficacité des mesures correctives adoptées, l'Autorité assure un suivi rigoureux de la mise en œuvre des engagements en matière de contrôle des concentrations. Le bilan de l'accomplissement de cette mission révèle l'existence de difficultés dans la mise en œuvre d'engagements aussi bien structurels que comportementaux.

En ce qui concerne les engagements structurels, l'affaire relative aux engagements du groupe Carrefour montre que la méconnaissance des conditions formelles de la mise en œuvre d'une cession sont susceptibles de mettre en échec l'efficacité du remède, notamment en empêchant l'Autorité d'exercer son suivi et en conduisant à la reprise des actifs cédés par un opérateur ne présentant aucune garantie de viabilité concurrentielle. L'expérience plus récente soulève également le problème des conséquences de l'incapacité de la nouvelle entité de procéder aux cessions auxquelles elle s'était engagée, faute de repreneur. Cette question se pose avec une acuité particulière dans des situations où les actifs concernés perdent leur valeur ou voient celle-ci diminuer, soit en raison de la cessation de l'activité concernée, soit en raison de circonstances de fait. A ce jour, ce type de difficulté a appelé la révision d'engagements de cession, les modifications acceptées ayant consisté dans la prolongation des délais prévus pour procéder à une cession, l'annulation d'une cession lorsque l'intensification de la concurrence avait permis de restaurer des conditions concurrentielles satisfaisantes, voire l'élargissement du périmètre de cession.

Il n'en reste pas moins que la majorité des difficultés rencontrées dans la mise en œuvre d'engagements concernent des mesures comportementales. L'appréciation de l'efficacité de telles mesures pour résoudre les problèmes identifiés est difficile puisqu'elle s'inscrit dans un contexte d'asymétrie d'information entre l'Autorité et les parties tout en nécessitant la définition de termes d'engagements suffisamment précis pour ne pas pouvoir donner lieu à contournement. Ainsi, l'expérience récente de l'Autorité concernant des engagements de licence de marque ou d'accès à des infrastructures essentielles montre que les parties sont capables de contourner leurs obligations en mettant en œuvre des pratiques que l'Autorité ne pouvait anticiper lors de l'adoption de la décision ou en exploitant la rédaction imprécise des engagements.

### **3.2 Les conséquences de l'expérience acquise dans l'élaboration des remèdes**

L'expérience acquise en matière de mesures correctives a conduit l'Autorité de la concurrence à intégrer dans les engagements qu'elle accepte de parties à des concentrations des mesures qui visent soit à faciliter leur mise en œuvre et son contrôle, soit à en assurer l'effectivité.

Au titre des mesures destinées à faciliter la mise en œuvre d'engagements et son contrôle, l'Autorité intègre systématiquement la nomination d'un mandataire indépendant des parties dont le rôle est a minima celui de suivre la mise en œuvre des engagements. Jouant le rôle d'interface entre les services de l'Autorité et les parties, la nomination d'un mandataire est garante d'un suivi constant du comportement des parties. Par cette politique, l'Autorité tire les leçons de la pratique, jusqu'en 2009, du ministre de l'économie. Ainsi, alors que les décisions ministérielles sur engagements ne prévoyaient de recours à un mandataire que dans la moitié des cas environ jusqu'en 2005, les services du ministre ont eu tendance à recourir à cette mesure de manière croissante durant la période 2006 à 2008 sans, toutefois, la prévoir systématiquement. Or l'expérience récente montre que l'absence de mandataires a pu contribuer, dans certains cas, à faciliter l'émergence de difficultés dans la mise en œuvre d'engagements dont le suivi est désormais assuré par

l'Autorité et que sa présence dans d'autres affaires a au contraire permis de traiter rapidement des tentatives par les parties de contourner leurs obligations.

La pratique de l'Autorité de la concurrence en matière de remèdes passe par d'autres mesures destinées à améliorer l'efficacité des mesures adoptées. La première est la pratique selon laquelle l'Autorité limite le risque qu'un remède s'avère inefficace en adoptant une mesure alternative en cas d'échec du remède initialement envisagé. Ce mécanisme est particulièrement pertinent lorsque les engagements alternatifs sont plus attractifs que ceux initialement envisagés (« *crown jewels* »). A tout le moins, l'Autorité n'adopte de tels mécanismes que pour des engagements alternatifs au moins aussi attractifs que ceux initialement mis en œuvre. Ainsi, par exemple, en autorisant la fusion des groupes Caisse d'Épargne et Banque Populaire dans sa décision n° 09-DCC-16 du 22 juin 2009, l'Autorité a imposé l'adoption de mesures structurelles au cas où les mesures comportementales initialement proposées s'avèreraient inefficaces. Cette solution est apparue pertinente en l'espèce dans la mesure où la concentration intervenait dans un contexte de crise bancaire de nature à compromettre l'attractivité de la vente d'actifs bancaires. L'Autorité a donc accepté que les parties s'engagent à maintenir une stricte indépendance dans la gestion de trois réseaux d'agences bancaires dans la zone géographique concernée (La Réunion), à condition, toutefois, que si cet engagement s'avérait inefficace au vue de la dégradation du positionnement concurrentiel de ces trois réseaux, la cession d'un des réseaux intervienne de plein droit.

L'Autorité a également été amenée à assurer l'effectivité d'engagements de cession ou comportementaux souscrits par les parties dont l'exécution dépendait, au moins en partie, du comportement de tiers, en prévoyant des cessions ou des mesures alternatives en cas d'échec dans la mise en œuvre des engagements imputables à ces tiers. Ce type de mesure concerne, notamment, des cessions d'actifs soumises à l'agrément de tiers ou la mise en œuvre de comportement conditionnés par l'autorisation d'un tiers à la procédure. L'existence de ces alternatives, généralement tenue confidentielle à la demande des parties, permet à l'Autorité d'anticiper sur d'éventuelles difficultés de mise en œuvre.

Enfin, l'Autorité tient compte du fait que les circonstances de marché, appelées à changer, peuvent justifier une modification de l'analyse concurrentielle des opérations de concentration et, de ce fait, de la nécessité des engagements ou de leur périmètre. Afin de tenir compte d'éventuels changements de ce type, les engagements peuvent comporter des clauses de révision ou des clauses de rendez-vous.

#### **4. La coopération internationale dans l'élaboration, la mise en œuvre et le contrôle des remèdes**

L'élaboration d'engagements dans le cadre d'opérations notifiées devant plusieurs autorités de concurrence appelle la mise en œuvre d'une coopération internationale parce que les engagements requis sont susceptibles de produire des effets en dehors des marchés nationaux. Cela étant, ce phénomène d'extra-territorialité de mesures prises dans le cadre du contrôle national des concentrations ne remet aucunement en cause la compétence d'une autorité nationale pour imposer des engagements. Néanmoins, pour les entreprises notifiantes, qui restent liées par des engagements souscrits devant une autorité nationale quel qu'en soit le champ géographique, alors que différentes autorités sont susceptibles d'analyser différemment l'opération, l'interventionnisme du contrôle est déterminé par la politique de l'autorité la plus exigeante.

Une affaire relative à l'acquisition de la société Marine Harvest par Pan Fish concernant des marchés de production et de vente de saumon, opération notifiée notamment aux autorités françaises et britanniques, illustre cette dynamique<sup>3</sup>. L'opération avait ainsi fait l'objet, en parallèle, d'un examen par

<sup>3</sup> Avis du Conseil de la concurrence n° 06-A-20 du 20 octobre 2006 relatif à l'acquisition de la société Marine Harvest NV par la société Pan Fish ASA ; lettre du ministre n° C2006-47 du 1<sup>er</sup> décembre 2006.

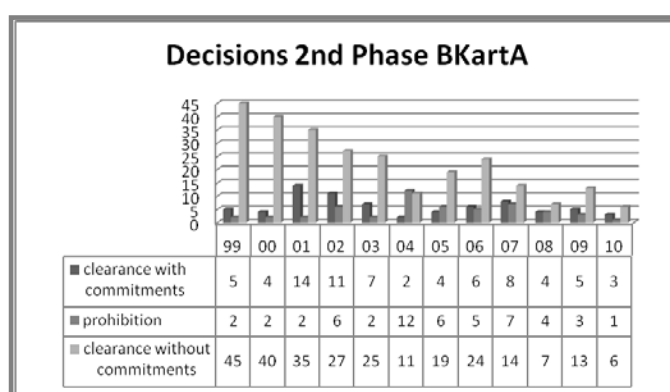
l'Office of Fair Trading puis d'un renvoi à la Competition Commission britannique et d'un examen approfondi par le ministre et le Conseil de la concurrence en France. Dans cette affaire, le ministre a adopté une décision avant l'échéance de la procédure britannique, l'examen de l'opération par la Competition Commission étant soumis à des délais légaux plus longs que ceux applicables aux autorités françaises. L'instruction du dossier a néanmoins fait l'objet de consultations entre les autorités française et britannique. Le ministre de l'économie a ainsi autorisé l'opération sous réserve d'engagements de cession portant sur des sites de production situés en Ecosse. La Competition Commission a ensuite autorisé l'opération sans engagements, considérant que l'opération n'était pas de nature à porter atteinte à la concurrence. Par la suite, les équipes du Conseil de la concurrence et de la Competition Commission ont participé à des échanges afin de bénéficier d'un retour d'expérience commun.

Enfin, l'intégration de l'Autorité de la concurrence et sa participation aux travaux d'organisations internationales telles que l'International Competition Network, l'OCDE ou l'ECA a permis de comparer son approche à la pratique d'autres autorités. Ces travaux, et l'effet d'apprentissage qui en découle, joue un rôle important dans la convergence de la pratique nationale en matière de remèdes avec celle d'autres juridictions.

## GERMANY

### 1. Introduction

The prohibition of a merger imposes far-reaching restrictions on companies. While in some cases this is the only way to avoid the creation or strengthening of a dominant position leading to higher prices, lower output or less innovation, in many cases appropriate remedies may be a preferable alternative. As can be seen in the chart below, remedies play an important role in the merger review practice of the Bundeskartellamt.



The design of an effective remedy capable of adequately addressing the competitive concerns in a merger case, however, is a complex matter that requires a high degree of knowledge of the industry concerned, as well as a great deal of foresight on the part of the case team and the merging parties. Efforts made during the remedy negotiation phase can help avoid difficulties in the further course of the proceedings and ensure the effectiveness of the remedy.

The following paper provides an overview of the experience of the Bundeskartellamt with regard to remedies in merger cases and touches on (1.) different types of remedies, (2.) the divestiture of a viable and competitive business, (3.) procedural issues, the role of (4.) third parties and the public, as well as (5.) the courts.

### 2. Different types of remedies

In principle, both structural and behavioural remedies are possible in German merger control proceedings. The important requirement is that remedies must be effective. Divestments in particular can be regarded as effective remedies if they remove the overlap created by a merger or reduce the horizontal overlap to a degree that eliminates the competition problem. Behavioural remedies are often more complex to design and to implement and their success is sometimes more uncertain.

German law rules out remedies that lead to a situation in which the Bundeskartellamt has to intervene or to monitor the behaviour of the merging parties on a permanent basis (Sec. 40 para. 3 Act against

Restraints of Competition, “ARC”). The role of the authority is normally limited to a one-off intervention and merger control should not create a situation in which the authority has to assume the role of a sectoral regulator. This legal requirement is sometimes misunderstood by commentators as ruling out behavioural remedies altogether.<sup>1</sup> However, the provision only instructs to reject particular behavioural remedies if they involve permanent intervention or monitoring by the Bundeskartellamt. Such behavioural remedies would be ineffective in the vast majority of cases and would also be refused on that ground in other jurisdictions. Accordingly, the relevant provisions under German law ensure the efficiency of the merger review process in that the Bundeskartellamt is not obliged to assess the effectiveness of remedy proposals that are typically ineffective, such as behavioural remedies that would require permanent intervention and monitoring of behaviour.

Examples of remedies that have been accepted by the Bundeskartellamt and that do not involve the divestment of a business include the following: divestment of slots at airports,<sup>2</sup> termination of exclusive distribution agreements,<sup>3</sup> granting the right to terminate long-term supply contracts,<sup>4</sup> access to infrastructure,<sup>5</sup> granting licenses of IP rights,<sup>6</sup> obligation to undertake formal tender procedures after public transportation licenses have expired, with the aim of opening up the market for competition,<sup>7</sup> admission of a competitor as a supplier of publicly funded healthcare services,<sup>8</sup> and obligation to disclose calculations.<sup>9</sup> All decisions are available on the Bundeskartellamt’s website.

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<sup>1</sup> Mestmäcker/Veelken, in: Immenga, Ulrich; Mestmäcker, Ernst-Joachim; Wettbewerbsrecht, Band 2 GWB. Kommentar zum deutschen Kartellrecht, 4th ed., Munich 2007, § 40 paras 62ff.

<sup>2</sup> Bundeskartellamt, Decision of 19 Sep. 2001, B9-147/00 – *Lufthansa/Eurowings*, pp. 2, 22ff.

<sup>3</sup> Bundeskartellamt, Decision of 2 June 2005, B3-123/04 – *H&R WASAG/Sprengstoffwerke Gnaschwitz*, pp. 3, 13f.

<sup>4</sup> Bundeskartellamt, Decision of 11 Oct. 2000, B8-109/00 – *Contigas/Stadtwerke Heides*, pp. 2, 8f; Bundeskartellamt, Decision of 4 Sep. 2000, B8-132/00 – *Eon/Hein Gas*, pp. 2, 18ff; Bundeskartellamt, Decision of 26 Jan. 2001, B8-208/00 – *EnBW/Stadtwerke Schwäbisch Gmünd* 1ff, 12; Bundeskartellamt, Decision of 3 Apr. 2001, B8-263/00 – *Neckarwerke Stuttgart/Stadtwerke Reutlingen*, pp. 2f, 12; Bundeskartellamt, Decision of 18 May 2001, B8-29/01 – *EnBW Regional, Stadt Schramberg u. a.*, pp. 2, 8f; Bundeskartellamt, Decision of 18 May 2001, B8-291/00 – *Trienekens Niederrhein, Stadt Viersen, Stadtwerke Viersen*, pp. 2, 10f; Bundeskartellamt, Decision of 29 Jul. 2002, B8-23/02 – *EnBW/ZEAG*, pp. 2f.

<sup>5</sup> Bundeskartellamt, Decision of 11 Oct. 2000, B8-109/00 – *Contigas/Stadtwerke Heides*, pp. 2, 8f; Bundeskartellamt, Decision of 4 Sep. 2000, B8-132/00 – *Eon/Hein Gas*, pp. 2, 18ff; Bundeskartellamt, Decision of 26 Jan. 2001, B8-208/00 – *EnBW/Stadtwerke Schwäbisch Gmünd* 1ff, 12; Bundeskartellamt, Decision of 3 Apr. 2001, B8-263/00 – *Neckarwerke Stuttgart/Stadtwerke Reutlingen*, pp. 2f, 12; Bundeskartellamt, Decision of 18. May 2001, B8-29/01 – *EnBW Regional, Stadt Schramberg u. a.*, pp. 2, 8f; Bundeskartellamt, Decision of 18. May 2001, B8-291/00 – *Trienekens Niederrhein, Stadt Viersen, Stadtwerke Viersen*, pp. 2, 10f; Bundeskartellamt, Decision of 29. July 2002, B8-23/02 – *EnBW/ZEAG*, pp. 2f.

<sup>6</sup> Bundeskartellamt, Decision of 3. Jul. 2002, B3-6/03, - *BASF/Bayer Crop Science*, pp. 2, 9ff; Bundeskartellamt, Decision of 25. May 1999, B5-16/99, - *Federal Mogul/Alcan*, p. 1f, 39f.

<sup>7</sup> Bundeskartellamt, Decision of 3. Jul. 2002, B9-164/01 – *DB AG/Stadt- und Regionalbus Göttingen*, pp. 2f, 46ff; Bundeskartellamt, Decision of 2. Dec. 2003, B9-91/03 – *DB Regio/üstra*, pp.2ff, 64ff.

<sup>8</sup> Bundeskartellamt, Decision of 10. May 2000, B3-587/06 – *Klinikum Region Hannover/Landeskrankenhaus Wunstorf*, pp. 2ff, 60ff.

<sup>9</sup> Bundeskartellamt, Decision of 11. Oct. 2000, B8-109/00 – *Contigas/Stadtwerke Heides*, pp. 2, 8f; Bundeskartellamt, Decision of 04. Sep. 2000, B8-132/00 – *Eon/Hein Gas*, pp. 2, 18ff; Bundeskartellamt, Decision of 26 Jan. 2001, B8-208/00 – *EnBW/Stadtwerke Schwäbisch Gmünd* 1ff, 12; Bundeskartellamt, Decision of 3 Apr. 2001, B8-263/00 – *Neckarwerke Stuttgart/Stadtwerke Reutlingen*, pp. 2f, 12;

However, purely behavioural remedies are rare in the Bundeskartellamt's practice. One example is the commitment not to apply for an anti-dumping duty for imports from certain Asian countries.<sup>10</sup> The idea behind this commitment was to avoid the creation of entry barriers. However, the commitment turned out to be quite ineffective because other market players could still apply for an anti-dumping duty. Moreover, the commitment was criticized because it restricted the exercise of rights under EU legislation.

Assessing whether a proposed remedy will effectively redress the competitive harm identified in a merger investigation is not an easy task. In this context, past experience with remedies in the particular industry is helpful and understanding the markets concerned is essential. The Bundeskartellamt cannot require the parties to propose the best remedy possible with regard to its effects on competition. They are only required to offer an effective remedy that is sufficient to resolve the competition problems created by the merger. This requirement is significant because the competitive situation before the merger may already have been problematic. This does not mean, however, that the Bundeskartellamt has to accept remedy proposals that rely too heavily on optimistic assumptions.

In vertical merger cases, in particular, behavioural remedies can be successful in resolving competition issues. In recent cases that raised vertical concerns, however, the competition issues have been resolved by divestments, e.g. in *Stihl/Zama*<sup>11</sup> and in *Van Drie/Alpuro*.<sup>12</sup> Sometimes behavioural obligations are also included to complement other remedies (such as divestments). These are, in particular, provisions relating to the use of trustees, reporting obligations, and buyer approval obligations, including obligations to provide information on proposed buyers.

### 3. Divestiture of a viable and competitive business

In structural relief cases, usually the divestment of a stand-alone business is required to ensure the effectiveness of the divestment remedy. Judging whether a carve-out is possible requires a careful analysis and due consideration of the characteristics of the markets involved. Mix-and-match solutions often carry high risks and are viewed with great caution by the Bundeskartellamt. In the *Mid Europe Partners/DISA* case<sup>13</sup> the business that was to be divested had to be created from three separate parts stemming from both companies. The implementation of this remedy proved to be anything but trivial, even if the end-result was satisfactory.

In the *CPTN* case<sup>14</sup> the Bundeskartellamt accepted the divestment of certain groups of patents held by the target. Strictly speaking, this was not a remedy but the redesign of the transaction and a re-notification of the modified deal. In addition, it has to be taken into account that the transaction was in essence limited to acquiring certain IP rights from Novell through a joint venture.

If upfront buyer solutions are chosen, the merging parties themselves have a strong incentive to make sure that a divestment is feasible and likely to attract buyers.

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Bundeskartellamt, Decision of 18 May 2001, B8-29/01 – *EnBW Regional, Stadt Schramberg u. a.*, pp. 2, 8f; Bundeskartellamt, Decision of 18 May 2001, B8-291/00 – *Trienekens Niederrhein, Stadt Viersen, Stadtwerke Viersen*, pp. 2, 10f.

<sup>10</sup> Bundeskartellamt, Decision of 2 May 2003, B3-08/03 – *Ajinomoto/Orsan*, pp. 2, 19ff.

<sup>11</sup> Bundeskartellamt, Decision of 21 Aug. 2008, B5-84/08 – *Stihl/ZAMA Asien*, pp. 2, 36ff.

<sup>12</sup> Bundeskartellamt, Decision of 27 Dec. 2008, B2-71/10 – *Van Drie/Alpuro*, pp. 2, 85ff.

<sup>13</sup> Bundeskartellamt, Decision of 21 Aug. 2008, B5-77/08 – *Mid Europe Partners/DISA*, pp. 4ff, 41ff.

<sup>14</sup> Bundeskartellamt, Press Release of 20 Apr. 2011.



### 3.1 *Protecting the divested business*

The effectiveness of the remedy can be seriously undermined if the business to be divested has deteriorated before it is actually sold. The merging parties may have an incentive to weaken the market position of the business to be divested because after the divestiture the business will compete with the merging parties for the same customers. This incentive may in some cases be more important than the effect that any deterioration may have on the sales price of the divested business. For example, as an effect of a protracted divestment procedure the business can lose key employees and key customers. During this time the business is often not developed further, investments as well as strategic and mid- and long-term decisions are delayed. The supply with sufficient capital may be challenged. These were serious concerns, for example, in the Mid EuropePartner/DISA case,<sup>15</sup> which also involved a mix-and-match solution, i.e. in this case the divested business consisted of three different units of the buyer and the target that still had to be integrated. In this case it became very clear that it would have been important to obtain information early in the process, ideally during the remedy negotiations regarding any measures that might impact the viability of the business, notably with regard to ongoing restructuring or relocation efforts.

The risk of deterioration can be reduced in various ways, including the following: (i) the divestment is implemented quickly, (ii) measures are taken to prevent dilution of the business, e.g. measures to keep employees and provide for sufficient funds to finance the business, and (iii) either the acquirer does not take control of the business to be divested before the divestment has taken place, or (iv) a hold separate manager makes sure that the business to be divested does not deteriorate.

The merging parties generally have a strong interest in implementing a merger transaction speedily in order to achieve the expected synergies and efficiencies as quickly as possible. A way to ensure a speedy divestment is to give the merging parties a strong incentive for it by requiring an upfront buyer solution. The Bundeskartellamt will normally require an upfront buyer solution which is specified as a suspensive condition for the clearance. This means that the acquirer cannot directly influence or dilute the to-be-divested business that is part of the target. However, the underlying purchase agreements often stipulate that the acquirer bears the commercial risk of divestments, i.e. the purchase price will not be reduced if a part of the target has to be sold below value. As a consequence, the target may not have an interest in continuing to develop the business to be divested. Therefore, even with an upfront buyer solution, there are good reasons to involve a monitoring trustee. The trustee obtains the necessary information, for example on the efforts of the business to retain its employees and customers. Monitoring trustees are regularly foreseen in remedy packages accepted by the Bundeskartellamt. Accordingly, in cases without upfront buyer solutions it is helpful to involve a hold separate manager who will ensure that the business is run as an independent unit.

### 3.2 *Ensuring divestment*

A competition authority's work does not end with securing a remedy. In several complex merger cases of the Bundeskartellamt the resources required for implementing a remedy equaled the resources necessary for the process of substantive assessment. Ensuring a timely divestment to a suitable buyer is a crucial element of remedy design and implementation. The incentives of the merging parties may change quickly, once they have secured a clearance decision. During the merger investigation parties are usually very willing to co-operate and to find a solution that can open the way for clearance. During the implementation phase the situation is different and sometimes may be akin to the typical setting of an abuse of dominance proceeding. Here, the merging parties have little interest in the proper implementation of the remedies. Not fully implementing the remedies or delaying their implementation may sometimes be more in their interest.

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<sup>15</sup> Bundeskartellamt, Decision of 21 Aug. 2008, B5-77/08 – *Mid Europe Partners/DISA*, pp. 4ff, 41ff.

The merging parties may also present the to-be-divested business in fundamentally different ways during remedy negotiation and implementation. During remedy negotiations the merging parties will normally try to offer as little as possible to gain the clearance. The divestment offer will generally be described as a business that will play a significant role in the market. Following the clearance decision, i.e. during the divestiture period, however, the merging parties may have an incentive to delay or to water down the divestment. At this particular stage, further difficulties such as veto rights of other shareholders, third-party owners of crucial assets, i.e. real-estate or production sites, or the lack of potential buyers for the to-be-divested business may arise.

Sometimes, there may be doubts whether the merging parties are really interested in identifying potential buyers that are acceptable to the competition authority. Interest in the assets on sale may be low. Potential buyers will normally try to acquire the assets or business for a bargain price. They are very aware that the merging parties will have to sell at any price once the divestment period comes to an end or that there may be a second period in which a divestment trustee will take over and provide them with a second chance to buy at a low price.

Many of these problems can be alleviated by requiring an upfront buyer solution. This maintains the incentive of the merging parties to obtain the approval of the competition authority for the solution of all the issues and problems that arise after the clearance decision has been taken. In cases with upfront buyer solutions the merger is prohibited-, once the time limit for divestiture has expired unless the time limit has been extended. Such an extension is possible in the practice of the Bundeskartellamt, but only if there are very good reasons. In cases without upfront buyer solutions the Bundeskartellamt regularly requires the merging parties to appoint a divestiture trustee to sell the to-be-divested business, if necessary, at any price once the first divestiture period has expired.

Where there have been doubts as to whether a sufficient number of suitable buyers would be interested in acquiring the business to be divested and if no better solution was available, the Bundeskartellamt has accepted so-called “crown-jewel” arrangements which usually concern assets or businesses that are significantly more attractive for buyers, for example because they contain a broader scope of business activities and are therefore more suitable to a broader group of buyers, or because the business is more profitable. Such a “crown-jewel” arrangement becomes applicable once a divestment has not been possible during the first divestment period. For example in the asphalt and aggregates case *Werhahn/NMW*<sup>16</sup> the divestment of a facility in a more remote area would have solved the competition problem, but it was unclear whether it would be attractive enough for potential buyers. Therefore, the Bundeskartellamt insisted on the divestment of a facility closer to an urban area as a fall-back solution. A similar solution was included for the sale of a participation in a company. Here the uncertainty was whether the other shareholders would block the sale. In case this happened, the divestment of another facility was chosen as a crown-jewel arrangement. The alternative facility did not raise comparable issues with co-shareholders, had a higher capacity and achieved higher sales. In this case and in other cases the Bundeskartellamt has also accepted alternative divestments, i.e. the merging parties have the choice which business they prefer to divest. In these cases it seems useful, however, to decide beforehand which business will be divested in case the merging parties are not able to implement the divestiture during the first divestiture period. In the *EnBW/EWE*<sup>17</sup> case a mechanism was included to decide which divestment would have to be implemented by the trustee. A clear solution to this issue facilitates the implementation of the remedy and avoids ex-post discussions with the merged entity.

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<sup>16</sup> Bundeskartellamt, Decision of 22 Aug. 2005, B1-29/05 – *Wilhelm Wehrhahn KG/Norddeutsche Mischwerke*.

<sup>17</sup> Bundeskartellamt, Decision of 6 July 2009, B8-96/08 – *EnBW/EWE*, pp. 4f, 7ff, 46f.

In many cases the identity of the buyer of the assets or business to be divested is crucial for the success of a remedy. In addition the terms of the sale and purchase agreement may also be important; these should not hamper the incentives of the divestiture buyer to compete with the merging parties after the transaction is consummated. For example, clauses that foresee some kind of revenue sharing after the transaction has been completed (so-called earn-out clauses) can raise problems.

The identity of the buyer as well as the terms of the purchase agreement always have to be approved by the Bundeskartellamt before the divestment is implemented. The potential buyer has to be independent from the merging parties and must be able to show that he is able and has the economic incentive to develop the divestment business as a viable competitor of the merging parties. Therefore, the merging parties are obliged to provide the Bundeskartellamt with sufficient information on the proposed buyer and explain why he meets these requirements. The trustee can play an important role in verifying the information and rendering his own assessment. It is helpful if the trustee is already involved in an earlier stage of the process, in particular when the merging parties meet with potential buyers. In many cases the Bundeskartellamt has also interviewed the proposed buyer to get a first-hand impression of the motivation, strategic plans and business of the proposed buyer.

### **3.3 *Ensuring compliance with other obligations***

In the Bundeskartellamt's practice, the main substance as well as the technical details of the remedies are usually contained in the operative part of the clearance decision itself. Remedies usually contain some additional obligations for the merging parties that play an auxiliary role with regard to the divestment. This applies in particular to the obligations to retain a trustee, to submit reports to the competition authority and to obtain the prior approval of the buyer as well as the contractual terms of the sale.

Normally parties comply with the rules laid down in the remedies section of the clearance decision, in particular if an upfront buyer divestment is ordered. Delays or non-compliance are more frequent if the decision does not contain any conditions but only obligations. If obligations are not implemented, the Bundeskartellamt can revoke the clearance decision subject to proportionality. Compliance with obligations can also be enforced by imposing consecutive fines for non-compliance.

The work of trustees can facilitate and support compliance. It is part of the trustee's responsibilities to monitor and report on the implementation of the remedies, any difficulties, obstacles and possible solutions. The reports as well as the process between trustee and merging parties that leads up to the reports make the parties aware of non-compliance issues and bring these issues to the attention of the competition authority. The discussions that take place between the different players involved in the process also help to clarify the content and scope of the obligations flowing from the remedies and may convince the merging parties to take the necessary steps. Usually the remedy package requires that trustees produce reports monthly in addition to an initial report, which sets out their work plan, and a final report, which sums up the implementation of the remedies.

## **4. Procedural issues**

In German competition law, remedies are only foreseen for second phase proceedings (Sec. 40 para. 2, 3) ARC). Rigid time limits for submitting remedy proposals are foreseen neither in the law nor in the Bundeskartellamt's practice. However, the proposals must be made at a stage when it is still possible to market-test them.

In many cases the merging parties reflect on remedies well before they notify a transaction, if they anticipate that the competition authority may identify competition problems. In practice, however, parties are often reluctant to propose remedies before the Bundeskartellamt has issued a statement of objections,

or at least before it has explained to the parties informally - but in detail - its main competitive concerns. This happens usually at an advanced stage of the proceedings. At that stage, it will often be difficult to complete the investigation including the assessment of remedies within the statutory review period of four months. In most cases it will be necessary to market test the remedies.

The negotiation and market-testing of remedies will normally prolong the merger review process by a few months. Therefore, the merging parties and the Bundeskartellamt often agree on an extension of the review period. In the Bundeskartellamt's practice, pre-notification contacts with the parties are the exception. This means that the effective review time is usually relatively close to the statutory four month period in second phase procedures.

There are no particular steps that are formally required when submitting a remedy proposal. Parties should include all the information required for assessing the remedy. Parties should base their remedy proposal on the model remedy clauses published by the Bundeskartellamt on its website. If there are differences to the model clauses, the merging parties should explain why they propose a different wording and why the remedies can still be expected to be manageable and effective.

It is the responsibility of the merging parties to submit a remedy proposal. The role of the Bundeskartellamt is to assess its effects and effectiveness. However, the Bundeskartellamt is not limited to choosing between accepting a remedy in the exact wording of the proposal and rejecting it. It can make slight modifications to the remedy's terms and conditions, though not to its main content.

The implementation of the remedies is normally ensured by the case team that was already in charge of approving the design of the remedies. The case team is supported by the Merger Unit of the General Policy Division that pools know-how on remedies design and implementation across the different decision divisions dealing with merger control.

## **5. Role of third parties and the public**

Third parties are an important source of information in a merger control procedure and in divestment negotiations. Depending on the case and the markets concerned, competitors, customers and suppliers can provide valuable information, in particular on the following issues: (i) Whether the proposed divestment will be able to effectively allay the competition concerns raised by the merger; (ii) whether the business that the merging parties have proposed to divest is viable, or more generally, what are the important factors when assessing viability in the particular sector or market concerned; (iii) whether the proposed buyer is suitable, or in general terms, what are the qualities that a buyer must possess in order to have the ability and the incentive to compete with the merging parties.

There are two important points to consider in this context. First, third parties, in particular if they are competitors, often have an agenda of their own. Some of the assessments and information provided may be framed in a way that serves their interests, e.g. in acquiring particular parts of the merging parties' business. Second, customers and suppliers may be reluctant to provide information to the competition authority that is detrimental to the merging parties given their ongoing business relationships which they might not want to jeopardize. Of course, these points are not specific to merger remedies.

The status of third parties in the formal proceedings can differ. First and foremost, third parties are involved in merger procedures in their capacity as the addressees of information requests. These are mainly done in writing, but sometimes it is also useful to have a face-to-face meeting or telephone interviews. During the negotiation of remedies in the second phase, the merger procedure is usually at a very advanced stage so that there is not much time to hold meetings with third parties. Sometimes telephone interviews can be the only way to obtain information at very short notice. However, third parties can also apply for a

more formal participation in the procedure if their economic interests are sufficiently affected by the merger. Once the Bundeskartellamt has granted them the status of interveners (*Beigeladene*), they have the right to be heard, the right to access the file, and they can challenge the Bundeskartellamt's decision, notably the effectiveness of remedies in court.<sup>18</sup> In merger cases that raise serious competition issues it is common to have a significant number of interveners.

## 6. Role of the courts

Courts are normally not involved in the design and implementation of remedies. Remedies do not have to be approved by a court before they can enter into effect. However, parties are free to challenge the substance of remedies in court. The fact that the merged parties have proposed the remedies in order to obtain clearance does not bar them from appealing a decision involving remedies in court.<sup>19</sup> Accordingly, there have been a number of decisions of the Higher Regional Court of Düsseldorf and the Federal Court of Justice concerning remedies.

In this context, the *Globus/Hela*<sup>20</sup> case is particularly interesting. This transaction between two Do-it-yourself (“DIY”) retailers was cleared subject to the divestment of several DIY stores. The divestment was not designed as an upfront buyer solution but as a dissolving condition, i.e. the clearance lapses if the stores are not sold before the end of the divestiture period. The companies consummated the merger and challenged the condition in court. They claimed the Bundeskartellamt should have restricted the remedy to a mere obligation and should have prolonged the divestment period. In addition they claimed difficulties in selling the stores. The Higher Regional Court of Düsseldorf made it clear that the parties had consummated the merger at their own risk. According to the judgment, should the merging parties not be able to affect the divestment within the relevant time frame, the remedy would lapse and the merger be deemed prohibited. The court also addressed the risk that the stores could not be sold for an economically justified price. It decided that this risk had to be borne by the merging parties. The court also rejected the petition for an extension of the divestment period. The court explained that remedies without upfront buyer solutions have the effect of tolerating the creation or strengthening of a dominant position until the divestment is implemented. Therefore, the duration of the divestment period has to be kept to a minimum. Following the judgment the merging parties were able to find acceptable buyers for the DIY stores to be divested.

## 7. Conclusions

Competition authorities are rarely in a position to make a complete and reliable assessment of a remedy proposal without obtaining substantial information and data from market participants. Accordingly, it requires a thorough market investigation to analyze a given remedy and determine its effectiveness. In addition, the implementation of a given remedy is sometimes a difficult task, not only for the competition authority but also for the merging parties, their management and legal counsel, the target, trustees, potential acquirers of the divested business and third parties. Therefore, the Bundeskartellamt will generally require the merging parties to come up with upfront buyer solutions to ensure that a timely and effective solution to the competition issue will be implemented. In this context, the Bundeskartellamt has published model texts for different types of commitments: (i) suspensive condition, i.e. the upfront buyer solution (*aufschiebende Bedingung*),<sup>21</sup> (ii) dissolving condition, i.e. the clearance lapses if not implemented

<sup>18</sup> Federal Court of Justice, [Judgment of 7 Nov. 2006](#), KVR 37/05 „pepcom“.

<sup>19</sup> Higher Region Court Düsseldorf, [Judgment of 22 Dec. 2004](#), VI Kart 1/04 „DB Regio/üstra“.

<sup>20</sup> Higher Regional Court of Düsseldorf, [Judgment of 22 Dec. 2008](#), VI-Kart 12/08 (V) „Globus/Hela“; upheld by Federal Court of Justice, judgment of 21 July 2009, KVZ 8/09 – Globus/Hela.

<sup>21</sup> Bundeskartellamt, [Model Text for Suspensive Conditions](#).

on time (*auflösende Bedingung*),<sup>22</sup> as well as mere obligation (*Auflage*).<sup>23</sup> It has also issued a model trustee contract<sup>24</sup> and plans to issue guidelines on the design and implementation of remedies in the future<sup>25</sup>.

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<sup>22</sup> Bundeskartellamt, [Model Text for Dissolving Condition](#).

<sup>23</sup> Bundeskartellamt, [Model Text for Obligations](#).

<sup>24</sup> Bundeskartellamt, [Model text for Trustee Mandate](#).

<sup>25</sup> cf. Bundeskartellamt, Activity Report, available at:  
<http://www.bundeskartellamt.de/wEnglisch/Publications/Report.php>.



## GREECE

### 1. Phase II merger review in Greece

Proceedings in merger review by the Hellenic Competition Commission (“HCC”) resemble the ones before the European Commission. Within a month of the notification, the HCC Directorate-General (HCC-DG) estimates whether the merger under review may be expected to result in a substantial lessening of competition in the relevant markets affected. In case of such concerns, the HCC-DG notifies the HCC Chairman, who issues a decision launching an in-depth investigation (Phase II). A Phase II merger hearing before the HCC would then be held within two months of the notification, while the HCC’s decision is reached within 90 days thereof. Whereas the vast majority of mergers notified to the HCC have been cleared in Phase I, it is Phase II merger decisions that concern complex competition issues.

In the course of recent years, the HCC has increasingly been using quantitative research techniques (such as econometrics) coupled with extensive qualitative market research in Phase II merger control, in order to assess pre-merger market conditions, as well as to forecast, as precisely as possible, the post-merger environment. By way of increasing scrutiny, accountability and consistency, the HCC is more than ever capable of identifying the competition issues arising from a particular merger. Better understanding of market forces has in turn led to more certainty in assessing whether a merger should be allowed or whether action should be taken to prevent it or mitigate its negative consequences.

In 2010, thirteen (13) mergers were notified to the HCC under Article 4b of Law 703/1977 (i.e. were subject to HCC clearance).

### 2. Legal provisions and procedure on remedies

Merger remedies have been adopted in the recent HCC decisional practice concerning Phase II mergers,<sup>1</sup> with a view to addressing significant competition distortions generated by a merger. Concerning the legal provisions for merger remedies, it is noted that the new Greek Competition Act (Law 3959/2011)<sup>2</sup> streamlines merger-related remedial action, reflecting more closely the corresponding provisions of EC Regulation 139/2004, as well as of other relevant EU Regulations and Notices. Article 8(8) describes in much more detail (compared to the equivalent provisions of the recently abolished Law 703/1977) the merger remedy procedure, which should be viewed as an important step in making the process of using merger remedies more transparent, while increasing legal certainty as well as achieving convergence towards EU practice.

As soon as the HCC-DG envisages a risk of a significant lessening of competition as a result of a merger, it is required to demonstrate to the merged parties that the proposed concentration raises competition concerns. The parties would then be expected to formulate appropriate and corresponding remedy proposals that would effectively address the above concerns referring to the risk of a significant

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<sup>1</sup> Note that, under Greek legislation, the acceptance of remedies is only possible in Phase II proceedings.

<sup>2</sup> The Greek Parliament adopted the new Competition Act in April 2011, which entirely abolishes Law 703/1977, which governed (with consecutive amendments) the protection of competition in Greece in the last 34 years.



lessening of competition and the resulting adverse effects. In line with the EU system, Law 3959/2011 clearly states that only the merged parties can put forward commitments; the HCC is not in a position to impose unilaterally and attach any conditions to an authorisation decision. This contrasts with Law 703/1977, which in its latest version also provided for the unilateral imposition of remedies by the HCC.

In practice, the HCC-DG will also gather information on possible remedies and consider relevant options as a starting point for the rigorous discussions with the parties that follow the communication of the HCC-DG's concerns, which take place in order to clarify the competition problems arising and to assist the parties in formulating their proposed remedies. The HCC's official position prior to the decision-making stage is reflected in the statement of objections (SO), which communicates to the parties the competition concerns and indicates the likely way to address such concerns, if any. Based on the SO and further to any possible commitments given by the parties, in order to address the HCC's competition concerns, the HCC Board eventually reaches a decision either clearing the merger unconditionally, or accepting the parties' commitments (on the condition that they are proportionate to the competition problem they purport to address), or prohibiting the merger.

### **3. Remedial action: key concerns and objectives**

The HCC policy towards remedial action closely follows EU guidelines and case law. In that respect, the EC Merger Regulation, the Implementing Regulation, the various Notices, Best Practice Guidelines and Model Texts have to date been reference points for the HCC. At the same time, they provide significant guidance to the domestic business and legal community concerning the general framework on the types of acceptable remedies and the requirements for their implementation.

The HCC also takes into account valuable relevant contributions from other international organizations such as the OECD and ICN. The HCC fully acknowledges the OECD's principles on the use of remedies, as expressed in its background note to the Roundtable on Merger Remedies (2004):

- a remedy should not be applied unless there is in fact a threat to competition;
- remedies should be the least restrictive means to effectively eliminate the competition problem(s) posed by a merger;
- the HCC typically does not use merger review to engage in industrial planning and
- the HCC must be flexible and creative in devising remedies.

Thus, the HCC, in its recent decisions involving merger remedies, has explicitly mentioned that its objective is to apply the most effective remedial action, which would ideally:

1. be proportional to the competition problems arising and have a comprehensive impact addressing the expected harm;
2. act swiftly in addressing the competition concerns; such remedies should be preferred to the ones that are expected to have an effect only in the long run or to the ones whose timing is uncertain;
3. where applicable, have a carefully-calculated duration, in order to offset the competition harm but not excessively hamper competition via over-regulating the affected markets;
4. be practical, in the sense that it should be capable of effective implementation, monitoring and enforcement;

5. be demonstrated to be necessary, i.e. it has to be proven by the HCC that the merger might impede or reduce competition; enhanced pre- and post-merger market analysis by the HCC-DG helps meeting this criterion;
6. have an acceptable risk profile. The effect of any remedy is always likely to be uncertain to some degree. In evaluating the effectiveness of remedies, the HCC will seek to approve remedies that have a high degree of certainty in achieving their intended effect.

#### **4. Structural or behavioural? The use of remedies in recent HCC cases**

Crucial as these principles set out by the HCC may be, recent HCC decisions have demonstrated that, in practice, the formation of a remedy so as to satisfy all of them may be far more complex than sometimes indicated in the economic literature.

##### **4.1 *Divestitures***

Structural remedies, especially in the form of divestitures, are thought to be preferable, inasmuch as they durably and permanently prevent the competition problem and do not, moreover, require medium or long-term monitoring measures. Indeed, in recent cases, the HCC has shifted its decisional practice from accepting behavioural remedies to the use of divestitures, as the main instrument of remedial action against foreseeable competition problems (mainly of horizontal nature).

For example, in its February 2011 decision that dealt with the notified concentration between MEVGAL and VIVARTIA,<sup>3</sup> both companies active in a range of dairy product markets, whereby the latter acquired control over the former, the HCC considered that the proposed transaction, as originally notified, could have raised competition concerns, *inter alia*, in the market for the procurement of chocolate milk, due to the fact that VIVARTIA's product "Milko" already had a considerable market power. Therefore, the merged entity, by virtue of the HCC's decision, would be expected to divest MEVGAL's chocolate milk business, currently operated under the brand name "Topino", in order to remove the horizontal overlap between the parties. Currently, VIVARTIA is searching for a "suitable purchaser" for the business and is expected to notify the HCC of its efforts within the coming weeks, whereby the HCC will assess the prospective buyer's ability to become an "active competitive force in the market".

It should be noted that in that decision, the use of econometrics has proven to be crucial in defining the markets, calculating efficiencies and simulating post-merger prices and general market conditions, resulting in increased confidence of the necessity of remedies, their proportionality, their nature, as well as the containment of their risk profile to an acceptable level. Despite that confidence, it should also be noted that, since the divested asset does not constitute a stand-alone business, there is an inherent risk that may not be viable or competitive. However, the HCC, in its appraisal of the suitability of the purchaser, is expected to address that concern.

##### **4.2 *Other structural remedies***

Structural remedies other than divestitures have also been employed by the HCC. For example, since 2009, the HCC has issued two merger decisions concerning the oil industry, i.e. the takeover of Shell Hellas SA (Shell) by Motor Oil Hellas S.A. (MOH) in 2010<sup>4</sup> and of British Petroleum Hellas SA (BP) by Hellenic Petroleum S.A (ELPE) in 2009.<sup>5</sup> In both of them, Phase II proceedings were initiated and

<sup>3</sup> HCC Decision 515/VI/2011.

<sup>4</sup> HCC Decision 491/VI/2010.

<sup>5</sup> HCC Decision 465/VI/2009.

remedies were accepted. In contrast to other EU countries, like Germany, France, and the United Kingdom, the Greek oil industry is divided into three distinct market segments; refining, wholesale and retail. Two domestic companies, MOH and ELPE, are active in the refining segment, covering approximately 90% of the total Greek oil demand, while the remaining 10% is imported by a few wholesalers. Wholesalers (Shell, BP, EKO, AVINOIL, Jetoil, etc.) are legally separated from the refining operations and sell domestically produced or imported products to end consumers and retailers (petrol stations), with whom they sign multi-year exclusive purchasing agreements. Thus, wholesale companies actually control the retail segment of the market.

Whereas both mergers were inherently vertical in nature (as the refining companies MOH and ELPE acquired wholesalers Shell and BP respectively), there were strong horizontal elements too, as both refineries had owned wholesale companies prior to the mergers (AVINOIL and EKO respectively). Therefore, the analysis focused on the retail markets for petrol and diesel in certain prefectures of Greece (each constituting a separate geographic market), where the merged entity would obtain considerably high market shares. In both cases, the remedy proposed and ultimately accepted by the HCC was that, in the problematic prefectures, the refining companies would dispose of a number of service stations from their network, equivalent to a reduction of volume-based market share below 55% in each prefecture. This would be achieved within a 6-8 month period either by non-renewal or by termination of contracts with petrol station owners. To supplement this remedy, a non-reacquisition clause was included, namely that the refining companies were expected not to re-acquire the released service stations for a period of 6 years thereafter.

The abolition of long-term exclusive contracts was viewed as the best tool to limit the merged companies' considerable market power attained in the wholesale level and exerted in the downstream retail segment of the market.

Of course, since the divested contracts are numerous (concluded between the wholesalers and about 100 businesses in each of the affected prefecture), a single-buyer solution which would have been preferable. However, in practice, such a solution was not possible because, in Greece, unlike in other EU Member States, the vast majority of the service stations are dealer-owned and dealer-operated (DODOs), as opposed to company-owned and company-operated (COCO) or company-owned and dealer-operated (CODO). Therefore, it was not feasible to opt for an en bloc single-buyer solution, due to the numerous third parties concerned (the dealers).

In addition, the remedy, albeit structural, imposes a monitoring burden on the HCC, as the companies concerned would be expected to submit to the HCC lists of service stations, which they intend gradually to dispose of, while making reference to the annual consumption of each retail station, so that it might be possible for the HCC to approve of the intended release and to monitor compliance with the commitments assumed.

#### **4.3 *Using both structural and behavioural remedies***

Not inconsistent with the general consensus of preference for structural remedies, the HCC will, more often than not, employ a combination of structural and behavioural remedies. Indeed, the HCC's experience has shown that certain behavioural remedies, when complementing a core structural remedy, may be effective, particularly if used during a transitional or bridging period, until a competitive market structure develops. Therefore, an effective structural remedy may require behavioural measures for a specified period in order, for example, to secure supplies of an essential input or service from the merged parties to the divested unit or other rivals. Such was the case in the ELPE/BP merger discussed above, whereby ELPE further committed to grant access to third parties (wholesalers) to its storage facilities/depots in Crete, under fair, reasonable and non-discriminatory terms (FRAND).

However, behavioural remedies are considered particularly appropriate in mergers with vertical elements, mainly with a view to preventing foreclosure risks, but also preserving the merger's potential efficiencies. In the VIVARTIA/MEVGAL merger, for example, apart from the market for chocolate milk, competition concerns were also raised as to the merger's impact on the upstream and downstream markets of fresh milk. For the upstream market, the remedy was that the merged entity shall continue to purchase milk, under current volumes and general trading terms, from producers situated in five prefectures in Northern Greece for a transitional period of three years, at the producers' choice and freedom. For the downstream market, the remedy was that the merged entity shall refrain, for a total period of five years, from any practice which may directly or indirectly result to exclusivity at retail outlets, including freezer-cabinet exclusivity. Finally, since the merged entity is also active in the production of milk, there was an additional commitment that competitors shall be able to purchase raw milk from the merged entity for a maximum yearly volume of 30,000 tn at cost basis and pursuant to an objective, transparent and verifiable set of criteria, for a total period of five years following completion of the merger.

## 5. On the classification of remedies

Remedy-related literature often blurs the boundaries of distinction between structural and behavioural remedies. Remedies that are basically behavioural but also contain structural elements are difficult to be subjected to a strict classification. Such remedies, often called "quasi-structural" have also been employed in the HCC decisional practice. Thus, in its January 2011 decision<sup>6</sup> concerning the acquisition of the EVGA S.A. ice cream brands by ELAIS UNILEVER HELLAS S.A., the HCC identified competition concerns stemming from the a non-compete clause which bound EVGA not to enter into the production and marketing of branded ice cream in co-operation with third parties. The HCC was satisfied that the duration of the clause was reduced from three years, as originally agreed, to one year, with a view to preventing unnecessary restriction of potential competition, while protecting the buyer's investment.

In general, the HCC believes that the exact classification of a remedy is of small practical use to merger enforcers; if an appropriate stand-alone divestiture that addresses the competition problem is not available, any "package" of remedies (which may consist of structural, quasi-structural or behavioural remedies, or a combination thereof) will suffice, as long as it is appropriate to eliminate the expected substantial lessening of competition and complies with the above general principles that the HCC has set.

Indeed, as sophistication in analysing market conditions grows and as recent HCC experience has shown, the sole use of structural remedies by no means guarantees that all competition issues stemming from a merger will be addressed. Rather, a mix of structural remedies and ancillary measures or behavioural remedies is, more often than not, the ideal solution. Therefore, for classification purposes, in order to assess the appropriateness and to facilitate helpful research on remedies, the HCC is of the opinion that it is probably more appropriate to view them by adopting the following distinction based on the *scope* rather than the *nature* of the remedy:

- package of remedies that are used to transfer a market position,
- package of remedies that induce exit (e.g. market exit via the withdrawal of a brand from the market) and
- package of remedies that grant access.<sup>7</sup>

<sup>6</sup> HCC Decision 513/VI/2011.

<sup>7</sup> Compare European Commission, DG Competition, *Merger Remedies Study*, October 2005, p. 18 *et seq.*



## HUNGARY

The present contribution of the Hungarian Competition Authority (Gazdasági Versenyhivatal, GVH) is based on the questions posed, but follows a slightly different structure. We first discuss the procedural issues of crafting a merger remedy (relating to questions 1, 5, 6, 7 and 8), and then the GVH's approach to the types of remedies used (in connection to questions 2, 3, 4 and 9), and finally, we present, as examples, a few recent merger cases where remedies were considered.

### **1. The GVH's procedure concerning merger remedies**

Parties may put forward possible remedies at any time during the merger investigation procedure; there is no separate remedy phase in the merger investigation. In principle, there is also no difference between a one- and a two-phase merger with regard to the submission of remedies, but parties naturally face different incentives regarding the submission of remedies in different phases of a case.

It is possible to already submit potential remedies in the notification. These may stem, for example, from parties' previous experience from similar mergers or pre-notification discussion. The remedies, in this case, are submitted with the understanding that they only be implemented if the GVH identifies competition concerns to justify them.

If remedies are submitted when the merger is still under investigation by the case team, the Competition Council (the decision making body of the GVH) may take part in the process to the extent of handling any remedy discussions.

Most frequently, however, remedies are put forward after the GVH has identified specific competition concerns and made these known to the parties, that is, following the issue of a Statement of Objections. The remedies are proposed by the parties and further discussions are led, on the part of the GVH, primarily by the Competition Council.

If a remedy includes a divestiture, there is no rule that the divestiture must be finalized before the merger closes. The timing of the divestiture depends on the specific case, and is subject to discussion between the GVH and the parties. Of course, it is preferred that the divestiture takes place as soon as possible.

The remedy typically contains measures to be taken in case the divestiture does not take place in a timely fashion; the transaction could thus, for example, become null and void. Also, the relevant laws contain provisions for enforcing the Competition Council's decisions. The remedy also usually includes reporting requirements and inspection clauses. The Authority has so far not employed sales trustees or monitoring trustees. There is also no staff dedicated solely to the enforcement of remedies. The GVH has to monitor whether the remedy has been correctly implemented through launching a separate, post-merger investigation.

The GVH has issued a short set of guidelines relating specifically to remedies, containing the general requirement for monitoring.<sup>1</sup> The GVH also maintains a document containing general principles followed by the Competition Council in interpreting and applying the Competition Act.<sup>2</sup> Some of these principles relate to merger remedies, and the procedural practices and general approach followed by the GVH that we describe in this submission.

## **2. The GVH's approach in crafting remedies**

The case and competition concern in question determines the type of remedy that should be used, and there are no hard rules in choosing between structural, behavioral or hybrid remedies. Structural remedies, especially divestitures, are usually preferred over behavioral remedies for several reasons. First, they are often easier to implement, and thus the costly continual monitoring of a market may be avoided. Second, they are often also the most effective, in that a divestiture may result in the creation or strengthening of a competitor in the market. In some cases, however, effective structural remedies are not available (we shall present such a case in the next chapter), and a behavioral remedy is sought instead. On the other hand, some competition concerns may be solved through a relatively simple behavioral remedy, which means smaller intervention into the functioning of the market. It is also preferable to intervene as little as possible, while alleviating any competition concerns.

In principal, the general approach to choosing remedies does not differ between horizontal and vertical cases. However, since the concerns that arise are different in horizontal and vertical mergers, the relative frequency of various types of remedies may differ. For example, divestitures may be more likely in horizontal mergers, and behavioral remedies pertaining to access to a facility more frequent in vertical mergers.

It is possible for a remedy to require the divestiture of intellectual property, although such a case has not yet occurred in the GVH's practice. There has been, however, a case where the right to use a specific brand name was divested, as part of a more complex, hybrid remedy.

The most typical behavioral remedies applied by the Authority relate to access to a facility. Such contracts often also contain methods for calculating price schedules and regulate many other aspects of access.

During remedy negotiations, the Authority typically conducts a market test of the proposed remedy, or possible remedies, in order to allow third parties to comment. The market test usually takes the form of a questionnaire, but public consultation have also been used in some cases.

## **3. Recent GVH experience with merger remedies**

The UPC/Spektrum merger was a vertical merger concerning UPC, the leading cable television service provider (downstream market) acquiring Spektrum, a television content provider (upstream market).<sup>3</sup> In this case, UPC already indicated in the notification that it pledged to provide non-discriminatory access to Spektrum's television channel to its downstream competitors. This behavioral remedy was accepted as alleviating any vertical competition concerns that may arise, and rules were set out

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<sup>1</sup> The 2008/1. Notice of the Competition Council, can be downloaded in Hungarian from the GVH's website: <http://www.gvh.hu/domain2/files/modules/module25/521787C1F0F45831.pdf>.

<sup>2</sup> This document can also be downloaded in Hungarian from the GVH's website: <http://www.gvh.hu/domain2/files/modules/module25/13908B1C365CEFE2C.pdf>.

<sup>3</sup> Case 61/2008.

to monitor its enforcement. The remedy, in this case, was proposed early on by the parties based on their previous experience with similar mergers.

The Prímagáz/Intergas merger gave rise to competitive concerns regarding access to a facility.<sup>4</sup> While Prímagáz was active (among others) in the downstream markets for wholesale and retail LPG gas, Intergas provided a loading service at the border enabling the importing of gas into Hungary via railway from the Ukraine. The service provided by Intergas formed a bottleneck in the industry, and third parties voiced concerns regarding their future access to this service. A behavioral remedy was adopted, which set out conditions for providing access to third parties for the next 2 years.

The Holcim/VSH merger gave rise to both horizontal co-ordinative competition concerns in the market for cement production and trade in Hungary, and vertical competition concerns regarding the upstream cement market and the downstream ready-mix concrete market.<sup>5</sup> Ideally, a divestiture of production facilities in the cement market would have been the optimal remedy that could have alleviated both concerns. However, for various reasons, there was no possibility to divest production facilities. As a second best solution, a hybrid remedy was accepted by the Competition Council. The parties divested their ownership in a major cement trading company in Hungary with suitable storage and transport facilities. Additionally, the parties committed a supply contract, to ensure that the trader has the option for access to cement from the parties' production facilities under reasonable conditions for 5 years, a sufficiently long transition period for it to secure its own sources. In this way, a new competitor had the possibility of entering the market, disrupting possible tacit collusion, and offering a supply alternative to the parties in the ready-mix concrete markets.

The Magyar Telekom/Vidanet merger provides an example for a case when no suitable divestiture could have been identified to alleviate competition concerns.<sup>6</sup> The merger would have eliminated competition between the two incumbent internet service providers on two alternative platforms, ADSL and cable. There was no suitable structural remedy available, and the behavioral remedies offered by the parties (to provide access to basic infrastructure) were, in the opinion of the Competition Council, insufficient to enable viable entry that could compensate for the loss in competition.

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<sup>4</sup> Case 146/2009.

<sup>5</sup> Case 153/2009.

<sup>6</sup> Case 158/2008.





## IRELAND

### 1. Introduction

This submission has been prepared by the Irish Competition Authority (“Competition Authority”) for consideration at the OECD Competition Committee Working Party 3 meeting on Tuesday 28 2011. It is our understanding that the meeting will discuss merger<sup>1</sup> remedies with reference to the ten questions annexed to the Chairman’s letter of 23 March 2011.

It would seem likely that there will be a high degree of commonality about the purpose and benefit of remedies. However, differences in legislation and institutional arrangements will likely result in a variety of responses to at least some of the questions listed in the Annex to the Chairman’s letter of 23 March 2011.

### 2. Remedies in an Irish merger review context

Before addressing the specific questions listed in the Annex to the Chairman’s letter, it may be useful to briefly summarise (i) what remedies are and (ii) the purpose of remedies in merger review.

Within a merger review context a remedy is essentially a regulatory response other than (i) the clearance of, or (ii) the blocking of a proposed transaction as originally agreed by the merging parties and notified to the Competition Authority.

The purpose of a remedy is, through a more targeted regulatory response, to remove the anti-competitive element from a merger while also retaining the pro-competitive element.<sup>2</sup> In this way the possible use of remedies implies a degree of flexibility in merger review, i.e., to allow solutions other than unconditional clearance or blockage.

In contrast, if the only alternatives are clearance or prohibition then there will likely be a greater risk of largely beneficial mergers being blocked and/or largely harmful mergers being cleared. The flexibility and targeting afforded by the use of remedies is essential for the credibility of an effects based merger control regime such as in Ireland.

Within the context of Irish merger review the meaning and purpose of remedies can be summarised as follows:

- a remedy seeks to modify a merger notified to the Competition Authority by removing its anti-competitive elements and retaining its pro-competitive elements;

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<sup>1</sup> For the purposes of discussion “merger” includes mergers, acquisitions, joint ventures etc.

<sup>2</sup> Merger Remedies Review Project report prepared by the ICN Merger Working Group in 2005. See <http://www.internationalcompetitionnetwork.org/uploads/library/doc323.pdf>.

- remedies are applied *ex ante* to prevent harm rather than *ex post* as a corrective measure,<sup>3</sup> - consistent with competition clearance being required prior to a proposed merger being put into effect;<sup>4</sup> and
- the beneficiary of the remedy is the consumer, rather than any or all of the merging parties or their competitors.

The questions listed in the Annex to the Chairman's letter of 23 March 2011 are addressed in turn below.

### **3. Question 1: merger review process**

*What is your process for considering possible remedies that present competitive problems?*

*Are parties responsible for proposing remedies, and are they required to follow particular procedures or time lines in order to do so?*

*If your merger review system involves a 2-phase process, are there different procedures and standards for reviewing proposed remedies in the 2 phases?*

Remedies can be considered at either Phase 1 or Phase 2 of the merger review process, as described below. As discussed below, whereas there are differences between the Phase 1 and Phase 2 review processes, the standard for reviewing remedies remains the same, i.e., whether the result of the merger would be to substantially lessen competition in markets for goods or services in the State.<sup>5</sup>

#### **3.1 Two-phase merger review process**

It will be useful to first describe briefly the merger review process in Ireland before addressing specific questions about procedures and standards. The Competition Act 2002, as amended, establishes a two- phase merger review process. For an initial assessment (Phase 1), the Competition Authority must make a determination that either:

- in its opinion, the result of the merger will not be to substantially lessen competition in markets for goods or services in the State, and accordingly, that the merger may be put into effect, or
- that it intends to carry out a full (Phase 2) investigation.<sup>6</sup>

The maximum time frame for a Phase 1 decision is one month from the "appropriate date". That is, the date of the merger being notified to the Competition Authority, or the date all responses to formal

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<sup>3</sup> That is, the remedy is applied before rather than after any substantial lessening of competition and harm to consumers occurs.

<sup>4</sup> Section 19(1) of the Competition Act 2002.

<sup>5</sup> Section 20 (1)(c) of the Competition Act 2002.

<sup>6</sup> Section 21(2) of the Competition Act 2002.

requests for information have been complied with.<sup>7</sup> However, in the event of the parties proposing remedies the maximum time period is changed from one month to 45 days.<sup>8</sup>

Proceeding to a Phase 2 investigation does not in itself imply that remedies will necessarily feature in the Competition Authority's determination.<sup>9</sup> Rather, in the event of a Phase 2 investigation, the Competition Authority, on completion of its investigation, must make a determination that the merger shall:

- be put into effect, i.e., cleared; or
- not be put into effect, i.e., blocked; or,
- be put into effect subject to compliance with conditions specified by the Competition Authority, i.e., conditional clearance.<sup>10</sup>

The maximum time frame, for a Phase 2 decision is four months from the "appropriate date", irrespective of the proposals for remedies, i.e., there is no adjustment to the time frame in the event of proposals being presented by the parties during the course of the Phase 2 investigation.

### 3.2 *Remedies proposed by parties*

There is substantial scope for parties to propose remedies.<sup>11</sup> The parties have the option of proposing remedies in each of Phase 1 or Phase 2 review processes described above, after the merger has been notified to the Competition Authority.

The Competition Authority will engage in early dialogue with the merging parties about remedies, particularly where the parties themselves acknowledge that a proposed transaction is likely to raise a competition concern.

If the Competition Authority accepts proposals offered by the parties then these proposals are included in the Competition Authority's determination. Such proposals become binding on the party to whom they relate and are referred to as "commitments" under the Competition Act 2002.<sup>12</sup> These "commitments" are legally enforceable obligations on the parties involved, the breach of which is considered a criminal offence.<sup>13</sup>

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<sup>7</sup> Section 19 of the Competition Act 2002. This time frame applies regardless of whether a merger meets the thresholds in section 18(1) of the Act thus qualifying it for mandatory notification, or is voluntarily notified under section 18(3).

<sup>8</sup> Section 21(4) of the Competition Act 2002.

<sup>9</sup> For example M/10/038 – Barnett/Origin/Hall and M/10/043 - Stena/DFDS are the two most recent examples of Phase 2 investigations that did not involve remedies.

<sup>10</sup> Section 22(3) of the Competition Act 2002. Also, consistent with Section 22(6) of the Competition Act, a conditional determination also includes an additional condition that the merger be put into effect within 12 months after making the determination.

<sup>11</sup> Section 20(1)(b) and 20(3) of the Competition Act 2002.

<sup>12</sup> *Ibid*, Section 26(1).

<sup>13</sup> *Ibid*, Section 26.

In a number of cases the Competition Authority received proposals offered in Phase 1 which have been agreed to and consequently have formed the basis of, or part of the basis of, the Competition Authority's determination. Examples of such cases, within the last five years,<sup>14</sup> are as follows:

- M/10/026 - ESB / Northern Ireland Electricity plc;
- M/09/013 - Metro/Herald AM;<sup>15</sup>
- M/07/040 - Communicorp/SRH;
- M/06/098 - Premier Foods/RHM; and
- M06/010 – Dupont/Syngenta.

### **3.3 Remedies imposed by the Competition Authority**

Whereas the parties can make proposals to the Competition Authority in Phase 1 or Phase 2, the Competition Authority can only impose conditions in Phase 2.<sup>16</sup> Limiting the scope for the imposition of conditions to Phase 2 is consistent with the difference in the potential scope of conditions compared to proposals.

If and when the Competition Authority imposes a condition on the parties this implies that there would otherwise have been a substantial lessening of competition (SLC). The acceptance of proposals by the Competition Authority does not necessarily carry the same implication. That is, proposals that address competition concerns that might not result in a SLC can form the basis of, or part of the basis of, a Competition Authority's determination.<sup>17</sup> By contrast the imposition of a condition implies that there would otherwise have been (i) an SLC and (ii) that the Competition Authority would not have cleared the merger.

To date the Competition Authority has imposed conditions on at least three occasions. In all other instances where remedies have been applied, including in Phase 2 determinations, remedies have been proposed by the parties.

### **3.4 Remedy standards**

The standard required of a remedy is the same in Phase 1 and Phase 2. To be effective a remedy must restore competition to the intensity or levels of actual competition prior to the merger.

## **4. Question 2: structural and behavioural remedies**

*When crafting merger remedies, does your agency employ structural remedies?*

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<sup>14</sup> For all completed merger cases, i.e. for which the Competition Authority has made a final decision at either Phase 1 or Phase 2 see:

<http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications.aspx?page=1&completed=True&year=0>.

<sup>15</sup> In M/09/013 - Metro/Herald AM proposals were also made, and accepted, at Phase 2.

<sup>16</sup> Section 22(3) of the Competition Act 2002.

<sup>17</sup> For example in M/05/50 – eircom/Meteor eircom made a number of general commitments. See <http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications/M05050--eircom--Meteor.aspx?page=4&completed=True&year=2005>.

*Do you employ behavioural remedies or hybrid remedies?*

*How do you decide what remedy or combination of remedies best cures the competitive harm of concern?*

*Is the approach different in horizontal and vertical merger?*

#### **4.1 Structural, behavioural and hybrid remedies**

The Competition Authority has, to date, employed both structural and behavioural remedies. The Competition Authority has a preference for structural remedies as they are typically more effective, workable and imply lower monitoring costs than behavioural remedies.

The choice of remedy is not determined *a priori*. Rather, the most appropriate remedy depends on the circumstances of the specific case in which a remedy is considered necessary.

Accordingly, the Competition Authority does consider behavioural remedies in appropriate circumstances, such as where:

- an alternative structural remedy is not feasible or workable;
- an alternative structural remedy is not proportionate, i.e., would restrict pro-competitive elements of the merger in question beyond that necessary or desirable to contain the adverse SLC effect of the merger in question; and,
- where a behavioural remedy can complement and support a structural remedy such as when the merged entity's behaviour will need to be modified in order for the structural remedy to be effective.

The latter of the above three represents a hybrid remedy, i.e., where a remedy (or a set of remedies) has both structural and behavioural characteristics.

#### **4.2 Vertical merger remedies**

To date, the Competition Authority has not made a determination involving remedies, structural or behavioural, aimed at addressing vertical competitive concerns.

### **5. Question 3: structural relief and divestment**

*When seeking structural relief, under what circumstances do you require the divestiture of a stand-alone business?*

*Do you ever require the divestiture of identified assets that are not a stand-alone business?*

*Do you ever require the divestiture of intellectual property in lieu of the divestiture of a stand-alone business or a collection of physical assets?*

*When do you use each type of divestiture remedy?*

### 5.1 *Effective divestment and viable competition*

Before addressing the different types of divestment, (e.g., whole business, part of a business, more than a business, and intellectual property), it will be useful to reiterate the purpose of divestment. The purpose of divesting assets is to enable the presence of a viable long-term stand-alone competitor to the merged entity in the market or markets of concern (i.e., the markets where there is an overlap in the activities of the merging parties.)

To be effective, divestment must ensure that a purchaser of the divested assets will have both the means and the incentive to maintain the level of pre-merger competition in the market(s) of concern. This implies that the resulting stand-alone business entity must possess all the physical assets necessary for the efficient production and distribution of the relevant product. The stand-alone business (or division or subsidiary) must also have the necessary personnel, customer lists, information systems, intangible assets, and management infrastructure.

To illustrate, elements that could be part of the business to be divested include:

- tangible assets (e.g., R&D, production, distribution, sales and marketing activities);
- intangible assets (such as intellectual property rights, know-how and goodwill);
- licences, permits and authorisations by governmental organisations granted to the business;
- contracts, leases and commitments (e.g., arrangements with suppliers and customers) for the benefit of the business to be divested;
- key personnel, i.e., staff essential for the viability and competitiveness of the business; and,
- other personnel, including seconded staff and temporary employees.

The most appropriate form of divestment is not determined *a priori* but rather depends on the circumstances of the merger for which a remedy is considered necessary.

The Competition Authority seeks to identify the most proportionate remedy, e.g., the divestment necessary to enable the presence of a viable, stand-alone business. An effective divestment remedy could involve any of the following:

- divestment of an entire existing business of one of the merging parties;
- divestment of less assets than an existing business within one of the merging parties;
- divestment of more assets than an existing business within one of the merging parties; or,
- ‘mix and match’ divestment, i.e., divestment of assets from both of the merging parties.

To date, the Competition Authority has not made a determination involving either divestment of more assets than an existing business or a ‘mix and match’ divestment. Therefore, these are not discussed further.

## 5.2 *Divesting an entire business*

The divestment of an existing business is likely to be the most effective means of establishing a viable long-term competitor for the merged entity. Accordingly, to date the Competition Authority's preference has been for the divestment of an existing business that either already competes effectively on a stand-alone basis, i.e., independently of the merging parties, or will be able to compete in the near future.<sup>18</sup>

## 5.3 *Divesting less than an entire business*

Divesting less than an existing business (i.e., a 'carve-out' to divest only part of a business or a collection of assets) could also be considered in certain circumstances. For example, divestment of non-core assets (i.e., unrelated or ancillary to the affected market(s)) might not be necessary in order to alleviate SLC concerns.<sup>19</sup>

A 'carve-out' may, however, be problematic if, for example, there is uncertainty about the productive potential of the assets. In such circumstances, the Competition Authority is likely to require additional measures such as requiring the identification of a purchaser of the business or assets in order to encourage an appropriate match of the purchaser capabilities to the potential of the assets to be divested.

## 5.4 *Intellectual property*

The divestment of a business inclusive of any relevant intellectual property rights is more likely to enable the presence of a viable long-term competitor to the merged entity in the market or markets of concern. That is, a purchaser of the divested business will have both the means and the incentive to maintain the level of pre-merger competition in the market(s).<sup>20</sup>

It is less likely that licensing or assignment of intellectual property (including patents, licences and brands) will be sufficient to enable the presence of a viable long-term competitor and to ensure a purchaser will have the means and incentive to maintain the level of pre-merger competition in the market(s). For example:

- the process of granting of a license may unnecessarily delay the point at which the licensee can compete;
- licensing requires an on-going relationship with the merging parties which may allow the licensor to influence the licensee in its competitive behaviour; and
- the licensing relationship may give rise to disputes between the licensor and the licensee over the scope, terms and conditions of the license.

<sup>18</sup> This was the approach adopted in M/07/040 - Communicorp / SRH. See <http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications/M07040--Communicorp-SRH.aspx?page=4&completed=True&year=2007>.

<sup>19</sup> This was the approach adopted in M/06/098 - Premier Foods/RHM. See <http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications/M06098--Premier-Foods-RHM.aspx?page=1&completed=True&year=2006>.

<sup>20</sup> For example in M/06/098 - Premier Foods / RHM, a remedy was agreed at Phase 1 to include the divestment of intellectual property rights. See: <http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications/M06098--Premier-Foods-RHM.aspx?page=1&completed=True&year=2006>.



The Competition Authority may, however, accept licensing arrangements as an alternative to divestment. For example, a licensing arrangement might be superior to divestment in situations where divestment would impede efficient, on-going research or where a divestment would not be practically possible due to the nature of the business.

## 6. Question 4: types of behavioural remedies

*What types of behavioural remedies does your agency use?*

*In what circumstances have you used firewalls, fair dealing clauses, transparency requirements, anti-retaliation provisions or prohibitions on anticompetitive contracting practices?*

### 6.1 Example – display newspaper advertising

The Competition Authority has required behavioural remedies sometimes to support and complement structural remedies. One notable example is M/09/013 – Metro/Herald AM.<sup>21</sup>

*Metro* and *Herald AM*, two ‘free’ daily morning newspapers, were to be replaced by a single *Metro Herald* to be published by FortuneGreen. In turn FortuneGreen was a company jointly controlled by rival paid-for newspaper publishers Irish Times Limited, DMG Ireland Holdings Limited and Independent Newspapers (Ireland) Limited.

The parties submitted proposals to ensure that:

- FortuneGreen would have both the incentive and the ability to be an effective competitor in the market for display newspaper advertising in the Greater Dublin Area; and,
- the proposed transaction would not create a forum for sharing sensitive information between the shareholders of FortuneGreen (i.e., Irish Times Limited, DMG Ireland Holdings Limited and Independent Newspapers (Ireland) Limited).

The parties also agreed to appoint a non-executive Chairman to the board of FortuneGreen in order to supervise compliance with the proposals. The non-executive Chairman submits an annual written report to the Competition Authority verifying compliance with the proposals.<sup>22</sup>

## 7. Question 5: assets to be divested

*Do you have experience protecting the to-be-divested assets or businesses prior to divestiture?*

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<sup>21</sup> M/10/026 - ESB / Northern Ireland Electricity plc also imposed reporting requirements on the acquiring party in relation to the sharing of commercially sensitive information. See <http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications/ESB--Northern-Ireland-Electricity-plc.aspx?page=3&completed=True&year=2010>.

<sup>22</sup> The Directors nominated to the Board by each of the Shareholders (“Nominee Directors”) were required to not have day-to-day responsibility for the advertising function of any daily newspaper sold in the Greater Dublin area. See: <http://www.tca.ie/images/uploaded/documents/M-09-013%20Press%20Release%20-%20Competition%20Authority%20Clears%20the%20Metro%20and%20Herald%20AM%20Merger%20with%20Commitments.pdf>, and <http://www.tca.ie/images/uploaded/documents/M-09-013%20Commitments%20Metro%20and%20Herald%20Am%20Merger.pdf>.

*Have you required that assets or businesses be held separate or otherwise preserved?*

*Have you employed monitoring trustees?*

## **7.1 Commitments prior to divestment**

The Competition Authority has in a number of cases required merging parties to commit to keeping specified assets, i.e., assets or business to be divested, separate from the business retained by the parties. These commitments apply up until the Competition Authority has made a determination clearing the merger in question.

The merging parties<sup>23</sup> are required to commit to maintaining the independence, economic viability, marketability and competitiveness of the assets or business to be divested.<sup>24</sup> These commitments are an integral part of the divestiture remedy agreement and can be separated into three categories:

- maintenance of the business provisions;
- hold-separate provisions; and,
- ring-fencing provisions.

### **7.1.1 Maintenance of the business**

Where a business is to be divested, the merging parties will be required to ensure the maintenance of all assets of the business pursuant to good business practice and in the ordinary course of business. The parties are required to ensure that no decision or actions are taken which might have a significant adverse impact on the assets or business to be divested, particularly in relation to the maintenance of fixed assets, knowledge and commercial information of a confidential or proprietary nature, the customer base and the technical and commercial competence of the employees.<sup>25</sup>

The merging parties must maintain the business in the same conditions as prior to the proposed transaction. In particular, the parties must provide sufficient resources, such as capital or a line of credit, on the basis and continuation of existing business plans, exercise the same administrative and management functions, and maintain any other factors relevant for maintaining competition in the specific sector.

The commitments also have to ensure that the parties take all reasonable steps, including appropriate incentive schemes to encourage all key personnel to remain with the business, and that the parties may not solicit or move any key personnel to their remaining businesses.

### **7.1.2 Hold-separate provisions**

The merging parties should hold the business separate from its retained business and ensure that the key personnel of the business to be divested do not have any involvement with the retained businesses and vice versa.<sup>26</sup> The parties are further required to appoint a hold-separate manager with the necessary

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<sup>23</sup> The requirements apply to all merging parties, notwithstanding that the business and/or assets to be divested will come from one merging party, unless it is a 'mix and match' divestment.

<sup>24</sup> *op cit.* note 19, for example.

<sup>25</sup> *ibid.*

<sup>26</sup> *ibid.*

expertise, who will be responsible for the management of the business and the implementation of the hold-separate and ring-fencing obligations. The hold separate manager operates under the supervision of the monitoring trustee.

### 7.1.3 *Ring-fencing provisions*

In relation to information, the merging parties must ring-fence the business to be divested and take all necessary measures to ensure that the parties do not obtain any business secrets or other confidential information.<sup>27</sup>

## 7.2 *Monitoring trustees*

The Competition Authority has utilised the services of monitoring trustees for both structural and behavioural remedies. For structural remedies the role of the trustee is to monitor the sales process and to thereby ensure that divestment occurs satisfactorily and in a timely fashion.

For behavioural remedies, the role of the trustee is ongoing monitoring of the conduct of the parties (i.e., conduct after the completion of the merger). The Competition Authority may, for example, require the parties to appoint an independent chairperson or director to oversee compliance with the remedies specified in the Competition Authority's determination. The role of the trustee in this context is important since the Authority cannot, on a daily basis, be directly involved in overseeing the implementation and monitoring of the remedies specified in the Competition Authority's determination.

As discussed in Question 4, in M/09/013 – Metro/Herald AM, the parties agreed to appoint a non-executive Chairman to the board of Fortunegreen in order to supervise compliance with the commitments. The non-executive Chairman, who is the monitoring trustee in this case, submits an annual written report to the Competition Authority verifying compliance with the proposals.

Trustees should be independent of the parties, have appropriate qualifications and capacity for the task, and should not be subject to conflicts of interest. Trustees may be part of an accounting firm, management consultancy or other professional organisation.

The parties can facilitate the process if, in those cases in which it appears that appointment of a divestment trustee is likely, they have (i) investigated possibilities early in the process and (ii) have provided names to the Competition Authority for approval.

## 8. **Question 6: timely divestment and trustees**

*How do you ensure an expeditious and successful divestiture?*

*Do you require divestitures be finalised before a merger closes? If not, how quickly do you require divestiture? What happens if the divestiture has not timely occurred?*

*Do you use sales trustees? Do you insist on enhanced asset packages when sales are not timely?*

*How do you ensure that a sale to a proposed divestiture buyer and the terms of the divestiture will accomplish your remedial goals?*

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<sup>27</sup> *ibid.*

### **8.1 *Time period for implementation of proposals***

It can generally be assumed that the merging parties will, at least initially, be best positioned to facilitate a speedy divestment to an acceptable purchaser. That is, the merging parties will have the most complete information about the operation and value of the assets to be divested and will be able to communicate that information quickly to prospective buyers.

A divestment remedy will, however, introduce a viable new competitor into the affected market(s). Consequently, while having knowledge about the assets to be divested and being in a position to accurately communicate that information, the parties also have an economic incentive to delay or frustrate the divestment. Therefore, the Competition Authority will allow the parties only a limited time to implement the divestment before seeking the appointment of a divestment trustee.<sup>28</sup>

Although there is no explicit time frame for the implementation of remedies, it is implicit in the Competition Act 2002 that the maximum period for the implementation of a divestment remedy is 12 months<sup>29</sup> from the date of the Competition Authority's determination.

Within the 12 month time frame the timeliest remedies are 'fix-it-first' remedies, e.g., a divestment that must be completed prior to regulatory clearance by the Competition Authority. More generally, while the maximum period for the above process is 12 months, this does not preclude the Competition Authority requiring a shorter time frame.

Non-compliance with the terms of remedies within the maximum allowable time period is covered below in Question 7.

### **8.2 *Divestment trustee***

It may sometimes be the case that a divestment trustee is required to monitor the compliance of the merging parties, i.e., during the period between the Competition Authority's determination and completion of the divestment). Furthermore, if the parties do not succeed in finding a suitable purchaser then a divestment trustee will be appointed with an irrevocable and exclusive mandate to dispose of the business, under the supervision of the Competition Authority, and within a specific deadline to a suitable purchaser.<sup>30</sup>

### **8.3 *Example – radio advertising***

The example of M/07/040 - Communicorp/SRH illustrates the above points regarding timing and divestment trustees. Communicorp and Scottish Radio Holdings ("SRH")<sup>31</sup> both owned radio stations in Dublin City and Dublin County, and elsewhere, in Ireland.

The Competition Authority identified competition concerns in the Dublin City and Dublin County radio advertising market, particularly in relation to Communicorp-owned 98FM and SRH-owned FM104 which were very close competitors. The merging parties proposed the divestment of FM104.<sup>32</sup>

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<sup>28</sup> It is not anticipated that a new trustee would be appointed, but rather the monitoring trustee can also carry out this function.

<sup>29</sup> See Sections 19(3) and 22(6) of the Competition Act.

<sup>30</sup> The Competition Authority might even require that a divestment trustee be appointed at the outset of the divestment process.

<sup>31</sup> SRH was in turn owned by Emap plc, a UK based multi-platform media group.

The Competition Authority considered the divestment of FM104 would be an effective remedy because it:

- removed the overlap between 98FM and FM104 that would otherwise have been created; and,
- maintained the merged entity's market share for advertising in Dublin City and Dublin County at the level that prevailed prior to the merger.

The merging parties were required by the Authority to identify an up-front buyer prior to the Competition Authority clearing the merger. The parties further undertook to implement the sale either by:

- Communicorp effecting the sale within three months from the date of the Competition Authority's determination; or,
- a divestment trustee effecting the sale within a subsequent period of three months.<sup>33</sup>

In this example the divestment was completed without the need to utilise a divestment trustee.<sup>34</sup>

## **9. Question 7: remedy compliance and enforcement**

*How do you ensure that parties comply with your remedy order?*

*Do you include reporting requirements or inspection clauses in your orders?*

*Do you have staff dedicated to enforcement of remedies?*

### **9.1 Enforcement of commitments and conditional determinations**

As noted above, a "fix-it-first" approach will remove any specific requirements to ensure compliance with and implementation of remedies. That is, the merger will only be cleared by the Competition Authority once the remedy has been implemented to address competition concerns.

More generally, as also noted above, trustees can play a role to ensure a satisfactory sales process for structural remedies and to monitor the conduct of the parties for behavioural remedies.

In addition, the Competition Authority, or any other person, may seek to enforce compliance with a commitment or a conditional determination by way of injunctive relief before the Irish courts. Furthermore, the Competition Act provides that any person who, by act or omission, contravenes a provision of a commitment or a determination shall be guilty of a criminal offence.<sup>35</sup>

### **9.2 Reporting requirements/inspection clauses**

The Competition Authority monitors the progress of the divestment process through regular reporting and it supervises the relationship between the parties and the trustee, who must be independent of business to be divested, to ensure that there is full co-operation.

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<sup>32</sup> *op cit.* note 18. The determination includes a more detailed description of all the proposals.

<sup>33</sup> *ibid.*

<sup>34</sup> See [http://www.finfacts.ie/irishfinancenews/article\\_1012155.shtml](http://www.finfacts.ie/irishfinancenews/article_1012155.shtml).

<sup>35</sup> Section 26 of the Competition Act 2002.

Particularly for behavioural remedies the Competition Authority may require reporting on an ongoing basis on its compliance with the merger remedies adopted. Reporting may take the form of a compliance certificate, the format of which is agreed by the Competition Authority, and typically completed by a senior officer employed by the merging party involved.

### **9.3      *Dedicated staff***

The Competition Authority does not currently have staff dedicated to the enforcement of remedies.

## **10.      *Question 8: remedy guidance***

*Is your experience in enforcing remedies reflected in documents describing your best practices or in other guideline documents? If not, are you planning to issue guidance in the near future?*

### **10.1     *Review of merger guidelines***

The Competition Authority's "Notice in Respect of Guidelines for Merger Analysis", dated 16 December 2002, does not contain any guidance on merger remedies.

Presently, the Competition Authority is conducting a review of its merger guidelines and in its consultation document dated 3 December 2010 the Competition Authority suggested the inclusion of a discussion of remedies. It is likely that there will be some discussion of remedies including (i) a discussion of reasons why the Competition Authority might consider remedies as an alternative to blocking a merger, and also (ii) where possible, examples of Competition Authority decisions.

## **11.      *Question 9: third parties and review by courts***

*What role do third parties and the public have in commenting on proposed remedies?*

*How have your courts assessed the agencies' remedies and efforts to enforce them?*

### **11.1     *Market testing of remedies***

The Competition Authority may market test proposed remedies in order to establish whether a remedy is appropriate, proportionate and effective in addressing any competition concerns raised by a proposed merger.

For example, in M/07/040 Communicorp/SRH the merging parties submitted proposals to divest a certain business. The Competition Authority distributed (i) a non-confidential version of the proposal, and (ii) a short questionnaire to six prospective purchasers of the business to be divested. The responses received were analysed as part of the Competition Authority's decision making process and the questionnaire was included as an appendix to the Competition Authority's written determination.

### **11.2     *Review by Irish courts***

To date, the Irish courts have not been asked to assess the Competition Authority's remedies and efforts to enforce them.

## **12.      *Question 10: any other comments***

*Any other comments on other issues that arise in relation to the assessment of merger remedies.*

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No further comments.

## ISRAEL

This contribution sets forth the framework for merger remedies used by the Israeli Antitrust Authority (IAA). The first section outlines the basic features of the merger review system and offers some data concerning merger statistics. The second section illustrates the main features of the recently published merger remedies guidelines draft. The third and final section provides some examples of merger remedies from recent years.

### 1. Brief overview of merger control in Israel

Merger control constitutes an important part of the IAA's mission to prevent the formation of market power.

Mergers that cross certain **thresholds** must obtain the approval of the Director General before execution of the transaction. Merging parties must submit a merger notification, in the event that one of the following conditions exists:

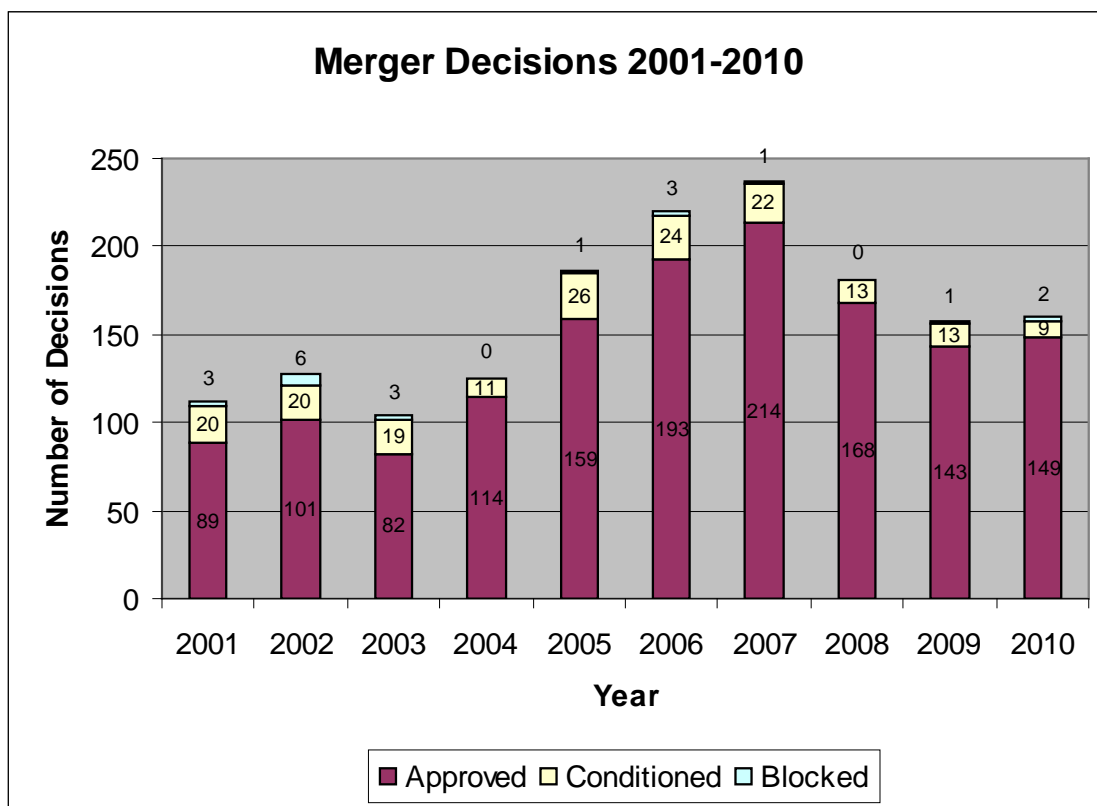
- As a result of the merger, the share of the merging companies in the relevant market is in excess of fifty percent;
- The joint sales volume of the merging companies according to their balance sheets for the year preceding the merger, is in excess of 150 million NIS; the sales volume of at least two of the merging companies is in excess of 10 million NIS each.
- One of the companies is a monopoly.

The Director General has the power to block a merger if the merger raises a reasonable concern of substantial harm to competition or the public. He can clear the transaction or approve it under conditions. The Director General's decision is subject to an appeal to the Antitrust Tribunal. The Antitrust Law sets a review period of thirty days, during which the Director General is required to reach a decision. The period can be extended by the Antitrust Tribunal or when the consent of the merging parties is granted. If the IAA does not decide within the prescribed time period, the merger is deemed to be compatible with the law. The moment the IAA receives a merger notification, it is classified by the Chief Economist by the degree of preliminary concern regarding the competitive issues that are raised ("green," "yellow" and "red," respectively).

The following table and graph describes the type of decisions in merger filings since 2001:

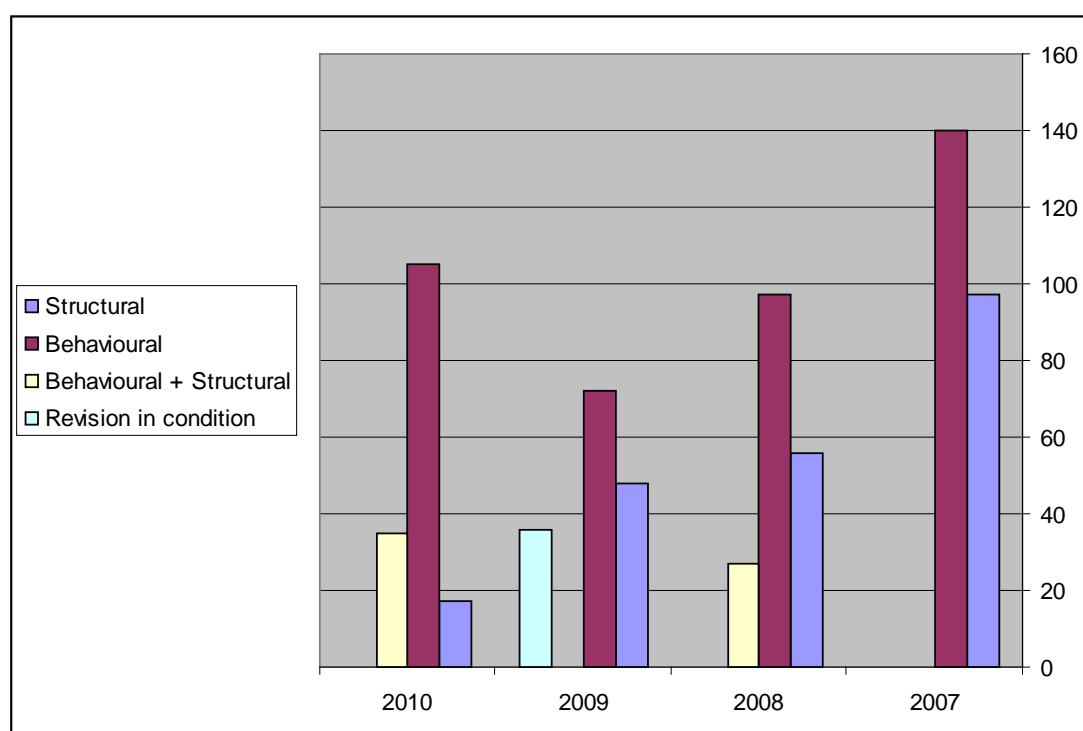


	Decisions	Approved	Conditioned	Blocked
2001	112	89	20	3
2002	127	101	20	6
2003	104	82	19	3
2004	125	114	11	0
2005	194	159	26	1
2006	219	193	24	3
2007	237	214	22	1
2008	181	168	13	0
2009	157	143	13	1
2010	160	149	9	2



The following table and graph illustrates the percentage breakdown of the remedies used with respect to conditioned mergers:

Total Conditioned Mergers			
	Structural	Behavioural	Behavioural + Structural
2007	97	140	
2008	56	97	27
2009	48	72	
2010	17	105	35



## 2. Draft guidelines for remedies in mergers

On January 23<sup>rd</sup> 2011 the IAA published its draft guidelines for remedies in mergers.

The draft guidelines for merger remedies are another addition to a body of policy guidelines issued by the IAA in an effort to enhance the overall level of transparency and legal certainty with respect to the IAA's policy and decision making process.

The draft guidelines for remedies in mergers address a broad spectrum of situations, however, it should be noted that the IAA takes into account the unique circumstances of each case under discussion – the parties to the merger, the nature of competition in the relevant markets, barriers to entry and above all, the particular competitive concerns that are raised by the merger.

The main features of the draft guidelines can be summarized as follows:

### 2.1 *The basic purpose of remedies*

The basic purpose of remedies is to prevent the reasonable concern of substantial harm to competition caused by the merger. The IAA aims at fulfilling this purpose while taking into consideration the principle of proportionality. Generally, the purpose of the remedies is not to increase competition in the market or to promote competition in markets that have no connection to the merger.

### 2.2 *General considerations for imposing a remedy*

When choosing a suitable remedy for a merger that creates a reasonable concern of substantial harm to competition, the Director General takes the following non exhaustive set of principles, into consideration:

- Remedies should address specific anti competitive concerns;
- Remedies must be enforceable and should allow for effective supervision over the merging parties' compliance.
- The design of remedies should seek to minimize monitoring costs.
- Remedies should be tailored to address the competitive concerns in a timely manner.
- Remedies must be feasible in the sense that parties should have the ability to comply.

### 2.3 *Structural and behavioural remedies*

Structural remedies deal with market structure. Mergers that might substantially harm competition usually do so due to the structural change they impose on the market. Structural conditions are designed to solve the root of the problem. Behavioural remedies, on the other hand, deal with anti-competitive behaviour resulting from a change in market structure and therefore only address the symptoms of the anti-competitive concern that arises from the merger. Accordingly, the IAA sees a clear advantage in using structural remedies over behavioural ones; there are exceptional circumstances where behavioural remedies may be appropriate, however.

#### 2.3.1 *Structural remedies*

There are two key structural remedies: first, objecting to the merger, which prevents, *ab initio*, the change in the market's structure; and second, asset divestiture, meaning a requirement that the merging companies are required to sell one or more of their assets when the continued control of such assets creates a competitive concern due to the merger.

#### 2.3.2 *Asset divestiture*

There are a number of considerations the IAA takes into account regarding the scope of the assets being sold under asset divestiture. First, the scope of assets to be sold must eliminate the reasonable concern of substantial harm to competition caused by the merger. Second, each asset sold must be accompanied by all additional assets required in order to maintain its competitive viability. Finally, the sale of an independent economic entity is preferred over the sale of specific asset.

#### Criteria for asset divestiture

The IAA determined criteria for asset divestiture. The main criteria are the timeline set for the asset divestiture, the competitive use of the asset and the approval of the buyer. The asset should be sold in a short period of time, generally not more than several months and not more than one year. The exact duration which is announced for the sale needs to be determined after considering the circumstances of each case. Furthermore, from the buyer's perspective, the asset must be acquired in order to make competitive use of it. All buyers of divested assets must be approved by the IAA.

#### Asset divestiture process

During the period of time between the approval of the merger and the actual divestiture, the merged companies retain a set of assets, the combination of which creates the competitive concern. This can give rise to three difficulties. First, during the period itself, the feared harm to competition may take place. Second, the merging companies may degrade the competitive viability of the asset that will be sold in the

future, thereby lessening the competitive pressure they will face after the sale, or even frustrating the entire divestiture process. Finally, an objective doubt may arise regarding the ability to sell the asset, either in general or during the prescribed period of time. When the potential for the occurrence of at least one of the above-mentioned scenarios is high, the IAA will insist on the assets being divested before the merger takes place. In other cases the asset divestiture may take place after the merger and the merging companies may sell the asset, in compliance with the criteria described above. If the sale does not take place, the right and duty to sell the asset is transferred to a trustee.

#### Divestiture trustees

The divestiture trustee will be chosen by the Director General from a list proposed by the asset's owner. The list of trustees will not include individuals that have past or present relationships with any person related to the merging parties. The trustee will act independently of the merging parties, and should not receive any instructions or advice from them. The divestiture trustee needs to have at least 10 years of proven experience in transactions of a similar scale. Her compensation will be determined in advance, and will not depend on the amount received in the asset divestiture. She is obligated to divest the asset as promptly as possible within a pre-determined timeline.

#### 2.3.2 *Behavioural remedies*

As mentioned above, behavioural remedies focus on treatment of the symptoms created by the change in market structure, rather than addressing the market structure itself. Behavioural remedies may be used in a number of scenarios: When the merger has been approved subject to structural or quasi-structural (discussed below) conditions, the implementation of such conditions may necessitate a restriction with respect to various types of behaviour by the merging companies, in order to enable or ease the execution of the structural condition; When the anti-competitive concern created by the merger involves a specific behaviour – one which can be determined and defined accurately in advance and is easily identifiable by third parties; When a competitive concern, despite the fact that its severity justifies the IAA's intervention, is expected to be diminished within a relatively short period of time, in which case behavioural remedies may be used for a short duration. In the event that the failing firm doctrine is invoked, when structural conditions cannot allay all the competitive concerns, and there are behavioural conditions that may solve the problem, those conditions may apply. In some unique and rare cases, when structural remedies other than blocking the merger are unavailable, behavioural remedies might be considered more openly. This option will be considered carefully, however, in light of the principles laid out above.

#### 2.3.3 *Quasi-structural remedies*

Within the range that exists between structural and behavioural remedies, there are also combined remedies which are termed here as quasi-structural. The advantage of using quasi-structural remedies, as opposed to behavioural remedies, is that that the former involve a specific action, lack complexity and do not require long-term supervision and monitoring. Quasi-structural remedies include transfer of information, for example the revealing of manufacture formulas and the use of legal rights, for example altering legal agreements. Such remedies may apply when the competitive concern raised by a merger is created as a result of the legal rights that are held by parties to the merger.

### **3. Application of remedies in merger cases**

On average, the IAA imposes remedies in approximately 10% of its merger decisions. The following examples illustrate various remedies that were used by the IAA in recent years:

### **3.1 Remedies in Terraflex - Kafrit merger (Plastic Industry)**

In May 2008 the IAA approved, subject to conditions, a merger between Terraflex Compounds (1994) Ltd. (“Terraflex”) and Kafrit Industries (“Kafrit”) (1993) Ltd., two key manufacturers of PVC, which serves as a raw material for the rubber and plastic industries.

This merger is both horizontal and vertical. The first condition is a quasi-structural remedy addressing the vertical concerns and the two latter conditions are behavioural remedies that address the horizontal concerns as summarized below:

1. Instruction to disclose formulas for plastic compound mixtures

The merging parties would have to reveal their formulas for plastic compounds to their clients. Specifically, Kafrit is obliged to transfer the formulas used to produce the mixtures for its customers to a trustee. Kafrit's customers would be entitled to receive the formulas for the products which they acquired from Kafrit for 15 months from the closing of the transaction.

2. Obligation to supply goods under current commercial conditions for 15 months following the approval of the merger

Terraflex is obliged to supply its customers and Kafrit's customers its entire range of current products, which was sold by both companies prior to the merger, in current commercial conditions (except for adjustment to raw materials prices) for a period of 15 months following the merger.

3. Prohibition to discriminate among buyers and unreasonably refuse to supply

Terraflex may not set different conditions for similar transactions to supply its products, with respect to prices, discounts, quality, payment requirements, product availability, supply time etc.

The first condition was designed to lower switching costs and prevent a situation in which Kafrit customers would be confined to the merged company. The merging parties own intellectual property rights in plastic compounds formulas. Access to these formulas significantly lowers switching costs and reduces barriers to entry. Disclosure of the formulas is a substantive condition intended to facilitate transfer of customers to other suppliers who could use the original formulas to manufacture mixtures. Likewise, disclosure of formulas enhances the prospects of new entrants to the market, since it eliminates the costs of developing new formulas. Subsequently, this condition addresses the concern over abuse of market power by the merged company.

The second condition grants the other companies in the market an adjustment period, following the structural change in the market, to assess their possibilities to engage with alternative suppliers, in Israel and abroad, or to form their own production line for plastic compounds mixtures.

The third condition addresses the concern in the vertical aspect that Terraflex might act against its competitors in the plastic industry by narrowing their access to raw materials.

Terraflex appealed the IAA's decision to conditionally approve the merger to the Antitrust Tribunal, and it asked the Tribunal to order a stay of the implementation of the IAA's decision, such that the merger could not be carried out until the Tribunal decides the appeal. In particular, Terraflex objected to the release of the formulas on the ground that this condition makes the merger transaction not economically viable.

In August 2008, the Tribunal accepted the IAA's position and rejected Terraflex' procedural, administrative and substantive arguments. Terraflex appealed the Tribunal's decision to the Supreme Court where the case is being heard.

### **3.2 Remedies in Scailex - Partner merger (Telecommunications)**

In September 2009 the IAA approved, subject to conditions, a merger between the two telecommunication companies Scailex and Partner.

Scailex, imports mobile phones, mainly from Samsung Electronics, and distributes them through a chain of stores under the brand name "Dinamica". Prior to the merger, Dinamica had a distribution agreement with Cellcom, Israel's largest mobile phone provider.

Partner, is Israel's second largest mobile phone provider, operating under the "Orange" brand name.

The IAA approved the merger with the condition that Scailex will either sell the Dinamica chain (structural remedy), or end its agreement with Cellcom (quasi-structural remedy).

The reasoning behind the conditions that were imposed stems from the following competitive concerns: the Israeli mobile phone provider market is an oligopoly with only three providers, Orange, Cellcom and Pelephone. Since Cellcom had a distribution contract with Dinamica, a merger between Partner and Dinamica would provide Partner with information on transactions of its largest competitor. In an oligopolistic market, such interdependence may support the companies' ability to co-ordinate.

### **3.3 Remedies in Electra – Mini Line merger (household appliances and electronics)**

In June 2010, the IAA received a merger notification from Electra Consumer Products Ltd (Electra) and Mini Line Ltd.

The parties have three core businesses: import, marketing, and sale of household appliances and electronics. Each has its own retail chains that specialize in selling household appliances and electronics.

Electra is the exclusive importer of appliances from Philips, Liebherr, Sauter and Miele. Mini Line is the exclusive importer of appliances from Sweden's Electrolux AB and South Korea's Samsung Electronics Co. Ltd.

The IAA found that a merger between the parties might lead to significant harm to competition since the parties may acquire market power in retail sale of household appliances and electronics.

Under these circumstances, the IAA was prepared to approve the merger with the condition that Electra would divest one of its retail chain stores to a third party which is not affiliated with the merging parties. However, the merging parties decided to withdraw the merger notification and announced on 22 November 2011 that the transaction was annulled.

### **3.4 Remedies in El Al – Knafayim merger (airline sector)**

In August 2004 the IAA approved, with conditions, a merger in the airline sector between Knafaim Holdings Limited (Knafaim) and El Al Israel Airlines Ltd.

Knafaim is an Israel-based tourism and air transport services company. Knafaim operates, through its subsidiaries, domestic flights and international charter flights. Knafaim also leases planes and provides maintenance services for airplanes and runways in Israel. Knafaim's domestic flights' destinations include

Eilat, Tel Aviv, Haifa, Ben Gurion Airport and the Rosh-Pina Airport. In addition, in the period relevant to the merger, Knafaim's subsidiary, Arkia, acted as a charter company and operated international flights in the Mediterranean region and Europe, and scheduled flights to Georgia and Uzbekistan.

El-Al is an Israeli airline which operates domestic and international flights from Israel. Services include commercial flight services, charter flights and cargo. Further activities include the provision of catering services to its own and leased aircraft, check-in services, such as at arrival and departure desks, cargo handling, security services and maintenance services for its own flight carriers, as well as for other companies.

The IAA's concerns with respect to the merger had to do with the risk that the merging parties would gain and abuse their market power in the passenger flight market to several of their destinations. The IAA found that the merger might also affect the cargo market and the market for airport ground services. Due to these concerns the IAA conditioned its approval of the merger on Knafayim divesting all its airline activity.

## ITALY

### 1. Introduction

The Italian merger review system envisages the possibility of clearing a merger with remedies. In the practice of the Italian Competition Authority, in fact, closing a Phase II merger case with remedies is not unusual, provided that the remedies eliminate the threat to competition stemming from the merger.

This contribution presents an overview of remedies in merger cases in Italy and it contains two sections. The first one provides an overview of the rules and procedures in Italian Competition law with respect to remedies in merger cases. The second contains some data on merger remedies decisions adopted by the Italian Competition Authority in the last ten years, outlining the most interesting features of the cases.

### 2. Process for considering mergers remedies in the Italian Competition Law

The Italian Competition Law (Law n. 287/90) provides the possibility of clearing a merger with remedies aimed at addressing the competition concerns stemming from the merger. Pursuant to the Law: i) the parties may offer commitments that offset the competitive concerns raised by a merger; ii) the Italian Competition Authority can impose remedies, even in those cases where the parties did not offer any.

Remedies typically form part of the decision and represent formal obligations and conditions that the merging parties have to agree to as part of the merger control process.

#### 2.1 *Legal framework*

The Italian merger review system envisages two phases. During Phase I, lasting 30 days, the ICA evaluate the competition effects of the operations. If the merger does not raise competitive concerns it can then be cleared with an authorization. If the Authority considers that a merger may be subject to prohibition, it shall commence a Phase II in depth investigation that lasts 45 days.

Pursuant to article 6 of Law n. 287/90 at the end of the Phase II investigation the Authority shall either prohibit the merger, or clear it with measures aimed at preventing its anticompetitive effects.<sup>1</sup>

Furthermore article 18 (2) of the Law establishes that an authorization decision may be adopted, on request of the parties, after they have proved the elimination of any element which allegedly disrupted competition from the original project. Even when remedies are proposed by undertakings, the ICA may impose integrative or different measures if those proposed by the parties appear insufficient to remove the competition issues. This happened in a number of cases.<sup>2</sup>

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<sup>1</sup> The rules on the antitrust control of concentrations are outlined in Law n. 287 of 10 October 1990, in particular in articles 5 to 7 and 16 to 19.

<sup>2</sup> In case C5422B, SAI-Società Assicuratrice Industriale / La Fondiaria Assicurazioni, decision no. 11475 of 17 December 2002, Bulletin no. 51-52 /2000, the AGCM imposed integrative measures, considering those offered by the parties as unable to remove the antitrust concerns stemming from the merger. The same



Although at both stages of the proceedings the Italian Authority may point out to the notifying parties the competitive concerns raised by the merger, binding remedies are only available in Phase II under Italian law. Commitments voluntarily adopted by the parties in Phase I are not binding and in the case of violation the ICA may only consider that the factual scenario on which it based its clearance decision has changed and, accordingly, that the transaction that was cleared was different from the one actually implemented.<sup>3</sup> This means that Phase I commitments have been very rare and must be clear-cut for the ICA to take them into consideration.<sup>4</sup>

## 2.2 Procedure

Although the Italian Competition Law does not expressly provide for any specific procedure with reference to merger clearance, it is possible to identify a standard procedure adopted by the Italian Competition Authority. As for the substantive assessment of remedies, the ICA has not adopted guidelines but it relies upon the principles laid down by the European Commission in its 2008 Commitments Notice.<sup>5</sup>

During Phase II, the parties usually meet the “case team” in informal hearings in order to discuss possible commitments. The ICA may ask for, or the parties propose, structural undertakings such as the sale or divestment of a part of their business or the transfer of a trademark, or behavioural undertakings aimed at maintaining an effective degree of competition on the market.

The parties may also decide not to offer commitments. In this case, the ICA may impose remedies in its final decision.<sup>6</sup> The adoption of measures imposed by the authority aimed at preventing the anticompetitive effects of mergers may be received in different ways from undertakings, which in most cases have complied with the imposed remedies, in some cases have abandoned the operation<sup>7</sup> and in some cases have challenged the ICA in Court.<sup>8</sup>

## 2.3 Time framework for assessing remedies

There is no express deadline for the presentation of commitments in the course of a merger review proceeding. The commitments can formally be submitted by the parties at any moment in time during the

happened in case C3818, Edizione Holding / Autostrade – Concessioni e Costruzioni Autostrade, decision no. 8090 of 2 March 2000, Bulletin no. 9/2000; in case C7065, Cassa Depositi e prestiti / Trasmissione elettricità rete nazionale-Gestore della rete di trasmissione nazionale, decision no. 14542 of 4 August 2005, Bulletin no. 29/2005; and in case C4158, Seat Pagine Gialle/Cecchi Gori Communications, decision no. 9142 of 23 January 2001, Bulletin no. 3/2001.

<sup>3</sup> In this case the Authority might reopen a proceeding to assess the merger but it cannot impose fines for the violation of the commitments.

<sup>4</sup> For example, in case C9738 Groupe Adeo/Castorama Italia, decision no. 19481 of 29 January 2009, Bulletin no. 6/2009, the ICA approved the transaction only after Adeo committed to a number of significant structural remedies in phase I.

<sup>5</sup> European Commission, *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004*, no. 2008/C 267/01.

<sup>6</sup> See Italian Competition Authority, C7951, Generali/Toro Assicurazioni, decision no. 16173 of 4 December 2006, Bulletin n. 47/2006. In this case the parties did not offer any commitments but the ICA authorized the transactions subject to certain conditions.

<sup>7</sup> Italian Competition Authority, case C5109 Groupe Canal+/ Stream, decision no. 10716 of 13 May 2002, Bulletin no. 19/2002.

<sup>8</sup> Italian Competition Authority, case C4438 ENEL-France Telecom/New Wind, decision no. 9268 of 28 February 2001, Bulletin no. 8/2001.

45 days of Phase II. Besides, the Phase II deadline for a decision may be extended by up to 30 days in case the undertakings do not provide the information and data at their disposal that are requested to them.

Although this is not provided for by the Law, the ICA usually sends a Statement of Objections (SO) to the parties in relation to mergers in Phase II. In this case, the parties are asked to submit any comments and/or commitments or additional commitments within the timeframe established by the ICA. A formal hearing normally occurs before the deadline set for the end of the proceedings. This may also allow the parties to formally offer commitments after having received the SO, although the timeframe for the submission becomes very tight in such a case.<sup>9</sup>

#### **2.4 Market tests**

The very tight time framework for the assessment of mergers does not allow the ICA to conduct a formal market test on remedies.

However, interested third parties can be admitted to take part in the proceeding if they present a reasonable request, and are, therefore, in the position to make comments on the commitments proposed by the parties. The Authority can rely on these comments when assessing the remedies.

#### **2.5 Implementation of merger remedies**

The ICA monitors the commitments' implementation. Generally, the parties are requested to send to the ICA periodical reports on the state of implementation of the measures. With reference to divestiture measures, the ICA can fix, in the decision, a number of characteristics the buyer should have and, consequently, approves the purchaser of each divested asset. However, in Italy there are no guidelines regarding trustee appointments.

In case of non compliance with the decision authorising a merger subject to conditions, the transaction should be considered as a prohibited merger and the parties be subject to the same fines provided for by the Law in case of implementation of a prohibited merger according to Art 19 of the Competition Act.

### **3. Merger remedies cases in Italy**

Between 2000 and 2010 the Italian Competition Authority opened 46 Phase II investigations. Of these, 22 were cleared subject to remedies and 7 were prohibited, a fact which underlines the relative importance of remedies in Italian merger control.<sup>10</sup>

As a general principle in adopting merger remedies decisions, the Italian Authority will consider remedies only if a threat to competition has been identified in the merger. Remedies will then be assessed in their capacity to address the competition concerns raised by the merger.

<sup>9</sup> In case C8939, Intesa San Paolo/ Cassa di risparmio di Firenze, decision no. 17859 of 17 January 2008, Bulletin no. 2/2008, the commitments were presented a few days before the SO. In case C8251, BS Investimenti SGR/Securcontrol, decision 16678 of 18 April 2007, Bulletin no. 14/2007, the commitments were submitted a few days after the SO and 6 days before the issue of the decision. In case C2741, Italcalsestruzzi / Calcestruzzi, decision no. 16173 of 4 December 2006, Bulletin no. 47/2006, the parties offered certain commitments and modified them in the course of the proceedings. The last modified version of the commitments was given to the ICA the day before the decision, that finally cleared the transaction by accepting those modified commitments.

<sup>10</sup> In the remaining 17 cases the mergers were either authorized without remedies after the investigation, or abandoned by the parties in view of the likely prohibition by the ICA.

The Italian Competition Authority generally recognizes that, since mergers lead to structural, permanent changes in the market, a structural remedy will frequently be the most appropriate solution where the merger causes competition concerns. Structural remedies are more effective and easier to administer because they do not require ongoing monitoring by the Authority.<sup>11</sup> This preference for non transitory remedies of a structural nature has also been stressed in judicial review decisions by the Administrative Courts.<sup>12</sup>

Accordingly, most of the merger remedies cases assessed by the Authority in the last ten years involved structural remedies. However, structural remedies have often been used in combination with behavioural ones in a relevant number of cases<sup>13</sup> while the adoption of behavioural remedies was limited to those cases where a divestiture could compromise the completion of the merger.

### 3.1 *Behavioural remedies*

The *Edizione Holding/Autostrade* case provides a good example of the difficulties associated with monitoring compliance of behavioural remedies, implying sometimes a need to reassess the case and long lasting litigation.<sup>14</sup>

In January 2000 the ICA had opened an investigation into the acquisition of a controlling interest in Autostrade (the company in charge of the motorways management) by Edizione Holding, a company operating in various markets, including the motorway catering market through its subsidiary Autogrill. In the ICA's view, the concentration could reinforce Autogrill's dominant position: the ICA considered that even if the catering services were allocated by public tender, those tenders could not be regular if privileged information were available to companies belonging to the same holding company. In March 2000 the ICA authorized the merger on condition that i) Autostrade would not directly supply catering services, but always entrusted them to third parties through competitive tenders; ii) that Autostrade entrusted the management of the tenders to third parties; iii) that the share of motorway catering points entrusted directly or indirectly to Autogrill (72%) would not increase.

In November 2004 the Authority completed an investigation concerning Edizione Holding's failure to comply with the conditions set for the authorization of the merger: the Authority found that the tender procedures initiated by Autostrade in October 2003 were organized so as to advantage Autogrill. During the investigation Edizione Holding cancelled 18 completed tenders. The other tenders not yet completed were held under different rules. The Authority imposed a fine on Edizione Holding of €6.79 million, equal to 1.2% of the company's turnover.

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<sup>11</sup> The Italian Competition Authority has often indicated in its decision that, whenever possible, structural remedies are preferred, in consideration with the difficulties in monitoring compliance to behavioural remedies. See case C5838 Telecom Italia/ Megabeam Italia, decision no. 12319 of 7 August 2003, Bulletin no. 32/2003.

<sup>12</sup> See Council of State, case Cassa Depositi e Prestiti vs. ICA, decision no. 550 of January 2007.

<sup>13</sup> Three cases were cleared exclusively with structural remedies between 2000 and 2011. C7951 (Assicurazioni Generali/Toro assicurazioni); C7667 (Alitalia/Volare) an C8939 Intesa Sanpaolo/Cassa di Risparmio di Firenze.

<sup>14</sup> Case C3818, Edizione Holding / Autostrade – Concessioni e Costruzioni Autostrade, decision no. 8090 of 2 March 2000, Bulletin no. 9/2000.

### 3.2 *Structural remedies*

The most common structural remedy is divestiture (of a business, shareholding, business unit or package of assets). In addition, with reference to divestiture remedies, ancillary tools are often used to ensure the viability of the assets to be divested, their timely sale and their most effective use in order to guarantee the stability of the pre-merger level of competition. However, cases solved through the adoption of structural remedies have implied a variety of measures and the cases reported below provide some examples.

In July 2006 the ICA gave its conditional approval for the acquisition by Alitalia of Volare, a company providing domestic and international passenger transport services by means of scheduled and chartered flights.

The ICA authorised the concentration subject to the fulfilment of several conditions aimed at preventing the establishment or strengthening of a dominant position by Alitalia. In particular, the Authority ordered that two pairs of slots on the Linate-Paris route be given to airlines other than Alitalia or associated companies or companies belonging to the *Sky Team* alliance, already operating on the route in question. The ICA also imposed to Alitalia to give up two pairs of domestic slots on the Linate-Bari and Linate-Lamezia Terme routes.<sup>15</sup>

In December 2006, the ICA completed its investigation and authorised the takeover of Toro Assicurazioni by Assicurazioni Generali subject to a number of conditions. The ICA concluded that the merger was likely to lead to the creation or strengthening of a collective dominant position in non-life insurance markets and in particular, the motor vehicle insurance market. In order to significantly reduce the increase in market share in non-life insurance, the ICA imposed Generali to divest a company of the group in favour a third party, independent of Generali and with a 2005 premium income in the automobile insurance markets (third-party and vehicle insurance) lower than the Toro's one (to prevent a significant growth in the degree of concentration in that market).<sup>16</sup>

In 2008 the ICA cleared the acquisition of Cassa di Risparmio di Firenze by Intesa San Paolo, subject to the divestiture of 29 branches in La Spezia, Terni and Pistoia. Moreover, Intesa Sanpaolo was imposed to divest its entire shareholding in the financial service company Agos, a joint venture with Credit Agricole in the consumer credit market and to remove the directors of Agos who had been appointed by Intesa Sanpaolo.<sup>17</sup>

### 3.3 *Mixed remedies*

In the last few years most of the Phase II mergers assessed by the Italian Competition Authority were in the banking sector. When competitive effects on the local markets emerged, they were generally solved through measures involving divestment of local branches. Competitive concerns involving the structure of corporate governance that might lead to collusive outcomes (such as interlocking directorates) were also tackled through conditions concerning structural and personal ties between competitors.

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<sup>15</sup> Italian Competition Authority, case C7667, Alitalia/Volare, decision no. 15666 of 5 June 2006, Bulletin no. 26/2006.

<sup>16</sup> Italian Competition Authority, C7951, Generali/Toro Assicurazioni, decision no. 16173 of 4 December 2006, Bulletin n. 47/2006.

<sup>17</sup> Italian Competition Authority, case C8939, Intesa San Paolo/ Cassa di risparmio di Firenze, decision no. 17859 of 17 January 2008, Bulletin no. 2/2008.

This leads to the application of a mixture of structural and behavioural remedies, that focused attention on the structural and personal links between competitors, as well as the level of market concentration shared by the merging entities. The ICA found solutions short of prohibition and involving divestiture remedies, typically cession of branches. Moreover, since the Italian experience showed that the process of reallocation created a complex web of inter-locking directorships, in approving further consolidation the ICA imposed measures to safeguard independence, and in some cases, required merging parties to exit from existing alliances.<sup>18</sup>

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<sup>18</sup> See, among others, C8277 BANCHE POPOLARI UNITE – BANCA LOMBARDA E PIEMONTESE AGCM, provv. n. 16673, 12/04/2007, C8277, Boll. 13/07 and C9182 - BANCA MONTE DEI PASCHI DI SIENA/BANCA ANTONVENETA AGCM, provv. n. 18327, 07/05/2008, C9182, Boll. 18/08.

## APPENDIX

## ITALY : MERGER REMEDIES CASES 2000-2011

Year	Structural remedies	Behavioural remedies	Mixed remedies
2000		C3818 (Edizione Holding/Autostrade)	C3932 (Telecom Italia/SEAT Pagine Gialle)
2001	C4438 (Enel-France Telecom/New Wind)	C4158 (SEAT Pagine Gialle/ Cecchi Gori Communications)	
2002		C5422B (Società Assicuratrice Industriale/ La Fondiaria Assicurazioni)	C5109 (Groupe Canal+/Stream) C5151 (Società esercizi commerciali industriali– S.e.c.i.–Co.Pro.B.–Finbieticola/Erdidania)
2003		C6133 (British American Tobacco/Ente Tabacchi Italiani)	C5838 (Telecom Italia/Megabeam Italia)
2004	N/A	N/A	N/A
2005			C7065 (Cassa depositi e prestiti/Trasmissione elettricità rete nazionale– Gestore della rete) C6941 (Koninklijke numico/Mellin) C5151B (Società esercizi commerciali industriali–S.e.c.i.–Co.Pro.B.– Finbieticola/Eribrand)
2006	C7951 (Assicurazioni Generali/Toro assicurazioni) C7667 (Alitalia/Volare)		C8027 (Banca Intesa/San Paolo IMI)
2007			C8190 (Società per i Servizi Bancari–SSB/ Società interbancaria per l'automazione– Cedborsa) C8251 (B Investimenti SGR/Securcontrol (Macerata) – Securcontrol (Ascoli Piceno) – Metropol security service) C8277 (Banche Popolari Unite/Banca lombarda e piemontese) C8660 (Unicredito Italiano/Capitalia)
2008	C8939 (Intesa Sanpaolo/Cassa di Risparmio di Firenze)		C9182 (Banca Monte dei Paschi di Siena/ Banca Antonveneta)
2009			C9817 (Istituto centrale delle banche popolari Italiane/SI Holding)
2010	N/A	N/A	N/A



## JAPAN

### 1. Introduction

In Japan, it is necessary to notify the Japan Fair Trade Commission (hereinafter referred to as “the JFTC”) of mergers that fall under certain requirements by 30 days before the implementation of such mergers. If the effect of a merger may be substantially to restrain competition in a particular field of trade, the merger in question shall be prohibited. (Articles 10, 15, 15-2, 15-3, and 16 of the Antimonopoly Act, hereinafter referred to as the “AMA”.) Furthermore, the JFTC may, pursuant to the procedures provided in the AMA, order the party in question to dispose of all or some of its shares, transfer a part of its business or take any other measures necessary to eliminate such acts in violation of the AMA (Article 17-2 of the AMA).

On the other hand, even though the effect of a merger may be substantially to restrain competition in a particular field of trade, such restraint may be remedied by certain appropriate measures taken by the party concerned. In response to the remedies proposed by the party, the JFTC will allow the merger when the JFTC concludes that the effect of the merger may not be substantially to restrain competition in a particular field of trade on condition that the proposed remedies are implemented.

The JFTC explains the basic principles of the remedies in the “Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combinations<sup>1</sup>”(JFTC, 31 May 2004) and introduces on the JFTC’s website merger cases in which the JFTC determined that the mergers have no competition concerns conditional on the implementation of remedies. In the following, we will introduce the basic framework of the remedies and past cases with remedies.

### 2. Basic principles of remedies

Appropriate remedies should be considered based on the facts of individual cases. However, the remedies should, in principle, be structural measures such as the transfer of business and should basically be those that restore competition lost as a result of the merger in order to prevent the merging party from controlling the price and other factors to a certain extent. However, in a market featuring a rapidly changing market structure through technological innovations, there may be cases where it is appropriate to take certain types of behavioral measures.

In addition, the remedies should be completed before the implementation of the merger in principle.

Even if the remedies are to be taken without fail after the implementation of the merger, then an appropriate and definite deadline for the remedies should be imposed. Moreover, to transfer all or part of the businesses as remedies, for example, it is desirable to select the transferee of the business in advance of the merger. Otherwise, the parties may be required to obtain permission in advance from the JFTC with respect to the transferee.

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<sup>1</sup> [http://www.jftc.go.jp/en/legislation\\_guidelines/ama/pdf/RevisedMergerGuidelines.pdf](http://www.jftc.go.jp/en/legislation_guidelines/ama/pdf/RevisedMergerGuidelines.pdf) (English version)



Based on a request from the party, when the necessity of continuing the remedies is assessed in light of changes in the competitive conditions after the merger, if it is determined that the effect of the merger may not be substantially to restrain competition, the party is sometimes permitted to change or terminate the remedies.

### **3. Types of remedies**

Typical remedies are illustrated as follows. To make the remedies appropriate, measures are taken independently or in combination.

#### **3.1 *Transfer of business, etc.***

The most effective measures to solve issues of substantial restraint of competition by the mergers are to establish new independent competitors, or to strengthen existing competitors so that they serve as an effective competitive constraint.

Such measures include a transfer of all or part of the business of the merging party or a dissolution of the merger (such as the disposition of voting rights, reduction in the percentage of voting rights held or termination of interlocking directorates in another company) and a dissolution of business alliances with a third party.

When, as an exceptional example, it is difficult, because of declining demand, to find a transferee to take over all or part of the company group's business (for example, a production, sales or development division), and research and development or services such as the improvement of goods in response to user requests are of less importance because the goods are in the stage of maturity, effective remedies may involve giving competitors trading rights at a price equivalent to the production cost of the goods (in other words, to make long-term supply agreements).

#### **3.2 *Others***

##### **3.2.1 *Measures to promote imports and market entry***

When the transfer of a business could not be taken as a remedy because demand is declining and it is expected to be difficult to find a company to take over all or part of the company group's business, promoting import or market entry can be considered as extraordinary remedial measures to solve the problems of the substantial restraint of competition in a particular field of trade.

For example, when the merging party holds storage facilities or distribution service divisions required for imports, the problems of the substantial restraint of competition in the particular field of trade would be solved by encouraging imports by means of making such facilities available to importers. Alternatively, the problem of a merger substantially restraining competition in a particular field of trade could be resolved by granting licenses to the party's patents under appropriate conditions to competitors or new market entrants at their request.

##### **3.2.2 *Measures concerning behavior of the party***

In addition to the cases in 3.1 and 3.2 A. above, measures concerning the behavior of the party could be considered measures to resolve the problem of the substantial restraint of competition in the particular field of trade.

For example, when, in a merger, goods are produced by the joint investment company but are sold by the respective investing companies, the problems of the substantial restraint of competition in a particular

field of trade are solved by measures that make it possible to block the exchange of information on sales of the goods between the investing companies and between each investing company and the joint investment company and by measures that ensure their independence, for example through a prohibition on the joint procurement of materials.<sup>2</sup> The problems of closure or exclusivity in markets can be addressed by prohibiting discriminatory treatment of non-affiliated companies with respect to the use of essential facilities for the business.

#### **4. Trends of remedies in past cases**

The JFTC studied the merger cases with remedies during the decade from 1996 to 2005 to analyze what kinds of remedies were actually implemented.<sup>3</sup> As a result, it was suggested that remedies, such as the transfer of business, etc., are relatively often implemented against the “horizontal type” competitive concerns. On the other hand, remedies regarding behaviors of the party are relatively often implemented in the “vertical type” and “conglomerate type” competitive concerns. However, remedies regarding the behaviors of the party are often implemented accompanied by other remedies.

#### **5. Assurance of the implementation of remedies**

As described in 2 above, remedies must be implemented before a merger. If implemented after a merger for some reason, a deadline needs to be definitely and appropriately determined. In this regard, the JFTC requests the details of the remedies and the deadline of the implementation to be described in the prior notification form so that it can confirm what kinds of remedies will immediately be implemented or have already been implemented. In addition, the JFTC ensures the implementation of the remedies through the measures described below:

- Extension of a deadline for a cease and desist order (Article 10, Paragraph 9, etc., of the AMA) if important issues (remedies, etc.) in light of the provision of Article 10, Paragraph 1, etc., of the AMA in a merger plan have not been carried out before the deadline.
- When the content of the written notification is contrary to the facts, extending the deadline for a cease and desist order (Article 10, Paragraph 9, etc., of the AMA) or imposing criminal sanctions against submission of a written notification with false description (Article 91-2 of the AMA).

Moreover, when behavioral remedies are applied, the JFTC monitors the deviation from the proposed measures by requiring the party to report on the concerned activities for a certain period following the merger.

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<sup>2</sup> Note, however, that, for example, when only the production sections of the goods are integrated by the joint investment company and each of the investing companies continues to sell the goods, even though measures are taken to prevent a co-ordinated relationship from developing these investing companies through the operation of the joint investment company, the production cost will be shared. As a result, there will be less room for price competition, so that they will have an incentive to commit the co-ordinated conduct with their competitors, including the other investing company. In this case, whether the investing companies are expected to take co-ordinated conduct with their competitors, including each other, will be examined.

<sup>3</sup> “Ex-post evaluation of the merger review”, Japan Fair Trade Commission, 22 June 2007 (page 27).

## 6. Recent cases

In the following cases, mergers initially raised competitive concerns, but as a result of the consideration of the remedies proposed by the parties, the JFTC determined that the effects of the mergers would not be substantially to restrain competition conditional on the implementation of the remedies.

### 6.1 *Acquisition of shares of Varian, Inc., by Agilent Technologies, Inc. (2010, Structural remedy)*

Agilent Technologies, Inc. (hereinafter “Agilent”), which manufactures and distributes analytical instruments, etc., planned to acquire all of the shares of Varian, Inc. (hereinafter “Varian”), which also manufactures and distributes analytical instruments, etc., thereby making Varian a wholly owned subsidiary.

The parties distribute analytical instruments all over the world, and they also distribute their products in Japan through their respective Japanese affiliates, etc.

Since the US-Federal Trade Commission (FTC) and the European Commission (EC) pointed out to the parties in their review processes that the proposed transaction might bring serious adverse effects on competition in some relevant markets, including those of 3 products such as Micro/portable GC<sup>4</sup> where both parties compete, the parties proposed to sell the Micro/portable GC business owned by Agilent to INFICON Holding AG (headquartered in Switzerland; hereinafter “INFICON”) as well as to sell the Triple quadruple GC-MS business<sup>5</sup> and the ICP-MS business<sup>6</sup> owned by Varian to Bruker Corporation (headquartered in the United States; hereinafter “Bruker”). The US-FTC and the EC cleared the transaction subject to the proposed remedial measures.<sup>7</sup>

Agilent offered to the JFTC to take similar remedial measures as mentioned above. Therefore, with regard to the 3 products mentioned above, there would be no increment of market shares in Japan after the transaction.

In addition, both INFICON and Bruker distribute analytical instruments, etc., all over the world. Since both companies have been distributing their products in Japan through their Japanese affiliates over a certain period, they have acquired management know-how and have developed distribution channels in Japan.

Consequently, as a result of the business transfer from the parties, it was considered possible enough that INFICON and Bruker, through their Japanese affiliates, could continue and develop each business as strong competitors in Japanese markets.

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<sup>4</sup> GC refers to gas chromatograph, which is a device that separates volatile specimens into individual components for analyzing the existence of specific substances.

<sup>5</sup> GC-MS refers to gas chromatography mass spectroscope, which is a device that analyzes the material substance and the amount of each component after separation of volatile specimens into individual components by GC.

<sup>6</sup> ICP-MS refers to inductive coupled plasma mass spectroscope, which is a device that analyzes the elements and their amount in the specimens.

<sup>7</sup> Transferees of these businesses were not decided when the EC cleared the proposed transaction on January 20, 2010. The EC imposed a condition for the potential transferee as follows: (1) can maintain and develop transferred businesses, (2) has established businesses in the concerned field and got results, (3) has an organization for sales and services, (4) has a sales channel, etc.

## 6.2 *Acquisition of shares of Sanyo Electric Co., Ltd., by Panasonic Corporation (2009, Structural remedy)*

Panasonic Corporation (hereinafter, referred to as “Panasonic”), engaged in manufacturing and sales of electrical equipment, etc., planned to acquire a majority of voting rights associated with the shares issued by SANYO Electric Co., Ltd. (hereinafter, referred to as “Sanyo”) that is engaged in the same business, and to make Sanyo its subsidiary.

In response to the competitive concerns raised by the proposed transaction, the company proposed remedies thereof.

### 6.2.1 *Content of the remedies*

Sanyo shall transfer facilities in its factory in Tottori prefecture for manufacturing cylindrical manganese dioxide lithium batteries (for use in residential fire alarms) shipped for domestic use, to another company. More specifically, Sanyo will transfer its manufacturing facilities for the batteries, staff, and contracts, etc., with its business partners to another company, which is a subsidiary of a major electrical equipment manufacturer and engaged in manufacturing and sales of batteries. Sanyo shall enter into a contract with the other regarding its transfer of business by the end of March 2010 and execute the transfer of business within three months after the conclusion of the contract.

### 6.2.2 *Evaluation of the remedy*

Since manufacturing lines and trading rights pertaining thereto are transferred from the parties concerned, it is thought that its transferee is able to operate the business of the cylindrical manganese dioxide lithium batteries (for use in residential fire alarms) with its own initiative. Therefore, it can be evaluated that the transferee company can become a strong competitor given that the remedies proposed by the parties concerned are surely implemented by them.

## 6.3 *Integration of liquefied petroleum gas business between JX Nippon Oil & Energy Corporation and Mitsui Marubeni Liquefied Gas Co., LTD. (2011, Behavioral remedy)*

JX Nippon Oil & Energy Corporation (JX Energy), operating an LP gas business, plans to split its LP gas business (excluding the business concerned operated by Japan Gas Energy Corporation, which is a subsidiary of JX Energy) allowing the LP gas business to be absorbed into Mitsui Marubeni Liquefied Gas, Co., LTD (Mitsui-Marubeni Liquefied Gas), and then to acquire shares in excess of 50% of Mitsui-Marubeni Liquefied Gas. Since both of the parties concerned are the primary distributors of propane and butane which LP gas can be classified into, the JFTC reviewed the case from the viewpoint of a horizontal merger with respect to each regional block as to propane and butane.

With regard to butane and propane, there have been competitive concerns in some regional blocks so that the parties proposed remedies thereof.

### 6.3.1 *Content of the remedies with regard to Propane in Hokkaido regional block*

Companies concerned enter into a contract on deposit for consumption<sup>8</sup> with a plurality of other primary distributors to allow the other primary distributors to use the shipping facilities in the Hokkaido regional block used by the parties concerned.

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<sup>8</sup> The term “contract on deposit for consumption” in this context refers to a contract between primary distributors to allow shipment of propane or butane by a primary distributor through depositing its own

### 6.3.2 *Evaluation of the remedies in 6.3.1*

It is thought that the above remedies enable the creation of a plurality of effective competitors. Therefore, the JFTC concludes that the effect of the integration may not be substantially to restrain competition in a particular field of trade through their unilateral conduct and through their co-ordinated conduct with their competitors, given that the remedies proposed by the parties concerned are surely implemented by them.

### 6.3.3 *Content of the remedies with regard to Butane in Tohoku regional block*

At the request of the other primary distributors who currently receive butane supply from the shipping facilities in the Tohoku regional block owned by the parties concerned (hereinafter, referred to as “trading partners”), the parties concerned continue the current barter trade<sup>9</sup> of butane with the trading partners.

### 6.3.4 *Evaluation of the remedies in 6.3.3*

Suppose that the parties concerned terminate the barter trade with the competitors as a result of the integration, this may cause a reduction in market share held by the competitors engaged in barter trade with the parties concerned in the Tohoku regional block, and on the other hand, cause an increase in market share held by the parties concerned, thereby the market will virtually be a duopoly by the parties concerned and a strong competitor.

The above remedies allow continuation of the current barter trade of butane by the parties concerned in the Tohoku regional block, so that the supply system by their competitors can be maintained. The market share held by the parties and the degree of concentration in the market will not change substantially as a result of the above remedies.

Therefore, the JFTC concludes that the effect of the integration may not be substantially to restrain competition in the Tohoku regional block through their unilateral conduct and through their co-ordinated conduct with their competitor(s) given that the remedies proposed by companies concerned are surely implemented by them.

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propane or butane to the shipping facility owned by another primary distributor. The contract on deposit for consumption between the primary distributors allows the primary distributors to ship propane or butane even to the regions without their own shipping facilities.

<sup>9</sup> The term “barter trade” in this context, refers to a purchase and sales deals by which propane or butane are supplied, with each other, from respective shipping facilities on an equal quantity/price basis. Carrying out such a barter trade between primary distributors allows them to ship propane or butane to the regions where they do not have their own shipping facilities.

## APPENDIX

With regard to the remedies made public after 2000, cases which include the remedies that fall under typical examples described in “Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination” are listed below.

Note that the remedies are not limited to the examples listed below and the necessity of remedies and the required measures differ depending on each case even in the same business field/products.

The description “Outline of business” on the list is provided as a reference for facilitating understanding. Therefore, it does not necessarily describe the businesses operated by each party accurately and comprehensively.

### 1. Transfer of business departments, etc./dissolution, etc. of joint relationship with the parties concerned

Year	Outline of business	Case Name
2000	Paper industry	Integration of business through establishment of a holding company by Nippon Paper Industries Co., Ltd. and Daishowa Paper Mfg Co., Ltd. ( <a href="http://www.jftc.go.jp/ma/jirei2/H12jirei2-01.html">http://www.jftc.go.jp/ma/jirei2/H12jirei2-01.html</a> (Japanese version only))
2002	Air transport services	Business consolidation through establishment of a holding company by Japan Airlines Co., Ltd. and Japan Air System Co., Ltd. ( <a href="http://www.jftc.go.jp/en/pressreleases/uploads/2002-Apr-26.pdf">http://www.jftc.go.jp/en/pressreleases/uploads/2002-Apr-26.pdf</a> (English version))
2002	Chemical industry	Integration between Mitsui Chemicals, Inc. and Sumitomo Chemical Co., Ltd. ( <a href="http://www.jftc.go.jp/ma/jirei2/H14jirei6.html">http://www.jftc.go.jp/ma/jirei2/H14jirei6.html</a> (Japanese version only))
2002	Chemical industry	Integration of polyethylene business between Japan Polychem Corporation and Japan Polyolefins Corporation ( <a href="http://www.jftc.go.jp/ma/jirei2/H14jirei12-01.html">http://www.jftc.go.jp/ma/jirei2/H14jirei12-01.html</a> (Japanese version only))
2004	Chemical industry	Integration of biaxially-stretched polystyrene sheet business between Dainippon Ink and Chemicals, Incorporated and Asahi Kasei Life and Living Corporation ( <a href="http://www.jftc.go.jp/pressrelease/04.july/04072102.html">http://www.jftc.go.jp/pressrelease/04.july/04072102.html</a> (Japanese version only))
2005	Manufacture and sales of medical equipment	Acquisition of shares of Guidant Corporation by Johnson & Johnson ( <a href="http://www.jftc.go.jp/en/pressreleases/uploads/2005-Dec-9.pdf">http://www.jftc.go.jp/en/pressreleases/uploads/2005-Dec-9.pdf</a> (English version))
2007	Manufacture and sales of pharmaceuticals	Integration between Mitsubishi Pharma Corporation and Tanabe Seiyaku Co., Ltd. ( <a href="http://www.jftc.go.jp/ma/jirei2/H19jirei2.html">http://www.jftc.go.jp/ma/jirei2/H19jirei2.html</a> (Japanese version only))
2007	Drug wholesaling	Acquisition of shares of KOBASHOU. CO., LTD. by Mediceo Paltac Holdings Co., Ltd. ( <a href="http://www.jftc.go.jp/ma/jirei2/H19jirei10.html">http://www.jftc.go.jp/ma/jirei2/H19jirei10.html</a> (Japanese version only))
2008	Pharmaceutical products/food business, etc.	Capital tie-up of Kirin Group and Kyowa Hakko Group ( <a href="http://www.jftc.go.jp/en/pressreleases/uploads/2008-Dec-19.pdf">http://www.jftc.go.jp/en/pressreleases/uploads/2008-Dec-19.pdf</a> (English version))

2008	Manufacture and sales of nuclear fuel	Acquisition of shares of Nuclear Fuel Industries, Ltd. by Westinghouse Electric Company ( <a href="http://www.jftc.go.jp/ma/jirei2/H20jirei3.html">http://www.jftc.go.jp/ma/jirei2/H20jirei3.html</a> (Japanese version only))
2009	Manufacture and sales of chemicals	Acquisition of shares of Mitsubishi Rayon CO., LTD. by Mitsubishi Chemical Holdings Corporation ( <a href="http://www.jftc.go.jp/ma/jirei2/H21jirei1.html">http://www.jftc.go.jp/ma/jirei2/H21jirei1.html</a> (Japanese version only))
2009	Manufacture and sales of petroleum products	Integration of management between Nippon Oil Corporation and Nippon Mining Holdings, Inc. ( <a href="http://www.jftc.go.jp/ma/jirei2/H21jirei2.html">http://www.jftc.go.jp/ma/jirei2/H21jirei2.html</a> (Japanese version only))
2009	Manufacture and sales of electrical equipment	Acquisition of shares of Sanyo Electric Co., Ltd., by Panasonic Corporation ( <a href="http://www.jftc.go.jp/ma/jirei2/H21jirei7.html">http://www.jftc.go.jp/ma/jirei2/H21jirei7.html</a> (Japanese version only))
2010	Manufacture and sales of analytical instruments	Acquisition of shares of Varian, Inc., by Agilent Technologies, Inc. ( <a href="http://www.jftc.go.jp/en/pressreleases/uploads/2010-June-9_2.pdf">http://www.jftc.go.jp/en/pressreleases/uploads/2010-June-9_2.pdf</a> (English version))

## 2. Giving trading rights based on costs

Year	Outline of business	Case Name
2000	Chemical products business	Integration of Urethane business through establishment of a co-parent company by Mitsui Chemicals, Inc. and Takeda Pharmaceutical Co., Ltd. ( <a href="http://www.jftc.go.jp/ma/jirei2/H12jirei9-01.html">http://www.jftc.go.jp/ma/jirei2/H12jirei9-01.html</a> (Japanese version only))
2002	Chemical industry	Integration between Mitsui Chemicals, Inc. and Sumitomo Chemical Co., Ltd. ( <a href="http://www.jftc.go.jp/ma/jirei2/H14jirei6.html">http://www.jftc.go.jp/ma/jirei2/H14jirei6.html</a> (Japanese version only))
2003	Manufacture and sales of lead-acid storage batteries	Integration of management between Yuasa Corporation and Japan Storage Battery Co., Ltd. ( <a href="http://www.jftc.go.jp/en/pressreleases/uploads/2003-Nov-07.pdf">http://www.jftc.go.jp/en/pressreleases/uploads/2003-Nov-07.pdf</a> (English version))
2004	Chemical industry	Integration of biaxially-stretched polystyrene sheet business between Dainippon Ink and Chemicals, Incorporated and Asahi Kasei Life and Living Corporation ( <a href="http://www.jftc.go.jp/pressrelease/04.july/04072102.html">http://www.jftc.go.jp/pressrelease/04.july/04072102.html</a> (Japanese version only))
2004	Manufacture and sales of chemicals	Integration of polyolefin business between Mitsui Chemicals, Inc. and Asahi Kasei Life and Idemitsu Kosan Co., Ltd. ( <a href="http://www.jftc.go.jp/pressrelease/04.december/04120701.html">http://www.jftc.go.jp/pressrelease/04.december/04120701.html</a> (Japanese version only))
2007	Manufacture and sales of structural steel beams	Acquisition of the stock of Tokyo Kohtetsu Co., Ltd. by Osaka Steel Co., Ltd. ( <a href="http://www.jftc.go.jp/en/pressreleases/uploads/2007-Feb-9.pdf">http://www.jftc.go.jp/en/pressreleases/uploads/2007-Feb-9.pdf</a> (English version))
2007	Industrial explosives business	Integration of industrial explosives business between Asahi Kasei Chemicals Corporation and Nippon Kayaku Co., Ltd. ( <a href="http://www.jftc.go.jp/ma/jirei2/H19jirei3.html">http://www.jftc.go.jp/ma/jirei2/H19jirei3.html</a> (Japanese version only))
2007	Manufacture and sales of surveying instruments	Acquisition of shares of Sokkia Co., Ltd. by Topcon Corporation ( <a href="http://www.jftc.go.jp/pressrelease/07.december/07121001.html">http://www.jftc.go.jp/pressrelease/07.december/07121001.html</a> (Japanese version only))
2009	Manufacture and sales of chemicals	Acquisition of shares of Mitsubishi Rayon CO., LTD. by Mitsubishi Chemical Holdings Corporation ( <a href="http://www.jftc.go.jp/ma/jirei2/H21jirei1.html">http://www.jftc.go.jp/ma/jirei2/H21jirei1.html</a> (Japanese version only))
2009	Manufacture and sales of petroleum products	Integration of management between Nippon Oil Corporation and Nippon Mining Holdings, Inc. ( <a href="http://www.jftc.go.jp/ma/jirei2/H21jirei2.html">http://www.jftc.go.jp/ma/jirei2/H21jirei2.html</a> ) (Japanese version only))

### 3. Supply / Provision of facilities, etc. necessary for Import/Entry

Year	Outline of business	Case Name
2000	Chemical products business	Integration of Urethane business through establishment of a co-parent company by Mitsui Chemicals, Inc. and Takeda Pharmaceutical Co., Ltd. ( <a href="http://www.jftc.go.jp/ma/jirei2/H12jirei9-01.html">http://www.jftc.go.jp/ma/jirei2/H12jirei9-01.html</a> (Japanese version only))
2002	Air transport services	Business consolidation through establishment of a holding company by Japan Airlines Co., Ltd. and Japan Air System Co., Ltd. ( <a href="http://www.jftc.go.jp/en/pressreleases/uploads/2002-Apr-26.pdf">http://www.jftc.go.jp/en/pressreleases/uploads/2002-Apr-26.pdf</a> (English version))
2002	Chemical industry	Integration of business between Mitsui Chemicals, Inc. and Sumitomo Chemical Co., Ltd. ( <a href="http://www.jftc.go.jp/ma/jirei2/H14jirei6.html">http://www.jftc.go.jp/ma/jirei2/H14jirei6.html</a> (Japanese version only))
2011	Liquefied petroleum gas wholesaling	Integration of Liquefied Petroleum Gas Business between JX Nippon Oil & Energy Corporation and Mitsui Marubeni Liquefied Gas Co., Ltd. ( <a href="http://www.jftc.go.jp/pressrelease/11.january/110107.pdf">http://www.jftc.go.jp/pressrelease/11.january/110107.pdf</a> (Japanese version only))

### 4. License of patent right/license of technology

Year	Business Field	Case Name
2002	Manufacture and sales of vending machines	Acquisition of shares of SANYO Electric Vending Machine Co., Ltd. by Fuji Electric Co., Ltd. ( <a href="http://www.jftc.go.jp/en/pressreleases/uploads/2002-Mar-22.pdf">http://www.jftc.go.jp/en/pressreleases/uploads/2002-Mar-22.pdf</a> (English version))
2003	Permanent magnet business	Integration of permanent magnet business between Hitachi Metals, Ltd. and Sumitomo Special Metals Co., Ltd. ( <a href="http://www.jftc.go.jp/ma/jirei2/H15jirei9-01.html">http://www.jftc.go.jp/ma/jirei2/H15jirei9-01.html</a> (Japanese version only))
2004	Manufacture and sales of glass substrates	Acquisition of glass substrate business for magnetic disks by HOYA CORPORATION from Nippon Sheet Glass Co., Ltd. ( <a href="http://www.jftc.go.jp/en/pressreleases/uploads/2004-Feb-18.pdf">http://www.jftc.go.jp/en/pressreleases/uploads/2004-Feb-18.pdf</a> (English version))
2004	Chemical industry	Integration of biaxially-stretched polystyrene sheet business between Dainippon Ink and Chemicals, Incorporated and Asahi Kasei Life and Living Corporation ( <a href="http://www.jftc.go.jp/pressrelease/04.july/04072102.html">http://www.jftc.go.jp/pressrelease/04.july/04072102.html</a> (Japanese version only))
2004	Manufacture and sales of chemicals	Integration of polyolefin business between Mitsui Chemicals, Inc. and Idemitsu Kosan Co., Ltd. ( <a href="http://www.jftc.go.jp/pressrelease/04.december/04120701.html">http://www.jftc.go.jp/pressrelease/04.december/04120701.html</a> (Japanese version only))
2009	Manufacture and sales of petroleum products	Integration of management between Nippon Oil Corporation and Nippon Mining Holdings, Inc. ( <a href="http://www.jftc.go.jp/ma/jirei2/H21jirei2.html">http://www.jftc.go.jp/ma/jirei2/H21jirei2.html</a> (Japanese version only))



## 5. Blocking of information exchange, etc.

Year	Outline of business	Case Name
2000	Manufacture and sales of chemical industrial products	Establishment of a joint manufacturing company by Mitsubishi Gas Chemical Company, Inc. and Nippon Peroxide Co. Ltd. ( <a href="http://www.jftc.go.jp/ma/jirei2/H12jirei7.html">http://www.jftc.go.jp/ma/jirei2/H12jirei7.html</a> (Japanese version only))
2002	Manufacture and sales of bus	Integration of bus manufacturing operations of Hino Motors Ltd., and Isuzu Motors Ltd., ( <a href="http://www.jftc.go.jp/en/pressreleases/uploads/2002-June-21.pdf">http://www.jftc.go.jp/en/pressreleases/uploads/2002-June-21.pdf</a> (English version))
2003	Manufacture and sales of chemicals	Establishment of a joint manufacturing company, manufacturing ethyl acetate, by Showa Denko K.K. and Kyowa Hakko Kogyo Co., Ltd. ( <a href="http://www.jftc.go.jp/ma/jirei2/H15jirei2.html">http://www.jftc.go.jp/ma/jirei2/H15jirei2.html</a> (Japanese version only))
2004	Manufacture and sales of chemicals	Integration of hydrazine hydrate business between Otsuka Chemical Co., Ltd. and Mitsubishi Gas Chemical Company, Inc. ( <a href="http://www.jftc.go.jp/en/pressreleases/uploads/2004-Jan-09.pdf">http://www.jftc.go.jp/en/pressreleases/uploads/2004-Jan-09.pdf</a> (English version))
2004	Chemical industry	Integration of biaxially-stretched polystyrene sheet business between Dainippon Ink and Chemicals, Incorporated and Asahi Kasei Life and Living Corporation ( <a href="http://www.jftc.go.jp/pressrelease/04.july/04072102.html">http://www.jftc.go.jp/pressrelease/04.july/04072102.html</a> (Japanese version only))
2005	Manufacture and sales of materials	Coproduction in ordinary wire rods business by Nippon Steel Corporation and Nakayama Steel Works, Ltd. ( <a href="http://www.jftc.go.jp/ma/jirei2/H17jirei6.html">http://www.jftc.go.jp/ma/jirei2/H17jirei6.html</a> (Japanese version only))
2007	Manufacture and sales of survey instruments	Acquisition of shares of Sokkia Co., Ltd. by Topcon Corporation ( <a href="http://www.jftc.go.jp/pressrelease/07.december/07121001.html">http://www.jftc.go.jp/pressrelease/07.december/07121001.html</a> (Japanese version only))
2009	Manufacturing and sales of petroleum products	Integration of management between Nippon Oil Corporation and Nippon Mining Holdings, Inc. ( <a href="http://www.jftc.go.jp/ma/jirei2/H21jirei2.html">http://www.jftc.go.jp/ma/jirei2/H21jirei2.html</a> (Japanese version only))
2009	Metallic material business	Integration of copper and brass business between Mitsui Mining and Smelting Co., Ltd and Sumitomo Metal Mining Co., Ltd. ( <a href="http://www.jftc.go.jp/ma/jirei2/H21jirei3.html">http://www.jftc.go.jp/ma/jirei2/H21jirei3.html</a> (Japanese version only))

## 6. Prohibition of restraint of trade and discriminatory trade

Year	Outline of business	Case Name
2000	Satellite operator	Acquisition of shares of Japan Satellite Systems Inc. by NTT Communications Corporation ( <a href="http://www.jftc.go.jp/ma/jirei2/H12jirei6.html">http://www.jftc.go.jp/ma/jirei2/H12jirei6.html</a> (Japanese version only))
2004	Manufacture and sales of chemicals	Integration of hydrazine hydrate business between Otsuka Chemical Co., Ltd. and Mitsubishi Gas Chemical Company, Inc. ( <a href="http://www.jftc.go.jp/en/pressreleases/uploads/2004-Jan-09.pdf">http://www.jftc.go.jp/en/pressreleases/uploads/2004-Jan-09.pdf</a> (English version))
2004	Manufacture and sales of glass substrates	Acquisition of glass substrate business for magnetic disks by HOYA CORPORATION from Nippon Sheet Glass Co., Ltd. ( <a href="http://www.jftc.go.jp/en/pressreleases/uploads/2004-Feb-18.pdf">http://www.jftc.go.jp/en/pressreleases/uploads/2004-Feb-18.pdf</a> (English version))

## KOREA

### 1. Introduction

In Korea, discussions on merger enforcement so far have been focused on how to decide whether a certain merger transaction should be blocked. For this reason, most of the merger discussions have been regarding, for example, defining the relevant market, assessing potential anticompetitive effect based on the defined markets and exceptional circumstances where potentially anticompetitive mergers are allowed.

However, it has been recognized from recent experiences that no matter how reasonably a relevant market is defined and correctly anticompetitive effects are assessed, without guarantee of effectiveness of remedies, such legal analysis is meaningless. In this context, importance of remedies in a merger case cannot be overemphasized.

### 2. Types of merger remedies

#### 2.1 *Relevant legal provisions*

Korea's competition law, Monopoly Regulation and Fair Trade Act (MRFTA) provides that anyone shall not engage in behavior that substantially lessens competition through a merger in a certain area, and the person who violates such provision shall be subject to remedies intended to redress the harm incurred from the anticompetitive behavior.

Article 16 of the MRFTA stipulates the detailed list of remedies the KFTC may issue for an anticompetitive merger including cessation of the concerned behavior, disposal of all or part of the stocks, resignation of officers, transfer of business and restrictions on business method or business scope which are designed to prevent the anticompetitive effect of the transaction.

Moreover, the "Guidance on Imposing Merger Remedies" established by the KFTC in December, 2006 divides merger remedies for addressing competitive concerns caused by a merger into structural and behavioral remedies, and specify considerations that need to be taken into account to impose such remedies.

#### 2.2 *Types of remedies*

According to the "Guidance on Imposing Merger Remedies" structural remedies aim to make changes in asset or ownership structure of merging firms. The most typical structural remedies are full-stop injunction and divestiture of assets.

Full-stop injunction is intended to block a merger transaction or undo a transaction to return the competitive situation in the relevant area to the pre-merger level. On the other hand, divestiture of assets, selling merging firms' assets to an independent third party, is used to allow a merger but restructure the transaction to alleviate competitive concerns.

Behavioral remedies, in the meantime, impose restrictions on terms, methods or scope of sales activities or internal business operation of merging firms during a certain period. Behavioral remedies the KFTC ordered in the past merger cases include restrictions on concurrent holding of an officer's position and price increases and prohibitions of anticompetitive behavior such as refusal to trade.

### 2.3 *Comparison among types of remedies*

Major consideration for crafting merger remedies should be how to restore or preserve competition with minimum costs. Besides, whether the concerned company is able to comply with the imposed remedies is another important factor that needs to be considered.

Structural remedies can change asset structure and create a new business entity, but, at the same time, carry big risks in the case of failure as they are irreversible once imposed. On the other hand, behavioral remedies could distort the market by imposing restrictions on merging firms' rights to their assets, and pose a burden on a competition authority since they require constant monitoring by a competition authority of the implementation.

For this reason, structural remedies such as divestiture are usually preferred to behavioral remedies. This trend is also shown in the court's rulings.<sup>1</sup> Moreover, in July 2011, the KFTC specified that structural remedies should be the first choice of remedies for an anticompetitive merger in the revised "Guidance on Imposing Merger Remedies".

In practice, however, there are many instances where behavioral remedies are inevitable or used in a complementary manner, so deciding types of remedies require sufficient consideration of the market environment surrounding the transaction. Behavioral remedies can be the most proper measures in some instances, for example, when there is no adequate buyer of divestiture assets or selection of assets to be divested is practically impossible.

In fact, regarding Honam Petrochemical Corp.'s stock acquisition in KP Chemical in 2004, the KFTC imposed behavioral remedies including price restrictions. In this case, behavioral remedies were chosen over structural ones despite potential anticompetitive effect of the merger in the PET<sup>2</sup> bottle market, since divestiture of physical assets for a part of the production process was not feasible.<sup>3</sup>

## 3. Standards for imposing merger remedies

### 3.1 *General principles*

Merger remedies should be based on particular facts of the concerned case and be able to resolve competitive concerns arising from the transaction. Furthermore, remedies should remain the minimum

<sup>1</sup> Seoul High Court ruling "2005 ㄴ3174" and Supreme Court ruling "2006 ㉞6659":

*"~ given that defendant has considerable discretion over deciding which remedies should be imposed, regarding a merger transaction that has already occurred, without special circumstance, the purpose of imposing remedy is to restore the competitive situation to the pre-merger level ~ (omitted) ~ as measure of imposing restrictions on method or scope of business while approving the transaction, which the plaintiffs argued for, makes it difficult to respond flexibly to future environmental changes, has limitations in redressing various competitive harms caused by the transaction and raises a question on effectiveness since it could result in waste of resources and another legal dispute ~ (omitted) ~".*

<sup>2</sup> PET is a solid intermediary material that is used for making containers of beverage, pesticide, etc.

<sup>3</sup> KFTC Plenary Session 2004-No. 387.

level necessary to restore competition, and be clear, specific and enforceable to the extent that judgment on implementation of remedies can be made objectively.

In the course of crafting and enforcing merger remedies, the KFTC seeks ideas and opinions from not only the merging parties but also the relevant parties including competitors, consumers, suppliers and experts on the concerned industry while ensuring full protection on confidential information of merging firms

### **3.2 *Standards for imposing merger remedies by types***

#### **3.2.1 *Standards for structural remedies***

##### **Full-stop injunction**

The purpose of remedies is to prevent the market situation from being worsened rather than encourage to or create a desirable market environment. Full-stop injunction is considered when there is no other way than blocking the transaction completely to prevent the deterioration of the market situation.

The KFTC issues full-stop prohibition based on comprehensive consideration of various factors such as whether it is hard to address competitive concerns arising from a merger without blocking or undoing the transaction, divestiture of assets is impossible since, for example, assets of merging firms are inseparable, or divestiture is not effective to restore competitive situation to the pre-merger level.

##### **Divestiture of assets**

Divestiture of assets has been considered an attractive remedy in that it is simple, relatively easy to administer and sure to resolve anticompetitive effect of a merger. However, successful divestiture requires selection of appropriate assets to be divested and adequate buyer and assurance of strict implementation of a divestiture plan.

The “Guidance on Imposing Merger Remedies” requires various factors be taken into consideration for selecting assets to be divested including: whether the scope of divestiture assets is enough to redress anticompetitive effects and restore effective competition, divestiture assets are focused on the competitive overlap caused by the concerned merger transaction, it is possible to separate assets for divestiture, and divested business can serve as a viable competitor.

A buyer of divestiture asset is chosen by merging firms in principle, but the KFTC can order the merging parties to have consultation with it on the following issues prior to completing the transaction;

- Whether the potential buyer has detailed business plans after purchase of the assets and the plans are enforceable;
- Whether the potential buyer’s financing plans to buy the divestiture assets are detailed, adequate and enforceable; and
- Whether the potential buyer has the same interest as merging firms in terms of ownership, finance or business relationship, or is under the single influence with the merging firms.

Merging firms are normally given 3~6 months to divest their assets depending on the size and complexity of the divestiture assets, the state of the economy and industrial practices. But they can be granted one-time extension of 3~6 months after comprehensive review on, for instance, whether they are in an exceptional situation making it impossible to complete an ordered divestiture in the given time or

overall agreements have been made on the divestiture so the transaction is expected to be completed in the near future.

In the case where divestiture assets are managed by an independent trustee appointed by merging firms, the deadline can be extended by more than 6 months.

Moreover, if merging firms fail to comply with the remedies such as divestiture order within the time designated by the KFTC, they are subject to charge for compelling the compliance in the form of periodic penalty payment under Article 17-3 of the MRFTA.<sup>4</sup>

### 3.2.2 *Standards for behavioral remedies*

As mentioned above, behavioral remedies require consistent monitoring of compliance and have the nature of direct regulation on business operation of merging firms.

Before issuing behavioral remedies, therefore, comprehensive assessment is needed regarding, such as, whether the concerned behavioral remedies are enough to restore effective competition, constant intervention by a competition authority is needed for monitoring implementation of the remedies and the remedies have an effect of directly regulating prices, output, market share or other sales-related aspects and sales performance of a merged firm.

## **4. Relation between types of merger and remedies**

Anticompetitive effects caused by a merger can take different forms depending on the nature of a merger, hence the need for consideration of the nature of a merger to craft effective remedies.

After the MRFTA was enacted, the KFTC imposed remedies in 45 merger cases until December, 2010. Among them, 10 cases involved vertical mergers, 23 horizontal mergers and 2 conglomerate mergers.

While various remedies were imposed on horizontal mergers including prohibition of transactions, divestiture of assets and restrictions on price increases, market share and trade, vertical mergers were all subject to behavioral remedies that prohibited anticompetitive trade.

For example, an attempt by Posco, the sole supplier of electrical steel sheet in Korea, to acquire 51% stakes in Hankook Core, the biggest producer of magnetic cores and purchaser of electrical steel sheets, through its subsidiary in 2007, was subject to remedies that included prohibitions on: reduction in the supply of electrical steel sheets for other domestic buyers, unfair treatment, imposing unfair trade terms, etc. The KFTC also set up a separate monitoring committee to supervise implementation of the imposed remedies and make quarterly reports on its activity to the KFTC.<sup>5</sup>

As vertical merger itself does not decrease the number of companies operating in a certain market, the nature of its anticompetitive effect is different from horizontal merger which directly reduces the number

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<sup>4</sup> Article 17-3 of the MRFTA (Charge for Compelling the Compliance) 1. The Korea Fair Trade Commission may impose a charge for compelling the compliance on a person who fails to fulfill corrective measures within the specified period after the person was subject to them pursuant to Article 16 (Corrective Measures, etc.) in violation of Article 7 (Restrictions on Mergers) within the limits not exceeding the amount obtained by multiplying 3/10,000 by the following amount per day. ~ (omitted).

<sup>5</sup> Resolution of the KFTC "2007-No.351".

of operating companies. In this context, preventing foreclosure effect through behavioral remedies is deemed more appropriate than blocking the transaction completely in many vertical merger cases.

It needs to be noted, however, the “Guidance on Imposing Merger Remedies” does not separate standards for imposing remedies depending on whether the concerned transaction is horizontal or vertical.

## 5. Monitoring of implementation of remedies

However effective remedies crafted, without assurance on implementation of the imposed remedies, anticompetitive effects of a merger cannot be addressed. In practice, however, monitoring of compliance with the imposed remedies places a severe burden on a competition authority.

To relieve such burden the KFTC may have merging firms report on the implementation of imposed remedies regularly during the designated time, and access documents or conduct inquiries into merging firms such as on-spot inspection to check whether they faithfully comply with the remedies under the “Guidance on Imposing Merger Remedies”.

In fact, the KFTC ordered merging firms, as part of the remedy, to make quarterly or half-yearly reports on their implementation of the remedies in 8 cases out of the 9 handled after 2008 excluding 1 case in which the transaction itself was prohibited. Even if the reporting obligation is not included in the remedy, the KFTC requires merging firms to submit documents necessary to confirm the compliance with the remedies every year during the period of remedy implementation.

Appointing a trustee can be a good way to ensure merging firms comply with the imposed remedies. For example, in a case where divestiture of asset is ordered, appointing an independent expert on the concerned market state to supervise the divestiture process can be more effective than placing the responsibility on a competition authority.

However, given the costs of appointing a monitoring trustee, the Korea’s competition law does not mandate appointing a trustee for the compliance monitoring. Instead, in previous cases, the KFTC ordered, as part of the remedy, the establishment of a separate watchdog committee or a consultative body comprising independent third parties to supervise implementation of remedies.<sup>6</sup>

## 6. Conclusion

Merger remedies, unlike enforcement activities against market dominance abuse, are intended to prevent the creation of market structure facilitating abuse of market power.

Therefore, merger remedies should be able to resolve competitive concerns without restraining mergers that could increase efficiency in the market. In this context, a competition authority should take a balance between principles of effectiveness and proportionality. Moreover even though establishing standards for imposing remedies is necessary, overly rigid “one-fits-all” approach needs to be avoided given that best remedies are different for each case.

<sup>6</sup> Resolution “2007-No.351(2007merger1076)” of the KFTC:  
Holding: Defendants (POSCO and Posteel) shall set up a compliance monitoring body composed of companies which buy electrical steel sheets and manufactures magnetic cores in the domestic market, and independent trade supervisors within 60 days from the receipt of this order. The compliance performance shall be reported to the KFTC in writing on a half-yearly basis for 5 years after the order is received.

Lastly, even if reasonable remedies are crafted, without sufficient monitoring of implementation of such remedies, they could become ineffective. In this regard, competition authorities need to pay more attention to ensure strict implementation of imposed remedies.

## MEXICO

**1. What is your process for considering possible remedies for mergers that present competitive problems? Are parties responsible for proposing remedies, and are they required to follow particular procedures or time lines in order to do so? If your merger review system involves a 2-phase process, are there different procedures and standards for reviewing proposed remedies in the 2 phases?**

The Federal Law of Economic Competition (FLEC or Law) empowers the Federal Competition Commission (CFC or Commission) to challenge and sanction those mergers which have the object or effect of diminishing, harming or impeding competition and free access to markets.

The Law considers that a merger might have those adverse effects when, as result of the transaction: i) the resulting economic agent acquires the power to unilaterally set prices or substantially restrict output in the relevant market, and competitors are unable to counteract that power; ii) the transaction is aimed at unduly displacing other economic agents, or denying them access to the relevant market; and iii) the transaction has the purpose or effect of substantially facilitating the parties to engage in monopolistic practices.

To avoid any of the aforementioned results, the Commission may stop the entire transaction until the merging parties have agreed and complied with the remedies imposed.

The remedies that the Commission can impose are:

- To carry out a specific behavior, or refrain from performing it;
- To divest to third parties certain assets, rights, equity interests or shares;
- To sell a particular line of production;
- To modify the terms or conditions of the transaction;
- To perform acts to promote the participation of competitors in the market, as well as, to provide them access to certain goods or services;
- Other acts aimed at preventing the merger from diminishing, harming or impeding competition or free market access.

The FLEC requires that the remedies imposed must be directly related to correcting the effects of the proposed merger. Also, remedies must correspond to the correction sought.

Remedies may be proposed by the parties, or may be imposed by the Commission. In the latter case, it is up to the merging parties whether to accept them or not. The Law, moreover, allows parties to present their remedies proposals at any time during the review procedure until a day after the case is listed to be discussed by the CFC's Plenum.



The Law also provides that in those cases when the CFC has resolved and the parties involved have filed an appeal before the agency, they can submit a proposal of remedies at any time during the process. It is important to note that the submission of the aforementioned proposal does not mean that the parties consent to the terms of the resolution that is being challenged.

Unlike other jurisdictions, the merger review system in Mexico does not contemplate a 2-phase process.

**2. When crafting merger remedies, does your agency employ structural remedies? Do you employ behavioral remedies or hybrid remedies? How do you decide what remedy or combination of remedies best cures the competitive harm of concern? Is the approach different in horizontal and vertical mergers?**

As noted above, the FLEC allows a wide range of remedies to cure the competitive harm of concern, including structural, behavioral or hybrid.

In the agency's experience, structural remedies are often more effective than behavioral ones. For this reason, the agency normally uses the latter as a complement to structural remedies.

When crafting merger remedies, the Commission considers, among other things:

- The kind of operation under review. In the case of horizontal mergers, the agency mainly uses structural remedies (divestitures). Meanwhile, in vertical mergers, it is more common to use behavioral remedies, especially when remedies are aimed at ensuring access to competitors who might unduly be displaced of the market as a result of the transaction.
- The proportionality between the remedies and the anticompetitive effects to be prevented.
- The costs of implementation for the parties and the monitoring costs for the agency.
- The feasibility to restore competitive conditions in the short term.

It is important to note, moreover, that when crafting remedies the Commission deliberately dismisses those alternatives that could result in a reduction in supply or output.

**3. When seeking structural relief, under what circumstances do you require the divestiture of a stand-alone business? Do you ever require the divestiture of identified assets that are not a stand-alone business? Do you ever require the divestiture of intellectual property in lieu of the divestiture of a stand-alone business or a collection of physical assets? When do you use each type of divestiture remedy?**

The agency uses both types of remedies, depending on the circumstances. For single product companies, the Commission prefers the divestiture of independent business units, with all the assets that are necessary to ensure the successful operation of the divested business, including intellectual property. In the case of multimarket companies, as in the case of pharmaceuticals, the agency has considered the divestiture of specific assets.

**4. What types of behavioral remedies does your agency use? In what circumstances have you used firewalls, fair dealing clauses, transparency requirements, anti-retaliation provisions or prohibitions on anticompetitive contracting practices?**

The agency has used various types of behavioral remedies. During its early years, they were rarely combined with other types of remedies. More recently, however, they are often used as a complement to structural remedies.

In the case of the acquisition by Grupo Televisa (the largest producer of TV contents and provider of subscription based TV services) of some cable companies in 2006 and 2007, the CFC subjected the approval of the merger to the condition that Grupo Televisa gave independent cable companies non-discriminatory access to its broadcast signals (must offer). In addition, the approval of the merger was subject to the condition that Grupo Televisa transmitted through its subscription based systems the broadcast signals produced and transmitted by independent stations (must carry).

In a case that involved the telecommunications sector, in 2005 the Commission analyzed a merger whereby, as a result of a transaction outside Mexico, a company that was already shareholder in the dominant player (Telmex), became indirect shareholder in one of its competitors (Alestra). One of the remedies the CFC imposed to address this problem was to oblige the merging parties to avoid any undue exchange of information among competitors. In addition, the Commission required them to carry out a multi-year independent audit to verify that this obligation was correctly fulfilled.

More recently, the Commission analyzed a mergers related to the petrochemical industry, more precisely, in the markets of suspension/mass PVC resin and PVC pipes. In 2009, Mexichem requested authorization to acquire its only competitor in the national resin market and its main competitor in the PVC pipes market. The Commission decided to block the mergers because of the existence of an antidumping duty for PVC resin, of approximately 35%, which prevented the imports this product. However, in 2010, the merger was approved after the parties proposed the elimination of the duty, which significantly changed the access to imported PVC resin. In addition, the Commission established several remedies aimed at preventing the promotion by Mexichem of duties that would limit access to imports of this product. Finally, the Commission also ordered the divestiture of three PVC pipe plants, which were transferred to an independent competitor.

**5. Do you have experience protecting the to-be-divested assets or businesses prior to divestiture? Have you required that assets or businesses be held separate or otherwise preserved? Have you employed monitoring trustees?**

In recent years, when the Commission has subject the approval of a merger to the divestiture of assets, it has placed special emphasis on the establishment of conditions to ensure that the to-be-divested assets maintain their value during the transition period. For this reason the agency has ordered the divestiture to be concluded in a short period of time and has required the assets to be held separately. In addition, trustees were employed to secure the proper management and sale of assets.

In addition to Mexichem's case, in 2010, the Commission authorized the Novartis- Alcon merger subject to the divestiture of an ophthalmic product. Similarly, in 2009, the authority authorized the Pfizer-Wyeth merger subject to the divestiture of some animal health products.

**6. How do you ensure an expeditious and successful divestiture? Do you require divestitures be finalized before a merger closes? If not, how quickly do you require divestiture? What happens if the divestiture has not timely occurred? Do you use sales trustees? Do you insist**

**on enhanced asset packages when sales are not timely? How do you ensure that a sale to a proposed divestiture buyer and the terms of the divestiture will accomplish your remedial goals?**

The FLEC does not allow the agency to interrupt review periods once they have started. Therefore, it is virtually impossible, from a procedural point of view, ensuring divestiture before the merger closes. However, if the parties fail to comply with the remedies, the FLEC allows the Commission to challenge a previously authorized merger. In these cases, moreover, the Commission can fine the merging parties with up to 10% of their turn over.

To ensure a successful divestiture, the Commission uses the following mechanisms:

- Clearly stating in the agency's ruling the scope of the remedies.
- Requiring that the divestiture plan submitted by the merging parties for the agency approval contains the minimum elements to secure and expeditious and successful divestiture.
- Requiring the merging parties to divest, in addition to the physical assets, all those assets that may allow the buyer to preserve the business in the market, including inventory, intellectual property rights, contracts related to the operation of business, contracts with key personnel working in business operations, sales force, etc.
- Giving preference to divestiture buyers with market knowledge and the financial strength to develop the business. Note that the Commission has to approve the prospective buyer before the divestiture takes place.
- Setting divestiture deadlines that minimize uncertainty and deterioration of the to-be-divested assets.
- Placing the to-be-divested assets under the administration of a trustee, who is also responsible for hiring a specialized financial agent to promote the divestiture.
- Keeping confidential the terms of the remedies until the conclusion of the divestiture process.

**7. How do you ensure that parties comply with your remedy order? Do you include reporting requirements or inspection clauses in your orders? Do you have staff dedicated to enforcement of remedies?**

To ensure that parties comply with remedies, the Law provides that failure to comply can lead to the reversal of the approval and, additionally, monetary fines up to ten percent of merging parties' revenues.

In most cases involving remedies, the Commission required parties to periodically report progress and to submit the relevant evidence. In this regard, it should also be noted that the Commission is empowered to verify the compliance of remedies at any time.

An element that has greatly contributed to secure an effective monitoring of compliance is that those that have been involved in the crafting of the remedies are often part of the team dedicated to enforcement of remedies.

**8. Is your experience in enforcing remedies reflected in documents describing your best practices or in other guideline documents? If not, are you planning to issue guidance in the near future?**

Although the Commission has not yet issued a guideline on remedies, it is planning to do so in 2012. This guideline will complement one the agency published early this year on the procedural aspects of merger notification and review.

It is noteworthy that all the resolutions issued by the agency are public and economic agents can review the terms under which remedies have been established since the adoption of the Competition Law in 1992.

**9. What role do third parties and the public have in commenting on proposed remedies? How your courts assessed the agencies' remedies and efforts to enforce them?**

Under the Competition law in Mexico, third parties have no legal rights in the merger review procedure. In practice, however, the agency maintains regular communication with those economic agents involved in the market and often requires them information that is normally is taken into account when designing remedies.

So far, the courts have not been involved in the assessment of remedies imposed by the CFC.



## NEW ZEALAND

- 1. What is your process for considering possible remedies for mergers that present competitive problems? Are parties responsible for proposing remedies, and are they required to follow particular procedures or time lines in order to do so? If your merger review system involves a 2-phase process, are there different procedures and standards for reviewing proposed remedies in the 2 phases?**

Under section 66 of the Commerce Act 1986 (Commerce Act), the Commerce Commission (Commission) may give clearances for business acquisitions if it is satisfied that the business acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market.

Section 67(3)(b) of the Commerce Act allows the Commission to grant an authorisation for an acquisition that may otherwise breach section 47 of the Commerce Act, if the Commission is satisfied that the acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted. This requires the Commission to consider whether there is, or is likely to be, a lessening of competition and assess the public benefit.

Under section 69A of the Commerce Act the Commission is able to accept undertakings from an applicant in respect of a clearance or an authorisation of a business acquisition<sup>1</sup>, to dispose of assets or shares (divestment undertakings). Undertakings must be provided in written form by the applicant or on behalf of the applicant. The purpose of divestment undertakings is to remedy the competition concerns raised by the proposed acquisition while allowing it to proceed with its potential benefits and efficiencies.

The Commission's analytical framework and process is fully set out in the Mergers and Acquisitions Divestment Remedies Guidelines. The guideline is available on the Commission's website.<sup>2</sup> In essence the three major considerations for the Commission are the asset risk, the composition risk and the purchaser risk associated with the divesture package.

The Commission encourages applicants to offer divestment undertakings as early as possible if they consider that they may remedy a substantial lessening of competition in the relevant market(s) that would be caused by the proposed acquisition.

When divestments are offered as part of an application for clearance, the Commission is able to assess the effects of the business acquisition, taking into account divestments from the beginning of the process. If divestments are offered near the end of the Commission's assessment of an application for clearance, the Commission may need to request an extension to the timeframe in order to consider the application in light of the proposed divestment.

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<sup>1</sup> All references to a business acquisition may also refer to a merger and all references to a clearance, equally apply to an authorisation.

<sup>2</sup> <http://www.comcom.govt.nz/assets/Business-Competition/Mergers-and-Acquisitions/Mergers-and-Acquisitions-Divestment-Remedies-Guidelines-June-2010.pdf>.

If divestment undertakings are not offered as part of the original application for clearance, the Commission will identify the likely competition concerns, and may invite divestment undertakings as a possible option.

While the Commission will clearly identify the likely competitive harm, it will not seek to design the divestment undertaking. The Commission will tend not to identify particular assets to be divested because the applicant and its advisers are usually in the best position to do so.

However, the Commission is available to discuss the terms of a proposed divestment undertaking insofar as it enables the applicant to structure or vary the terms of the divestment undertaking to remedy the competition concerns.

The Commission may provide feedback to the applicant that divestment undertakings are not necessary because it considers there are unlikely to be competition concerns absent the divestment. In this situation, the applicant will be given the opportunity to withdraw its divestment undertakings.

Similarly, the Commission might also highlight where there are competition concerns in specific markets that will require the offered divestment remedy. Based on the Commission's feedback, the applicant will then be given the opportunity to vary its undertakings before the Commission makes its final decision. Whether the applicant chooses to vary its undertaking or not is solely the decision of the applicant.

**2. When crafting merger remedies, does your agency employ structural remedies? Do you employ behavioural remedies or hybrid remedies? How do you decide what remedy or combination of remedies best cures the competitive harm of concern? Is the approach different in horizontal and vertical mergers?**

As noted above, the Commission is only able to accept undertakings to dispose of assets or shares. The Commission is unable to accept behavioural undertakings in respect of business acquisitions.

**3. When seeking structural relief, under what circumstances do you require the divestiture of a stand-alone business? Do you ever require the divestiture of identified assets that are not a stand-alone business? Do you ever require the divestiture of intellectual property in lieu of the divestiture of a stand-alone business or a collection of physical assets? When do you use each type of divestiture remedy?**

The Commission will consider the implications of a divestment offer that is for a stand-alone business or specific assets under the "composition risks" element of its analytical framework.

In general, the Commission prefers the divestment of an existing business entity or unit that has already demonstrated its ability to compete in relevant markets. The existing business entity should ideally contain all the physical assets, relevant personnel, customer lists, information systems, intangible assets and management infrastructure required.

The Commission will carefully examine divestment undertakings offered by an applicant if the applicant proposes to sell assets that comprise something less than an existing business entity.

**4. What types of behavioural remedies does your agency use? In what circumstances have you used firewalls, fair dealing clauses, transparency requirements, anti-retaliation provisions or prohibitions on anticompetitive contracting practices?**

As noted above, the Commission is only able to consider structural undertakings. The Commission is unable to accept behavioural undertakings.

**5. Do you have experience protecting the to-be-divested assets or businesses prior to divestiture? Have you required that assets or businesses be held separate or otherwise preserved? Have you employed monitoring trustees?**

The Commission will consider the possibility of divested assets deteriorating prior to completion of the divestment under “asset risks” element of its analytical framework. If the Commission identifies asset risks, applicants would then provide sufficient evidence to the Commission to allay the asset risks. This might include an undertaking that the applicant will appoint an independent manager to ensure that the assets to be divested are not eroded, or the applicant may undertake to not co-mingle the assets.

**6. How do you ensure an expeditious and successful divestiture? Do you require divestitures be finalized before a merger closes? If not, how quickly do you require divestiture? What happens if the divestiture has not timely occurred? Do you use sales trustees? Do you insist on enhanced asset packages when sales are not timely? How do you ensure that a sale to a proposed divestiture buyer and the terms of the divestiture will accomplish your remedial goals?**

If divestment undertakings are accepted by the Commission, they are deemed to form part of the clearance given. The terms of the divestment undertaking must therefore be finalised before the Commission reaches its final determination.

Following the Commission’s determination, the assets must be divested as quickly as possible in order to remedy any potential competition concerns over asset and composition risks. The shorter the divestment period, the less likely it is that factors such as the deterioration of assets, the loss of customers and/or key personnel, or similar, will cause the divestment to be ineffective.

The Commission generally applies tight timeframes to the divestment process to improve the effectiveness of the remedy. The timeframe in which the assets must be divested will vary depending on the facts of each case. In general, the Commission will allow six months for an applicant to fulfil the terms of the divestment undertaking.

This timeframe may be shorter if the Commission considers there are high risks related to the divestment. However, the Commission recognises that New Zealand is a small economy and that there may be a small number of potential purchasers. If this is the case, the Commission may allow a longer divestment timeframe. A longer timeframe for divestment may also be appropriate in times of economic recession as there may be fewer potential purchasers. In most cases, the timeframe for divestment will be kept confidential to prevent gaming by potential purchasers or an undesirable “fire-sale”. If the purchaser has been identified, this should be included in the undertaking.

The Commission also gives consideration to the suitability of the proposed purchaser. The Commission requires the applicant to keep it fully informed throughout the divestment timeframe as to the status of the asset(s) to be divested and the progress of the divestment generally. The Commission will also monitor whether the applicant is on track to complete the divestment.



A buyer acceptable to the Commission may need to have certain attributes that enable it to be an effective competitor in the relevant market. If a buyer is not acceptable, the Commission may find that the proposed divestment does not remedy the substantial lessening of competition in the market. Examples of attributes that may make a buyer acceptable are:

- it is independent of the merged entity;
- it possesses or has access to the necessary expertise, experience and resources to be an effective long term competitor in the market; and
- the acquisition of the divested shares or assets by the proposed buyer does not raise competition concerns.

In some cases there may be little or no interest from potential purchasers. This might indicate that the assets are unattractive to potential purchasers which may cast doubt on the effectiveness of the undertaking. Possible ways in which applicants could allay the Commission's purchaser risk concerns include, but are not limited to, the following:

- Ideally, offering to divest to a named buyer before the Commission makes its decision. The Commission will assess whether the proposed buyer is likely to provide sufficient competition post-acquisition. If the Commission is so satisfied, the divestment undertaking that forms part of the clearance will include the buyer as the named purchaser.
- If no buyer is apparent prior to clearance being granted, including in its divestment undertaking to the Commission that it:
  - will divest the assets to a buyer that is acceptable to the Commission within a specified timeframe; and
  - will inform the Commission of the identity of the proposed buyer prior to entering into a binding contract for sale and purchase of the shares/assets, providing reasons and evidence that establish that the buyer is likely to provide sufficient competition post-acquisition.

In this scenario, the Commission will assess whether sale of the assets to the proposed purchaser is likely to allay the competition concerns identified and will communicate its conclusions to the applicant.

- Including in its divestment undertaking to the Commission a clause stipulating that if the divestment does not take place within the specified timeframe, that:
  - It will appoint an independent sales agent to divest the assets at no minimum price to a buyer acceptable to the Commission. In that event, the agent's mandate will be discussed and agreed with the applicant on a case-by-case basis.
  - It will inform the Commission of the identity of the proposed buyer prior to entering into a binding contract for sale and purchase of the assets, providing reasons and evidence that establish that the buyer is likely to provide sufficient competition post-acquisition.

The Commission does not insist on, or accept, enhanced asset packages when divestments are not completed in the specified timeframe.

**7. How do you ensure that parties comply with your remedy order? Do you include reporting requirements or inspection clauses in your orders? Do you have staff dedicated to enforcement of remedies?**

The Commission will monitor an applicant's compliance with a divestment undertaking. Divestment packages accepted by the Commission may have reporting requirements that, for example, specifies that the applicant must notify the Commission of specific business acquisition milestones.

Section 69AB of the Commerce Act states that if a divestment undertaking is contravened (e.g., the divestment does not occur), the clearance to which the undertaking relates is void from the date it was granted. This means that the applicant is no longer protected from proceedings initiated under sections 27 and 47 of the Commerce Act by the Commission or another party.

If the Commission is satisfied that there is a contravention of an undertaking, it can apply to the Court under section 85B of the Commerce Act for a divestment order. The Commission must show that the terms of the divestment undertaking have not been met by the applicant.

The Commission may also employ the following enforcement options:

- seek an injunction from the Court under section 84 of the Commerce Act to halt the business acquisition; or
- use a cease and desist order under section 74A of the Commerce Act to halt the business acquisition; or
- apply to the Court under section 85A of the Commerce Act for pecuniary penalties for a contravention of an undertaking.

Under section 69AC of the Commerce Act, the Commission may, on application, accept a variation of an undertaking if it considers that the variation would not have materially affected its decision to give the clearance. Any application for variation of an undertaking must be made no later than 20 working days before the date on which the relevant obligation under the undertaking must be met.

The Commission does not have dedicated staff assigned to the monitoring and enforcement of divestment remedies. Rather, the Mergers team itself is responsible for these functions.

**8. What role do third parties and the public have in commenting on proposed remedies? How have your courts assessed the agencies' remedies and efforts to enforce them?**

The Commission will seek third party views as to whether the proposed divestment would remedy any substantial lessening of competition in the relevant market. If a divestment undertaking is offered after the investigative process, for example, in response to a letter of issues, the Commission will re-contact third parties it has spoken with and received information from, in order to obtain comments on the divestment undertaking.

In *Commerce Commission v British American Tobacco Holdings (New Zealand) Ltd* the New Zealand High Court considered, amongst other issues, the Commission's jurisdiction and ability to enforce divestment undertakings given by an overseas applicant.<sup>3</sup> The High Court found that the Commerce Act's business acquisition prohibition section "extends the operation of s 47 to the foreign acquisition of shares

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<sup>3</sup> (2001) 10 TCLR 320.

or assets in New Zealand businesses to the extent the acquisition affects New Zealand markets”. This would also capture any divestment undertakings offered by foreign entities. However, the High Court noted that enforceability in respect of foreign entities was questionable. It stated, “the Commerce Act 1986 therefore extends to those transactions although whether... the Commission can do anything effective about it remains a matter for doubt”.

To date, the New Zealand courts have not had reason to assess the Commission’s approach to business acquisition remedies.

**9. Feel free to comment on other issues that arise in relation to the assessment of merger remedies.**

The increasing number of global mergers has enhanced the need for communication, co-ordination, and co-operation among competition authorities in different jurisdictions. The Commission has consulted overseas competition authorities (particularly Australia) to ascertain whether divestments overseas are likely to have an effect on competition in markets in New Zealand. The Commission usually asks for a voluntary waiver from the applicant that allows the Commission to exchange confidential information with overseas competition regulators before any confidential information is exchanged.

## POLAND

Polish procedure in the merger cases is a one-stage process. Proceedings should be concluded within two months. In practice, that term is longer because of the existing stop-clock provisions. The absence of two-stage proceedings means that there is no clear transition between the initial findings of the existence of competition concerns and an extended, in-depth investigation. Parties have the right to actively participate in all fact-finding activities at all stages of the proceedings. That right also includes the possibility of submitting commitments to eliminate identified competition concerns. It means that both the party and the competition authority have the right and the opportunity to propose remedies. In practice, due to the absence of two-stage proceedings, it is the UOKiK president that comes forward with the initiative and the proposal of remedies. In that situation the entrepreneur is notified about the conclusions of the market investigation and the potential competition concerns only at the very end of the proceedings. Based on those findings, the competition authority presents the entrepreneur with the proposed remedies and at the same time sets a date for him to respond to those proposals. Usually such deadline is set at 14 days. The deadline may be extended if necessary. Proposals of the competition authority initiate the negotiations process. During that process, the entrepreneur has both the opportunity to discuss the practicality and validity of the assessment of competition concerns caused by the merger, as well as the content and scope of the proposed conditions. Findings of the competition authority made on the basis of the market survey set the framework for negotiations. Negotiations take place at the head office of the competition authority and involve representatives of the entrepreneur and case handlers which conduct the proceedings.

The Polish competition authority enjoys wide discretion when deciding on the terms and conditions of the merger cases. These conditions can be both structural and behavioral, as well as any combinations thereof, for example hybrid conditions. In practice, the decisions issued by the president of UOKiK show an unequivocal preference for structural conditions. This is explained by the general observation that mergers produce permanent changes in the structure of the market, which means that preventing their negative impact requires the use of structural means. Structural conditions are usually easier to apply and do not require an expanded monitoring mechanism. In addition to structural conditions, the Polish competition authority also applies behavioral conditions, as well as mixed, or hybrid conditions. The application of a specific condition depends on the nature of the merger and the type of competition concerns found. For example, in the case of a merger between two manufacturers, or the merger of two retail chains, the most frequent conditions are structural conditions, consisting of the disposal of the factory or a production line, or specific stores. Of course, there may be situations when the subject of the transaction is indivisible, for example when it is a single factory; this opens up new opportunities with respect to the terms and conditions. Different type of concerns produced by horizontal and vertical consolidation also affects the type of conditions applied by the Polish competition authority. Due to the fact that vertical consolidation usually leads to various types of market foreclosure, the conditions applied should be aiming to preserve the openness of the distribution or supply channels. Such nature of the competition concerns may be eliminated by applying behavioral conditions which oblige the entrepreneur to maintain the openness of the distribution network. Such situation did take place in the case of the CEDC/Polmos Bialystok merger on the alcohol market, the merger between the biggest alcohol distributor and the biggest maker of flavored vodkas. One of the conditions imposed on the entrepreneur in this transaction was the requirement to maintain distribution of alcohols of other producers at a specific level, one that guaranteed the openness of the wholesale distribution channel.

When deciding to apply structural sanctions, an analysis is made to identify to what extent part of the business subject to remedies would be able to perform its functions independently and conduct effectively business operations, exerting true competitive pressure. From that point of view, standalone business units of the entrepreneur stand the best chance. They do not require significant spinoff-related expenses and can be transferred to another entrepreneur within a relatively short period of time. In certain situations, it is possible to impose structural conditions on parts of the business, or a set of assets of the entrepreneur that was not a standalone entity. Such moves are possible provided that spinning them off from the remaining assets is possible to achieve and the time needed to do so is not excessive. Often such carved out assets are accompanied by intellectual property rights. A good example would be the merger of jam producers Agros Nova and Kotlin, where competition disposal conditions were imposed on one production line, together with rights to brand names, contracts and the essential human resources. Combining all of these elements produced a chance that the potential and value of the jam production line would be preserved in the future and would serve as an effective competitor with respect to jams made by Agros Nova.

The Polish competition authority has only very rarely applied behavioral remedies. In most cases they were imposed with respect to vertical mergers as an attempt to prevent market foreclosure. They had the form of commitments to preserve a specific level of turnover generated by selling goods from independent vendors and supplemented by fair-dealing clauses.

In the case of structural conditions, the Polish competition authority usually applies measures which aim to secure the assets subject to the disposal requirement. In particular, this applies to the requirement to maintain the same level of capital investments into the assets subject to disposal and ensuring it does not deteriorate. Until now, the Polish competition authority has not used the institution of a trustee. It is not entirely clear whether it would be possible to have one based on the competition law. That issue has been considered, but until now the UOKiK has never decided to appoint a trustee who would monitor execution of anti-trust provisions.

No “fix-it-first” remedies have ever been imposed in the existing practice of the Polish competition authority. All the terms and conditions set by the president of UOKiK apply to the post-merger period. Compared to other countries, the deadlines to meet structural conditions, for example partial asset disposal, were often quite long, ranging usually from 12 to 24 months. It should be stressed that during last few years average deadlines become shorter. Obviously the deadlines set in the decision are the maximum ones and entrepreneurs in some cases have been selling assets within shorter timeframes. Relatively long deadline for the implementation of remedies is due to the fact that they are announced publicly. As an obligatory part of the decision issued by the UOKiK president, the deadline to meet the conditions is also published. In light of the Polish law, there are no legal grounds to keep the deadline to meet conditions in secret. The absence of implementation of remedies can produce serious consequences for the entrepreneur. According to article 107 of the Polish Law On the Protection of Consumers and Competition, the UOKiK president can impose a monetary fine on entrepreneurs, equivalent to 10,000 euro for each day of delay in the implementation of conditional term. Such situation did occur when, in 2008, the competition authority fined Carrefour for unreasonable delay in the implementation of the obligations it has taken upon itself. As was already indicated, in the Polish law it is not entirely clear if the use of trustees is allowed. Due to considerable doubts, such measure has not been employed in the past decisions. While ordering the sale of part of entrepreneur’s assets, the UOKiK president also imposes an obligation to obtain prior acceptance of the potential buyer of those assets. This provides an assurance that the new buyer would guarantee effective use of the assets purchased in order to increase competitive pressure on the entrepreneur participating in the merger process.

The main instrument of control of the execution of remedies by entrepreneurs are the reporting obligations imposed on them. These consist of requiring the entrepreneur to periodically present the reports about progress on the execution of those terms and conditions. In the case of doubts as to the proper

execution of those terms, the Polish competition authority may launch explanatory proceedings and conduct an on-site inspection at the entrepreneur. The inspection on the fulfillment of conditional clearance is conducted by the same people, who have conducted the proceedings related to that specific merger. There are no separate officials responsible solely for the inspection of the fulfillment of remedies.

The Polish competition authority has a fairly limited experience in the issuing of conditional decisions. Just seven such decisions were issued since the existing competition law came into effect in 2007. For that reason, it seems that the actual evidence would be too scarce to use it to develop guidelines or good practices. For that reason, there are no official guidelines of the Polish competition authority regarding the conditional decisions. If our experience in that respect grows, then there will be grounds to codify our experience as part of guidelines.

Role of the third parties and that of the public opinion in the development of terms and conditions is very limited. The process of negotiating the terms and conditions is not made public and third parties cannot present their position regarding the remedies proposed. Role of the courts and their judgments on the assessment of the merger decisions is also very limited, since no conditional clearance has ever been contested in court. Consequently, there are no court rulings on these matters. Only the decision on the imposition of a penalty for delayed execution of remedies has been appealed. However, that matter is still pending and the court has not issued a verdict in that case.



## PORTUGAL

The design, implementation and monitoring of merger remedies has assumed a central role in the activity of the Merger Department of the Portuguese Competition Authority (PCA) for the past years. Throughout this time, the PCA accumulated substantial experience and has fine-tuned its standards of remedies analysis and implementation to the lessons learnt. This process culminated in the *Draft Merger Remedies Guidelines*, submitted to public consultation in the end of 2010 and January 2011. This document is based on the experience of the PCA, as well as on the practice and guidelines of other competition authorities, and covers both the procedural aspects as well as the substantive analysis of the remedies.

The PCA describes the various types of remedies according to the risk analysis entailed, emphasizing the fact that the remedies execution risk has to be assumed by the notifying party as a general rule. As main principles, the following are underlined:

- *Effectiveness* – the commitments must be likely to eliminate the identified competition concerns. Effectiveness also implies that the commitments are feasible, entailing an evaluation of both the implementation and monitoring costs. Furthermore, the time-frame of the remedies has to be taken into account. In order to ensure the effectiveness of merger remedies, the PCA will only accept those which have a high degree of certainty and remove the competition concerns identified.
- *Efficiency* – the commitments correspond to the solution with lower costs, among those which are likely to eliminate the competition concerns identified. Costs of market distortion resulting, in particular, from the implementation of behavioral commitments, whether related with static efficiency (e.g. efficiency in resource allocation and cost efficiency), or with dynamic efficiency (e.g. incentives to innovate) are taken into account. Likewise, costs that result from the elimination of potential synergies and efficiencies that would result from the merger, and which could be passed to the consumer, are also included in the analysis.
- *Proportionality* – the commitments should eliminate the competition concerns identified, balancing the means and the objective.

The following major ideas in the *Draft Merger Remedies Guidelines* can be highlighted:

- the legal distinction between “*conditions*” to a non-opposition decision (e.g. divestiture obligations) and “*accessory obligations*” (such as trustee appointments);
- the assumption that structural remedies imply a commitment to the results rather than a commitment to pursue best-efforts;
- the establishment of short deadlines for the remedies;
- the appointment of monitoring and divestitures trustees as a general rule;



- the requirements, consequences and process of the possible revision and the eventual non-compliance of remedies.

## **1. The process for considering possible remedies**

The Portuguese Competition Act (Law nr. 18/2003, of June 11) foresees the concept of remedies in Articles 35 and 37. In the context of this legal framework, the remedies are proposed by the merging parties — and not imposed by the PCA — and consist of a set of measures aimed at eliminating significant impediments to effective competition arising from a proposed merger operation, in the national market or in a part of it. The PCA will then evaluate if the proposed commitments are sufficient to eliminate the identified competition concerns related with the notified merger.

Although the concept of remedies is set up in the above mentioned articles, they do not rule, however, the process for proposing remedies nor its time lines. Therefore, the reference to remedies under Portuguese Law is more focused on substance rather than in the specific proceedings for submission by the parties and subsequent approval by the PCA.

Article 35(1) concerns PCA decisions in first phase proceedings, which can be non-opposition decisions if the notified merger does not create or reinforces a dominant position which may result in significant impediments to effective competition or if the merging parties submitted commitments that were deemed by the PCA to eliminate the identified competitive concerns (Article 35(2)). The same applies to the PCA decisions in second phase proceedings (Article 37).

To sum up, the PCA can accept remedies, both in first phase or in second phase proceedings. The remedies presented by the parties shall address the problems identified during the competitive assessment of the merger. As there is no specific procedure to submit remedies, whether in phase one or in phase two investigation, there are no different standards for reviewing them. However, at the end of phase two, the PCA developed an in-depth investigation and its conclusions concerning the remedies proposed may benefit from a more detailed analysis than in first phase proceeding, even though acceptance, by the PCA, of the set of remedies in either phase of the proceedings will only take place if they were found sufficient to be effective.

## **2. Structural vs behavioral remedies**

The PCA, in line with the EC Commission, also has a clear preference for structural remedies over behavioral remedies. Indeed, it is considered that a structural solution is more effective, since it entails a modification into the market structure, deemed to solve the identified competition concerns. Furthermore, this kind of remedy usually does not require a high level of monitoring by the PCA and, in the case of an infringement of the remedies, it is easier to detect.

Nevertheless, the selection of the type of remedies – structural, behavioral or hybrid – and the appraisal of the associated risks are always made on a case by case basis, according to the principles of *effectiveness*, *efficiency*, and *proportionality*. This approach is no different in horizontal or vertical mergers.

## **3. Types of divestiture remedies**

The PCA usually requires the divestiture of an existing viable stand-alone business. However, taking into account the principles of *proportionality* and *efficiency*, it may also accept the divestiture of businesses which have existing links or are partially integrated with businesses retained by the parties and therefore need to be ‘carved out’.

In what concerns assets divestiture, in particular brands and/or licenses, it is considered by the PCA that the divestiture of a business generally appears preferable to the divestiture of licenses and/or IP rights. Indeed, it is considered that a divestiture consisting of a combination of certain assets which did not form a uniform and viable business in the past creates risks as to their viability and competitiveness. However, the PCA may accept this type of divestiture if the viability of the business is ensured, notwithstanding the fact that the assets did not form a unified business in the past.

#### 4. Types of behavioral remedies

In certain cases, the PCA may consider behavioral commitments offered by the merging parties. These types of remedies may be designed with the aim of improving market contestability.

The PCA may accept measures intended at creating or strengthening the ability and incentive of competitors to dispute the merging parties' customers, which may imply a reduction of some barriers to entry or expansion, such as:

- measures imposing restrictions on the conduct of the merging parties (*e.g.* not requesting a particular license<sup>1</sup> for a period long enough so as to increase the scope for entry and expansion by competitors in the relevant markets);
- measures designed to alleviate the switching costs faced by the merging parties' customers (*e.g.* limiting practices aimed at enhancing customer loyalty)<sup>2</sup>;
- measures aimed at reducing/eliminating the establishment of exclusive contracts or long-term contracts by the merging parties. These measures may consist of imposing the revoke of some contractual clauses if they are found to restrict effective competition, *e.g.*, exclusive long-term supply agreements which limit upstream competitors' access to clients in the downstream market;
- measures imposing the termination of distribution agreements between the merging parties and their competitors, *e.g.*, if they are found to facilitate or promote the co-ordination of certain commercial behaviors;
- measures restricting the adoption of certain business conducts, such as bundling or cross-selling;
- measures ordering the merging parties to grant access to (a) infrastructures, in particular networks, (b) essential raw materials, (c) licenses and leases, (d) technologies and (e) patents, know-how or other intellectual property rights. In these cases, the access of third parties must be made according to a transparent and non-discriminatory process, especially when vertical effects that could raise competitive concerns are identified;

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<sup>1</sup> E.g., PCA decisions in cases Ccent. 1/2008 - Pingo Doce/Plus, 29.04.2008 and Ccent. 51/2007 – Sonae/Carrefour, 27.12.2007. The set of remedies imposed in these cases consisted of restrictions to expand retail food sales areas for a period of 3 years from the decision's date as well as not submitting new licence applications, for a period of 12 months, in the relevant markets where competition concerns were identified. Given the limits emerging from the standards for appraisal of license applications by the relevant administrative authorities, the purpose of these commitments was to increase the scope for entry and expansion by competitors in the relevant markets of concern.

<sup>2</sup> E.g., PCA decisions in cases Ccent. 8/2006 – Sonaecom/PT, 23.10.2007; Ccent. 56/2007 – CATVP/Bragatel Pluricanal Santarém Pluricanal Leiria, 21.11.2008; and Ccent. 21/2008 – CATVP/Tvtel, 21.11.2008, all cases concerning media markets.

- concerning minority shareholdings, which may generate perverse effects but whose associated financial benefits do not entail, by itself, competition concerns, the PCA may consider a mere waiver of all rights inherent to that minority stake, such as rights of representation on the board of directors, veto rights and rights to information, but allowing the possession of the capital share;
- periodical information report obligations.

Some behavioral commitments may imply a restriction on proprietary rights. As an example, we mention the establishment of a temporary lease agreement with a third party concerning a part of the portfolio of assets of the merging firms (*e.g.* a power plant or brand)<sup>3</sup>.

The PCA may also, in very specific conditions, accept remedies that intervene directly in the behavioral conduct of the merging parties, namely in what concerns pricing strategies, product quality and/or variety, quantity offered or production capacity, aimed at limiting/eliminating the predicted adverse competitive effects of the merger. This type of behavioral commitments are, however, only accepted under very exceptional circumstances, since they do not act on the causes of the competitive problems (*e.g.* in terms of market structure or the level of market contestability), but only restrict the adverse effects of the concentration until competition in the market is restored. The assessment of the adequacy of this kind of measures will consider both the costs and benefits of the short-term intervention. Furthermore, they may be justifiable in the context of a broader set of remedies, but clearly as a transitory measure until effective competition is restored or when the application of structural commitments or other behavioral commitments would be disproportionate, given the type and duration of the competitive problems identified, in particular when it is foreseeable that effective competition in the market will be restored in the short term.

## 5. Protecting the to-be-divested assets or business

When assessing the remedies offered by the notifying party, the PCA assesses the risks associated with their implementation. In divestiture remedies, it is important to ensure conditions aimed at preventing that the competitive potential of assets or businesses to-be-divested deteriorates before their divestment. In this respect, the set of remedies has to guarantee the maintenance of the commercial value and competitiveness of the businesses or assets, avoiding the possibility of the loss of their economic viability, for example, as a result of the loss of customers or employees.

In the analysis of divestiture remedies, the PCA puts great attention to the extent in which they ensure the protection of the to-be-divested assets or businesses prior to divestiture. The remedies package offered by the notifying party may include a number of sufficient obligations to preserve the to-be-divested assets or business. When this is not the case, the PCA may impose an additional set of orders aimed at protecting the to-be-divested assets or business for the notifying party to comply with, which become part of its final decision.

Therefore, in its decisions, the PCA provides for the separation of the divested business in relation to the activities retained by the parties, ensuring that it is managed as a separate entity intended for sale.

In some cases, it might be necessary to impose barriers to the flow of information ("*chinese walls*") to ensure the maintenance of the competitive value of the divesting assets or business.

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<sup>3</sup> The PCA's clearance to the merger case Ccent. 6/2008 – EDP Produção/Activos EDIA (Alqueva Pedrógão) was made conditional to the celebration, by EDP Produção, of a temporary lease agreement with a duration of 5 years, not subject to renewal, for the management of the hydro power plants of Agueira and Raiva.

In order to ensure the enforceability of the set of commitments, the PCA has appointed monitoring trustees in past decisions. The PCA may issue orders and instructions to the monitoring trustee, and the latter may propose to the parties any measures it considers necessary for the performance of their duties. The parties, however, are forbidden of giving instructions to the trustee without the previous agreement of the PCA.

In the perspective of the PCA, the monitoring trustee should protect the integrity and independence of the to-be-divested business during the period between the implementation of the merger and the acquisition of control by the future acquirer. As such, the monitoring trustee will be responsible for supervising and reporting the efforts made by the parties to find an acquirer, submitting reports to the PCA (periodical or upon a specific request by the PCA), namely describing the implementation of the set of remedies.

In cases of separation of the activities, the monitoring trustee may also be responsible for assigning the personnel between the to-be-divested business and the activities held by the parties.

In some cases, the PCA may also consider that it is necessary to appoint (following a proposal from the parties) a hold-separate manager, independent from the parties. This person will integrate the divesting businesses, with direct knowledge of the business or assets to be divested, being responsible for their daily management, under the supervision of the monitoring trustee. This management is performed independently of the notifying party and in the best interest of the business or assets to be divested, with the aim of maintaining its economic viability, marketability and competitiveness.

## **6. Ensuring a successful divestiture**

The PCA considers that the deadlines established for the divestment of businesses or assets must be short, so as to prevent risks associated with the deterioration of their competitive value in the period of time between the adoption of a final decision by the PCA and the divestiture.

Based on its experience, the PCA considers that a 6 months period would normally meet this criterion (as proposed in the *Draft Merger Remedies Guidelines*), although longer time frames may be accepted given certain specificities of the case at hand. This period comprises both phases established for the divestment procedure, namely a first one in which the notifying party attempts to accomplish the divestment and a second one in which a divestiture trustee promotes the sale. In the context of this second phase, the divestiture trustee may be given the option of selling the business/assets with no minimum price limit ("fire sale clause").

The PCA also considers the possibility of including clauses of divestiture of property of the type of "crown jewel", normally offered as an alternative and subsequent commitment to a first sale attempt. In fact, this type of clause can expedite the divestiture process, by reducing the incentives of the merging parties in delaying the sale.

Moreover, the appointment of monitoring and divestiture trustees, which is accounted for, as a general rule, in the PCA decisions, clearly envisages making the divestiture process successful and more expeditious.

In some cases, as previously mentioned, it may also be necessary to appoint (following a proposal from the parties) a hold-separate manager for the daily management of the divesting business, under the supervision of the monitoring trustee, ensuring the maintenance of the economic viability, marketability and competitiveness of the business to-be-divested.

In its *Draft Merger Remedies Guidelines*, the PCA states that the main way to mitigate the risks associated to a divestiture, in particular those related with finding a purchaser, is to require the notifying

party to celebrate a binding contract with a buyer, either prior to the implementation of the transaction (buyer pre-implementation "*up-front buyer*") or prior to the decision of the PCA (buyer pre-decision or "*fix-it-first*"). Nonetheless, these two mechanisms are only feasible in very exceptional cases and the PCA does not have experience in none of them.

## **7. Mechanisms for remedies enforcement**

The PCA usually includes periodical reporting obligations to the notifying party and the trustees, namely in what concerns the evolution of the negotiations underlying the divestiture process and the identification of potential buyers, together with a general reporting obligation concerning any matter relevant to the remedies implementation.

The compliance with the remedies imposed is usually monitored by the case handlers. There is also a Monitoring Unit within the Mergers Department that is responsible for the follow up of all remedies being monitored.

## **8. Remedies guidelines in Portugal**

Following the above mentioned public consultation, the PCA expects to issue its Remedies Guidelines until the third quarter of 2011.

## **9. The role of third Parties and Court's assessment concerning merger remedies**

According to the Portuguese Legal Framework, third parties to the merger can be consulted, in order to give their views on the remedies proposed by a notifying party. This consultation is mandatory concerning those third parties with a legitimate interest who opposed the merger and voluntary for all other third parties which the PCA finds relevant to consult on the matter. Some of these third parties usually bring useful information to the file concerning remedies, even though they only have access to a non-confidential version of the remedies package.

On another level, namely the public consultation on the Remedies Guidelines, the interaction with third parties has proved very proficuous, yielding useful comments, especially those made by competition lawyers.

On what the intervention of courts is concerned, so far only one appeal was presented and it has not been decided yet. It refers to a PCA decision on the revision of remedies.

## **10. Other issues**

Referring to the major ideas in the *Draft Merger Remedies Guidelines* highlighted above, the PCA considers that it might be useful to present some thoughts concerning (i) the legal distinction between "*conditions*" to an approval decision (e.g. divestiture obligations) and "*accessory obligations*" (such as trustee appointments); (ii) the assumption that structural remedies imply a commitment to the results rather than a commitment to pursue best-efforts and (iii) the requirements, consequences and process of the possible change and the eventual non-compliance of remedies.

In what concerns the establishment of short deadlines for the implementation of remedies and accounting for the appointment of monitoring and divestitures trustees as a general rule, these reflect a common trend to other jurisdictions, namely the European Commission, and were already addressed in this document.

### **10.1 The legal distinction between “conditions” to an approval decision and “accessory obligations”**

As above referred, remedies are measures proposed by the merging parties in order to eliminate the competition concerns identified. These remedies are proposed by the parties, and subsequently analyzed by the PCA, who evaluates if they eliminate the competition concerns identified and, this being the case, adopts a non-opposition decision with remedies (imposing “*conditions and obligations*”), corresponding to the commitments submitted by the parties.

“*Conditions*” are the commitments necessary to eliminate the competition problems identified (e.g. a divestiture), without which the PCA would not issue a non-opposition decision, and “*obligations*” are the commitments aimed at making the *conditions* feasible, these being essentially accessory (e.g. the appointment of a monitoring trustee).<sup>4</sup>

Thus, the non-compliance with the “*conditions*” has, as expressed in the *Draft Merger Remedies Guidelines*, the following main consequences: (i) revocability of the PCA's non-opposition decision, (ii) nullity of the contracts related with the merger (article 41 of the Portuguese Competition Law) and (iii) imposition of a fine of up to 10% of the previous year's turnover (article 43, paragraph 1, al. d) of the Portuguese Competition Law).

The non-compliance with the “*obligations*” leads to the imposition of a fine of up to 10% of the previous year's turnover.

### **10.2 Remedies imply a commitment to the results rather than a commitment to pursue best-efforts**

As mentioned above, remedies are intended to ensure the maintenance of effective competition, allowing the adoption of a non-opposition decision by the PCA. Therefore, the PCA considers that remedies are a result condition of a non-opposition decision, independently of this qualification being stated in the remedies text.

When the notifying party offers commitments with the purpose of obtaining a non-opposition decision it must be aware that, if the remedies' result is not obtained, regardless of the justification or the existence of guilt, the condition is considered not complied with (e.g. this would be the case when an asset's divestiture corresponding to a remedy is not carried out because no buyer is interested in acquiring it).<sup>5</sup>

In the case of non-divestiture, even when a divestiture trustee has been appointed, the notifying party, who assumes the risk of infringement, is held responsible for the non-compliance.

### **10.3 Requirements, consequences and process of the possible change and the eventual non-compliance of remedies**

#### **10.3.1 Amendment of remedies**

The PCA can draw-up a review clause concerning remedies, which allows it to change the commitments, with the consent of the notifying party, concerning intermediate deadlines for the fulfillment of the conditions imposed, as well as the timing, frequency and content of the obligations imposed. The

<sup>4</sup> Paragraphs 19 and 20 of the Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (2008/C 267/01).

<sup>5</sup> Differently, in a best efforts obligation the notifying party would not be obliged to obtain the divestiture result, but only to act with the due diligence required to obtain the result.

review of commitments covers only matters without direct impact on the competitive structure and it is predicted *ab initio* in the remedies text.

The revision clause has a range different from that of a change of remedies, as the latter concerns remedies with a direct impact on the competitive structure and implies an amendment to the PCA's decision.

Thus, for the purposes of amendment of commitments, the PCA verifies if there was an exceptional/extraordinary change in the circumstances that supported its non-opposition decision with remedies, which was not foreseeable and has a relevant impact in the market structure.

The modification of the remedies can result from a request of the notifying party or from the PCA's own initiative, but it is conditioned to the agreement of the notifying party and, in certain cases, the entity that resulted from the merger. Third parties that opposed the merger in the initial procedure have to be consulted.

The effects of the amendment are merely to the future and the procedure and form are basically the same (only simplified) as the original PCA's non-opposition decision.

#### *10.3.2 Non-compliance with remedies*

When the non-compliance of remedies to which the PCA's decision has been conditioned upon is verified, as stated in the *Draft Merger Remedies Guidelines*, the PCA replaces the non-opposition decision with remedies with a prohibition decision, ordering the appropriate measures to restore effective competition. The contracts related to the merger are considered null and void and a fine of up to 10% of the notifying party's turnover of the previous year can be applied. This last sanction also applies to situations where remedies that are mere obligations and not conditions are not complied with.

## SLOVAK REPUBLIC

### 1. Introduction

The Antimonopoly Office of the Slovak Republic, Division of Concentrations (hereinafter „the Office“) does not have much experience with imposing conditions and obligations in mergers. Since 2004 when the new Act on Protection of Competition introducing the adjustment coming out from the *acquis communautaire* referring to the conditions and obligations in mergers came into force, the Office identified only in three cases where the assessed merger causes negative impacts on effective competition.

In two cases the Office found that the conditions proposed by the undertakings are insufficient to eliminate the competition concerns identified by the Office. In these cases the Office prohibited the merger.

In one case the Office assessed the proposed conditions as sufficient to eliminate the competition concerns identified by the Office and the merger has been approved subject to conditions.

When the Office identifies serious competition concerns of the assessed merger, it is obliged to inform the undertakings concerned on this fact and it has to give reasons for its assertions. Afterwards the Office asks the undertakings concerned to propose conditions and obligations.

The Office provides the undertakings concerned with consultations on proposed conditions and obligations with the aim to help the undertakings to find such conditions and obligations which would ensure full and effective elimination of competition concerns identified by the Office.

Approach of the Office to the assessment of conditions and obligations proposed by undertakings concerned, as well as the procedure how to propose and assess the conditions and obligations is summarized in the publicly available material of the Office *Imposing Conditions and Obligations in Mergers*,<sup>1</sup> derived from the materials of the European Commission referring to imposing of conditions and obligations.

### 2. Mergers resulting in negative impacts on competition:

#### 2.1 *Merger Airport Vienna and Airport Bratislava*

In 2006 the Office identified the serious competition concerns in the case of merger through which the keeper of Airport in Vienna (capital of Austria) would acquire the joint control over the Airport in Bratislava (capital of Slovakia). Competition concerns referred to the relevant market of providing airport infrastructure for regular regional flights consisting in creation or strengthening of dominant position resulting in significant barriers to effective competition in the relevant market.

Regarding the mentioned facts the undertakings concerned submitted the draft of conditions and obligations and the Office has been assessing whether they are sufficient for full and effective elimination of competition issue. The Office regarded the kind of proposed conditions, their extent, time horizon and

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<sup>1</sup> [http://www.antimon.gov.sk/files/9/2006/podm\\_konc2.rtf](http://www.antimon.gov.sk/files/9/2006/podm_konc2.rtf) - only Slovak version is available.



probability of their successful and complete implementation in the context of characteristics of the relevant market including the position of merger participants.

The undertakings concerned proposed to eliminate the competition concerns of the Office mainly by price regulation of airport taxes, by commitment to make investments in infrastructure of Bratislava airport and by wider choice of bus connections between Vienna and Bratislava. The Office considered these conditions as insufficient to eliminate the negative impacts of merger on competition conditions.

The Office prohibited this merger. The decision is valid.

## **2.2 *Merger Tesco and Carrefour***

Another merger in 2006 having negative impacts on competition was the merger of undertakings Tesco and Carrefour. Undertaking Tesco holding the largest chain of hypermarkets and supermarkets in the Slovak Republic wished to acquire the chain of hypermarkets owned by the undertaking Carrefour in more countries, including also four hypermarkets in the Slovak Republic.

This merger created or strengthened dominant position of undertaking Tesco in the relevant market of the retail sale of consumer goods for everyday use in hypermarkets, supermarkets, and discount stores in the cities of Bratislava, Žilina, and Košice and their catchment areas within 20 minutes of car ride resulting in significant barriers to effective competition in these relevant markets.

For elimination of competition concerns identified by the Office the undertaking Tesco proposed to sell three hypermarkets of undertaking Carrefour, located in the cities in west, middle and east Slovakia. However, the Office was doubtful about the appropriate acquirers of sold business. Hence, the Office addressed all undertakings having been specified by the undertaking Tesco as appropriate acquirers of sold business and it found certain risks about the real interest to buy the sold business, thus the proposed condition was risky in the view of the existence of the appropriate acquirer.

Regarding these facts it was necessary to enforce the so-called up-front buyer solution, when the undertakings concerned must not implement the merger before fulfilment of conditions and obligations.

As the undertaking Tesco did not agree with up-front buyer solution the Office prohibited the merger of undertakings Tesco and Carrefour. The undertaking Tesco did not submit an appeal and the decision came into force.

## **2.3 *Merger Holcim and VSH***

In 2011 the Office identified serious competition concerns in the case of merger consisting in acquisition of direct exclusive control of undertaking HOLCIM Auslandbeteiligungs GmbH, Germany (hereinafter „Holcim“) over the undertaking Východoslovenské stavebné hmoty, a. s., Slovakia (hereinafter „VHS“).

Holcim acts in the Slovak Republic via its subsidiary company Holcim (Slovensko) a. s., Rohožník (hereinafter „Holcim SK“) mainly in the area of production and sales of white and grey cement, truck-mixed concrete and aggregates, as well as in the area of cargo traffic services.

VHS operates in the area of production and sales of grey cement, truck-mixed concrete and aggregates, as well as in the area of cargo traffic services.

The Office analyzed the impacts of merger on several relevant markets whereas competition concerns were identified in the area of production and sales of grey cement and in the area of production and sales of truck-mixed concrete.

Regarding production and sales of grey cement the Office set aside the issue whether the relevant market in the referred case is the production and sales of grey cement or production and sales of bulk and packaged grey cement. In both cases merger would negatively impact the competition.

According to the participant notifying the merger the market is determined by the territory of the Slovak Republic, the Czech Republic, the Hungary, south Poland and eastern Austria. However, the Office found out that primarily with regard to different border flows of grey cement, diverse structure of the grey cement market, various prices of grey cement in particular countries as well as necessity of local presence for active operation on the market, the geographic relevant market is territory of the Slovak Republic.

In monitored period 2005-2010 except 2009 Holcim SK was the largest supplier of grey cement in Slovakia. VHS was in this period the third largest supplier of grey cement.

The Office found out that concerned merger will cause negative impacts on conditions of competition, as undertaking will acquire dominant position in the relevant market of production and sales of grey cement in Slovakia or in the relevant market of production and sales of bulk grey cement in Slovakia (hereinafter relevant market of production and sales of grey cement), resulting in barriers to effective competition. In consequence of examined merger undertaking Holcim will not be exposed to significant competition in the relevant market of production and sales of grey cement and with the regard to its economic power it will be able to conduct independently.

Considering production and sales of truck-mixed concrete from the horizontal point of view, the Office found that negative effects of merger do not happen, but the vertical assessment revealed significant barrier to effective competition in several local geographic markets in Slovakia of production and sales of truck-mixed concrete.

With reference to the above mentioned facts the Office asked the undertaking Holcim to submit conditions and related obligations that eliminate competition concerns of the Office.

To eliminate competition concerns resulting from merger and identified by the Office the undertaking Holcim suggested conditions and related obligations leading to selloff of terminal owned by Holcim SK which is located in the area with the utmost overlapping of activities of concerned parties.

The Office addressed local and foreign producers of grey cement, wholesale distributors and processors of grey cement to test conditions and obligations suggested by Holcim.

On the basis of market testing of conditions and obligations suggested by undertaking Holcim, as well as on the basis of other information, the Office found out that the selloff of Terminál Vlkanová to appropriate acquirer eliminates negative structural effects of concerned merger upon conditions of effective competition in relevant market of production and sales of grey cement in Slovakia. Consequently, significant barriers to effective competition in relevant market of production and sales of truck-mixed concrete in relevant territory of Slovakia will be eliminated.

Regarding the above mentioned facts the Office approved merger subject to conditions. The decision came into force on May 31, 2011.

Presently, the Office monitors the fulfilment of conditions and obligations.

### **3. Conclusion**

Based on the relatively limited experiences of the Office with the cases when the Office has been dealing with the conditions and obligations proposed by the undertakings concerned, it is possible to observe that the Office considers the conditions which do not eliminate the competition concerns of the Office (merger of Vienna and Bratislava Airports) and the conditions, implementation of which is risky without implementation of up-front buyer solution (merger of undertakings Tesco and Carrefour) as insufficient to eliminate the negative impacts of merger.

Generally we may say that the Office prefers structural conditions to behavioural ones.

In the case of Holcim and VSH merger the Office is now monitoring the fulfilment of conditions and obligations and after their supposed fulfilment the Office plans to realize the ex-post analysis of competition in the relevant market of production and sale of grey cement in the Slovak Republic.

## SPAIN

### 1. Introduction

The adoption of a new Competition Act in 2007<sup>1</sup> increased the flexibility of the Spanish merger review system in relation to remedies. The Spanish merger system involves a two-phase (or three-phase) process, where parties can propose remedies in first or second phase proceedings before the Competition Authority, when a merger raises serious doubts as to its compatibility with the national market. Unlike the European Commission, the Spanish Competition Authority can impose conditions on a merger when commitments have not been proposed by the undertakings or they have been rejected by the Authority in the second phase.

Since 2007, the Spanish Competition Authority (*Comisión Nacional de la Competencia* “CNC”) has adopted different solutions depending on the characteristics of the mergers subject to control. In line with other competition authorities, the question of which type of remedy is suitable to eliminate competition concerns has been examined on a case-by-case basis, but there are common patterns that will be explained in this paper.

In the majority of cases ruled under the new Act, mergers which could hinder competition have been authorized after the approval of commitments presented by the parties. Nevertheless, in one specific case, Abertis-Axion-Tradia, the Authority rejected the commitments proposed and imposed by itself conditions.

In general, it is common to use structural remedies but behavioral remedies have also been adopted in several occasions when structural remedies were very difficult or impossible to implement.

One of the main issues to take into account when accepting remedies is their effectiveness. In order to ensure that conditions or commitments will be respected, the Spanish Competition Authority can use a team composed by the case handler and one supervisor to monitor this process.

The purpose of this paper is to put forward the key elements of the different types of remedies accepted by the Spanish Competition Authority when examining and approving mergers. For this reason, we will analyze different cases where the CNC has adopted both structural and behavioral remedies. In order to clarify the nature of the Spanish merger review system, the general procedure will be explained first.

### 2. General procedure

As explained in the introduction, the Spanish merger system involves a two-phase process.

After the notification, during the first phase, the Investigations Division analyses if an operation can impede or obstacle the effective competition. In that case, parties can propose commitments to solve these competition concerns within twenty days after the notification of the merger is filed in due form with the CNC. If they propose commitments after this time limit, they may be rejected without any further analysis.

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<sup>1</sup> *Ley 15/2007, de 3 de julio, de Defensa de la Competencia* (Competition Act 15/2007, of 3<sup>rd</sup> July 2007).

The parties have to propose commitments that are sufficient enough to remove competition concerns and submit the necessary information to assess them. The celebration of meetings between the parties and the Investigations Division is usual, in order to avoid remedies that do not solve these concerns and undoubtedly will not be accepted by the Council of the CNC.

If the undertakings present remedies in the first phase, the initial time line (one month) is prolonged for ten days. The commitments presented in the first phase can only be accepted if the competition problem detected is clearly identifiable and can be easily remedied. So after the proposal of remedies by the parties and its submission to the CNC, the CNC should assess them and decide whether these remedies, once implemented, would eliminate the competition concerns identified. After the approval, the CNC has to monitor the compliance of these remedies.

Nonetheless, if during the first phase the Investigations Division concludes that the operation raises serious doubts as to its compatibility with the relevant markets, and remedies have not been presented or have been rejected, the second phase of the procedure starts. During the second phase, the Investigations Division must draw up a Statement of Objections, where it analyses in deep the operation and concludes if it can obstacle effective competition. The Statement of Objections is then sent to the parties. The latter and third parties with a legitimate interest in the case have ten days to formulate allegations.

If the operation is considered to obstacle effective competition, parties can offer commitments, within up to thirty-five days after the decision of the Council of the CNC to initiate second phase proceedings and initial time line to resolve (two months) is prolonged by fifteen days. If they propose commitments after this time limit, they may be rejected without any further analysis.

In all cases, the Investigations Division submits any proposal of commitments filed by the parties to the Council of the CNC.

The CNC is also allowed to communicate the proposed remedies to other parties in the proceedings and third parties, which helps the CNC to analyze the possible impact of the merger in the affected markets.

Remedies are assessed under the principles of adequacy (the commitments must eliminate the anti-competitive risks generated by the merger), proportionality (their aim is not to offset all competition problems that may exist in the market, but only those arising from the specific transaction) and least intervention (in case there are several options, the one which would less interfere with the principle of enterprise freedom should be chosen).

Finally, if the parties do not offer commitments, or if the CNC rejects remedies proposals, the CNC Council may still approve the merger subject to conditions in the second phase. These conditions would be previously fixed by the Investigations Division.

Any second phase decision taken by the CNC Council approving a merger subject to remedies (either commitments or conditions) or prohibiting it could be modified by the Council of Ministers in the third phase for “reasons of general interest” other than the promotion of competition. According to the 2007 Competition Act, these reasons of general interest may relate to defense and national security, protection of public security or health, free movement of goods and services within the national territory, environmental protection, promotion of research and technological development, or safeguarding the objectives of sector-specific regulation. The third phase may last an additional one and a half months. Until this date, the Council of Ministers has never formally opened a third phase analysis in relation to any merger.

Generally when a merger has been authorized subject to remedies, parties must present a plan of actions and the Investigations Division has to carry out the necessary actions to enforce remedies and

monitor fulfillment of the obligations. The Investigations Division must analyze any modification of the proposal of remedies requested by the parties. If the circumstances that motivated the adoption of the remedies changed, the CNC Council can approve a modification in those remedies, following a proposal by the Investigations Division.

No appeal by administrative procedure may be lodged against the decisions of the CNC in merger proceedings, and judicial appeals may only be lodged in the terms in Administrative Jurisdiction Act, as it is reflected in Spanish Competition Act. In particular, merger decisions can be appealed before the *Audiencia Nacional*. The last jurisdictional appeal can be lodged before the Supreme Court.

### **3. Structural remedies: divestitures**

#### **3.1 Procedure**

Structural remedies are those that involve divestitures of assets held by the parties.

Since it is not possible to give a general assessment of all the cases, the CNC has to run a case-by-case analysis. The purpose of this section is to extract the principles the CNC has observed in the analysis and resolution of the merger cases approved with structural remedies, focusing the attention on two cases: Gas Natural-Unión Fenosa and Dia-Plus.

When a merger is authorized subject to structural commitments or conditions, it is of vital importance to define the right scope of the divested business.

The CNC has to ensure (1) that the remedies proposed are suitable, sufficient and proportionate for eliminating the obstacles to competition arising from the operation in the relevant markets but also (2) that the remedies (divestments) are permanent and affect stand-alone businesses or at least assets that are able to be managed with full independence by the potential buyers and (3) that the remedies could be implemented in a short period of time.

In reference to the second point, in some cases it is not necessary to determine in the proposal the concrete assets/businesses that should be divested. More or less concretion in the businesses/assets to be divested will depend on both the geographic scope of the affected markets and the economic or technical performance of the assets. For example, if the merger leads to an increase of the market power in a market with a regional scope, divestments would be located in that region. The CNC also takes into account that generally the parties have incentives to offer the divestment of the less profitable assets, when it is possible to choose between different ones. In this case, the CNC has to determine if the divestment of the proposed assets would have enough impact in the market and would permit the maintenance of the competition dynamics of the pre-merger market. Nevertheless, although concretion about the assets may not be required in the remedies' proposal, the CNC can impose on the parties the obligation to submit in a short period of time a plan of actions, in which the conditions and characteristics of each particular commitment should be detailed.

Regarding the remedies proposed to ensure the implementation of the divestments, it is important to highlight that these additional obligations are considered as important as the divestments themselves.

Although these remedies are linked to the monitoring procedure, the conditions and principles of this monitoring process should be set in the proposal itself and in the resolution deciding on the merger. These conditions will determine the activity of the CNC during the months after the merger and try to ensure that the remedies are implemented in a fixed period of time.

The conditions regarding the procedure of divestment would usually be the following:

- Fixation of a deadline to finish the implementation of remedies.
- Appointment of a sales-trustee, which can also require managerial tasks.
- Determination of the conditions that the potential purchaser must conform and procedure to approve it.

Referring the deadline, it is of high importance to fix a limited timeframe and, at the same time, to create enough incentives to ensure that the limit will not be exceeded. The resolution must impose a deadline on the remedies implementation and describe a schedule for the divestment process. Usually, a first period (“initial period”) is given to the parties to find potential buyers and freely negotiate the sale of the assets by themselves. Nonetheless, after this first period the parties are usually obliged to propose a sales-trustee, which will assure to the CNC that divestments will be done on time. During this “additional period” the sales-trustee organizes the selling process by selecting and recruiting potential buyers and presenting them the assets. It is not necessary to request the parties to stop their own selling process, as long as it does not interfere with the sales-trustee efforts and its remuneration. When the deadline approaches, it is necessary to make sure that the parties or the sales-trustee have the adequate mechanisms (such as auctions) to ensure the effective divestment of the asset. Until that moment, the economic interests of the parties have been defended but, at the end of the divestment period, the seller could be obliged to sell the asset at any price.

As regards the sales-trustee, if it is used, the parties should propose in a short period of time one or more potential sales-trustees to the CNC. The sales-trustee should fulfill several conditions:

- He must be independent of the parties.
- He must have the needed qualifications to carry out the mandate.
- His appointment should not create a conflict of interest.
- His retribution must be enough to assure an independent and successful mandate.

Having received a list with the potential candidates to become sales-trustee of the operation, the Investigations Division must check that the above-mentioned conditions are fulfilled and analyze the plan of actions proposed by each one. The Investigations Division may freely approve or reject the proposed candidates, although always reasoning the decision. When more than one candidate is approved, then usually the parties can freely select one of them.

The trustee should ensure the implementation of the remedies. For this purpose, the trustee will maintain continuous communication with the CNC and will submit periodic compliance reports (usually monthly). The parties must collaborate with the trustee and provide it with all the information and documentation requested. The parties will also invest the trustee with the necessary power to carry out the mandate.

In some cases, the sales-trustee or a different trustee (selected in the same way) may be used to manage the divested assets during the transition period between the decision and the divestment in order to preserve the value and the normal functioning of the affected assets until final divestiture.

Last but not least, the CNC determines the conditions that the buyer must fulfill to get approved. The purchaser requirements are normally the following:

- The purchaser is required to be independent of and unconnected to the parties.
- The purchaser must possess the financial resources, proven relevant expertise and have the incentive and ability to maintain and develop the divested business as a viable and active competitive force in competition with the parties in the merger and other competitors.
- The acquisition of the business by a proposed purchaser must neither be likely to create new competition problems nor give rise to a risk that the implementation of the commitments will be delayed. Therefore, the proposed purchaser must reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the business to be divested.

Nevertheless, the suitability of the proposed purchasers will be assessed during the monitoring procedure. The CNC supervises the compliance of the resolution. Two are the main activities of the Investigations Division at this stage:

- The assessment and approval of the purchasers and the contracts.
- The general surveillance of the process through a continuous communication with the parties, with the potential purchasers and, if it is the case, with the sales-trustee.

Independently of the merger control (if needed) by the CNC of the divestiture transactions, the Investigations Division is set to assess and approve every single potential buyer of the divested assets. Just before or after having signed the contract, the parties are obliged to submit the contract and an extensive description of the potential buyer to the Investigations Division. If there is a plan of action, the parties must explain how the contract complies with it and with the resolution as well as the state of the process to get all necessary approvals from the relevant regulatory authorities. Focusing on the particularities of the contract and the characteristics of the buyer, the Investigations Division analyses if the conditions contained in the plan of action and the resolution are fulfilled.

The Investigations Division usually receives monthly information about the state of the process from the parties and, if it is the case, from the sales-trustee, too. Thanks to these compliance reports, the Investigations Division can evaluate the process and inform the CNC Council when the remedies are not being properly fulfilled.

Nevertheless, every single case is different and the monitoring procedure may divert in some cases.

Following a reasoned request by the parties, and taking in consideration the particular circumstances in each case, the CNC may exceptionally provide an extension of the deadlines for the divestiture, or, exceptionally, dispense with, modify or replace one or more of the remedies.

For example, in some cases, the economic situation and the competitive structure could have changed in such a way that the remedies could have a different effect from the initially forecasted.

Nevertheless, the CNC will only waive a remedy if it finds out that a substantial and permanent change in the circumstances that led to the adoption of the remedies, once the merger has taken place.



## 3.2 Cases

### 3.2.1 Gas Natural/Unión Fenosa Case<sup>2</sup>

Gas Natural (GN) and Unión Fenosa (UF) were two publicly traded vertically integrated energy companies. GN was an energy group whose primary business was the supply, transportation, distribution and marketing of gas and the generation and sale of electricity.

UF primarily operated in the electricity sector (generation, distribution and marketing), although in the last years it had also entered gas markets, mainly by a joint venture, Unión Fenosa Gas, S.A., which it owned 50-50 with ENI, S.P.A.

During the assessment of the operation, the CNC identified following competition concerns:

In the gas sector, GN wielded significant market power, mainly as a result of its strong position in the supply of gas into Spain, its large shares in the various markets for supply to end customers, its vertical integration and its structural and commercial ties to its main competitors. This market power would have been strengthened by the operation even though in the last years factors such as the increase in regasification capacity and regulatory unbundling of the distribution network from supply had helped to facilitate competition.

The concentration was deemed capable of hindering competition in the supply of gas to Spain as it buttressed GN's leadership. Furthermore, the disappearance of UF as an independent competitor was especially important given its vertical integration, its alliance with ENI and its supplyside independence from GN.

With respect to the secondary gas wholesale market, the concentration may have aggravated the Spanish gas system's lack of flexibility; because GN would have become the most important entity offering flexibility and UF would have disappeared as an independent operator, which was of extreme importance as it had a much larger presence in this market than in retail supply.

Moreover, although the resulting entity was strengthened only marginally in the import and transport infrastructure market, this factor was a salient issue that implied an analysis of the strategic value of the ties between GN and Enagás.

In gas distribution networks, GN became the only operator in the market in certain provinces, although with only minor additions. This could have reduced effective competition in rolling out new networks, given the legal preference for granting new networks to the closest distributor.

In relation to the supply of gas to end customers, the merged entity strengthened GN's position as top supplier in Spain. This strengthening was less worrisome in the supply to combined cycle plants and to large customers due to the existence of factors such as self-supply of combined cycle facilities and the expected entry of new operators, the greater trend toward effective competition in the high-voltage market and the coming on line of the Medgaz gas pipeline. However, in the supply of gas to small customers, the operation diminished effective competition because the operator that disappeared had significant growth potential given its presence in power distribution and supply and its vertical integration in the gas sector. In addition, it partly offsets the loss of market share recorded by GN in the years prior to the operation in a market with a small number of supply-side players (five, which would have become four).

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<sup>2</sup> C-0098/08 Gas Natural/Unión Fenosa case.

Regarding the electricity sector, GN was the agent whose entry in the power production wholesale market had been the most successful and sustainable in the years prior to the merger, to a great extent due to the availability it enjoyed of natural gas and fuel for combined cycle facilities and to the fact that its scheme of incentives was different than that of the incumbents.

In electricity production, the new group would have stand at the level of the dominant operators, Endesa and Iberdrola, albeit with a smaller share in the wholesale market, thereby intensifying the level of concentration of the market. Although the operation was not considered to carry a significant risk of having a unilateral effect on this market, it increased the risk of co-ordination between the new undertaking, Endesa and Iberdrola, as it expanded not just the capacity, but also the incentives for co-ordination.

The increased strength of the resulting company in supply to end customers was compounded by the incentives for the new entity to continue growing in those markets, given that its share was higher in the generating market than in retail supply. Nevertheless, as a result of the operation, there was a strengthening of the merged company's simultaneous presence in gas and electricity networks, which created a risk to the maintenance of effective competition in the retail supply of gas and electricity to residential customers and SMEs.

To sum up, given the structure of the market after the operation and the existing barriers to entry, in the absence of certain commitments or conditions, the operation was considered capable of generating risks for the maintenance of effective competition in some of the markets considered, especially in the supply of gas to Spain, the wholesale electricity market and retail supply of gas and electricity.

Given these competition concerns, GN submitted the following structural remedies:

Disposal of 600,000 gas distribution points, primarily in the provinces where there is overlap between the GN and UF networks.

Disposal of the business associated with natural gas customers (approximately 600,000). GN likewise undertakes to supply buyers with the natural gas needed to meet the requirements of those customers during two years in market conditions.

Disposal of 2,000 MW of power generating capacity with combined cycle technology currently in operation with a remaining useful life of not less than 10 years, located in Andalusia, Galicia, Centro, Levante and Catalonia. GN also undertakes to supply the buyer with natural gas to satisfy its supply needs during two years in market conditions.

The obligation to transfer these assets in a confidential timeframe to a buyer that does not generate risks of hindering effective competition and is approved by the CNC. If GN does not manage to transfer the assets in the confidential timeframe, then a sales-trustee will be appointed and will continue with the divestiture during a confidential timeframe.

The commitment to present monthly compliance reports to the CNC and a detailed plan of actions.

GN undertakes to abstain to adopt decisions which could put the future management and the value of the assets to divest at risk.

The commitments submitted by GN were considered suitable, sufficient and proportionate for eliminating the obstacles to competition arising from the operation in the various markets.

The sale of 600,000 distribution points more than offset the size of the distribution network acquired by Gas Natural and the shedding of the attached 600,000 customers far exceeded the acquired market share

of gas consumers (94,000 customers approx.). Furthermore, the divestitures entail complete networks, which will facilitate their autonomous management and make them more attractive to prospective buyers. The CNC concluded that this divestiture would boost the buyer's competitiveness vis-à-vis the Gas Natural group in carrying out the gasification of new areas and the development of new distribution networks. In addition, the commitment included supply of gas by the merged company to the buyer during a transitory period which was estimated to be enough to permit the latter negotiate supply arrangements with other suppliers on the basis of the assets acquired.

With regard to the power plants divestiture, the commitments implied the release of 2,000 MW of combined cycle gas turbine (CCGT) plants, which would offset not only the horizontal overlap in generation but also the vertical strengthening between gas supply and electricity production. CCGT plants are the ones where the parties to the merger overlapped, and have a strategic relevance given that they set the wholesale (marginal) market price and cover eventual shortfalls of renewable plants. The divestiture was therefore considered adequate because it reduced the strategic position of the new entity in this technology.

The commitments also reduced significantly any post-merger risks of co-ordinated effects with Endesa and Iberdrola (main players in electricity in Spain). In particular, divestiture of combined-cycle assets would help to maintain an asymmetry in generation portfolios of the new company compared to those of its rivals.

In this case, the concrete assets to divest were not determined in the resolution, although GN committed to submit to the CNC a plan of action in a 20-days period. This plan of action included the description of the concrete assets and the explanation about how the proposed divestment fulfilled the commitments.

The merger was finally cleared subject to the above mentioned commitments on 17th February 2009.

One month after the resolution of the Council, the Investigations Division approved the detailed plan of actions for the implementation of the commitments adopted in the resolution.

Given the difficulties found to sell the assets in the initial framework, GN requested twice extending the initial period of divestment; requests that the CNC granted.

One year after the resolution a letter of GN was received by the CNC requesting a waiver of the commitment to sell 2,000 MW of CCGT plants and the suspension of the agreed deadline for the execution of the sale of these assets until a final decision on the waiver application.

By agreement of the Director of the Investigations Division, the CNC rejected the request for suspension of the agreed deadline for the execution of the sale of the above mentioned assets until a final decision on the application waiver. This agreement was appealed to the Council of the CNC.

The Investigations Division sent to GN a Proposed Report on Surveillance in relation to its request for waiver of pending commitments to enable them to allege. Both, the allegations and the report were submitted to the Council, which decided not to permit the waiver.

GN argued that the situation and the expected developments in energy markets in Spain were worse than those considered in the resolution and that all of this had affected the competitive position of GN.

The Council agreed with the analysis of the Investigations Division and argued that there was no substantial, lasting and unpredictable modification in the conditions of competition in relevant markets as to justify the exemption of the proposed divestment of 2,000 MW of CCGT plants.

Some months later, GN sought a modification of the commitments. Basically, the proposal reduced in 400MW the divestiture of CCGT plants and in return GN agreed to divest 300,000 additional distribution points and the attached 600,000 customers of natural gas.

Several exceptional reasons had impeded the sale of the pending CCGT plants and it became very difficult to achieve the divestiture without assuming GN a high loss. The Investigations Division and the Council agreed that the replacement of the assets at the time suggested by GN in the plan of action for the new ones provided a more rapid and effective implementation of the remedies so as to effectively counteract the potential anti-competitive effects of the concentration. Finally, the Council of the CNC accepted the modification of the remedies.

### 3.2.2 *Dia-Plus case*

The concentration operation that gave rise to case DIA-PLUS consisted in the acquisition by DIA, a subsidiary of CARREFOUR group, of exclusive control of PLUS. DIA was a Spanish hard-discount supermarket chain, subsidiary of CARREFOUR group (one of the biggest retailers in the world) since 2000. PLUS was a German hard-discount supermarket chain that had entered the Spanish market in 1994. The operation was notified to the CNC the 3rd September 2007.

If the merger had been approved without commitments, the position of Carrefour group in the retailing market would have been strengthened. Carrefour's national market share after the acquisition was 19, 2%, in which PLUS represented around 2 percentage points. Nonetheless, in some local areas that percentage would arrive to more than 30%. In these local areas, where Carrefour market share would be over 30% and there were no other competitors, competition concerns would arise. Furthermore, due to regulation, there were barriers to entry for potential competitors.

In order to solve these competition problems in the first phase, DIA/CARREFOUR presented a proposal of commitments where it offered the divestiture of one supermarket owned by DIA, and six supermarkets previously owned by PLUS. DIA also committed itself to abandon the project of a new supermarket. This proposal of remedies included the figures of a monitoring trustee and a divestiture trustee and a time line to comply with all the obligations. The concentration was approved by the CNC' Council the 30th October 2007.

During the monitoring process, the undertakings sold 3 out of 7 supermarkets and abandoned the project of establishing a new business (as they had reflected in the proposal). Nonetheless, DIA group requested a modification of the commitments for the other 4 supermarkets in order to avoid divestiture.

In this specific case the CNC Council considered the structure of the retailing market had changed so it approved a modification in commitments for three of them but it maintained the necessity of divestiture for the last one, given the regional situation of that business. When DIA-group complied with this last divestiture the monitoring process ended.

## 4. Behavioral remedies

Contrary to the European Commission, the CNC has not shown a clear preference towards structural remedies. In fact, non-structural or behavioral remedies have been adopted in several occasions, mainly because according to Spanish case law, prohibition is a solution of last resource.

The Spanish Supreme Court pointed out in cases like Sogecable-Via Digital, that prohibition must only be adopted if conditions that are proportionate and adequate to solve competition concerns cannot be imposed.

In some cases ruled under the 2007 Competition Act, the CNC has imposed behavioral conditions in order to avoid the prohibition of an operation. An example would be Abertis-Axion case, where the CNC adopted several conditions alternative to divestiture<sup>3</sup> like granting access to key assets, such as infrastructures and networks, and change of long-terms contracts.

In other cases the Spanish Competition Authority has accepted behavioral commitments presented by the parties. This has been a common solution in situations where divestiture or other structural measures were difficult to apply due to regulation, the disproportionality of any possible divestitures or specific questions related to the operation. They have been used, for example, in some operations related to television and broadcasting services such as Telecinco-Cuatro<sup>4</sup>.

The main problem derived from this type of remedies is that monitoring becomes complex, so it is necessary to be especially cautious when designing and implementing them.

#### **4.1 *Abertis/Axion and Tradia/Teledifusion Madrid cases***

The concentration operation that gave rise to case ABERTIS / AXIÓN consisted in the acquisition by ABERTIS, of the ABERTIS group, of exclusive control of AXIÓN. ABERTIS had an analogue and digital network for transport and broadcasting of audiovisual signals with nationwide coverage, with a number of sites that allows it to provide radio and television transport and broadcasting services with digital and analogue technologies to national, regional and local radio and television networks. AXIÓN provided support services for the transport and broadcasting of TV and radio signals, with its own infrastructure throughout the entire country, although primarily focused in Andalusia (in the South of Spain), with access and colocation arrangements with other companies in the rest of the country, including ABERTIS.

The concentration operation that gave rise to case TRADIA / TELEDIFUSIÓN MADRID consisted in the acquisition by TRADIA TELECOM, S.A. ("TRADIA"), a wholly owned subsidiary of ABERTIS, of exclusive control over TELEDIFUSIÓN MADRID, S.A. ("TELEDIFUSIÓN MADRID"). The company TELEDIFUSIÓN MADRID was created in December 2005 and only operates in the Region of Madrid, where it provides support services for transport and broadcasting of local Digital Terrestrial Television ("DTT") signals.

When the Investigations Division examined the operation, the most direct effects of the ABERTIS/AXIÓN concentration operation on effective competition were identified in the markets for carrying TV signals at the national, regional and local level, where, after the merger, the competitive alternative in some regions would have disappeared. As for the TRADIA / TELEDIFUSIÓN MADRID concentration operation, its impairment of effective competition is mainly seen in the regional and local TV broadcasting markets in the Community of Madrid, where TELEDIFUSIÓN MADRID was the main competitive alternative to ABERTIS, and, in conjunction with the disappearance of AXIÓN, it also had national effects as it meant the disappearance of a potential ally for UNIREN (an association of regional operators) in the Madrid zone (regional "plaque").

It is relevant to mention that these were regulated markets. The specific ex-ante regulation had been approved by the CMT (Telecommunications Market Commission) before the notification and modified during the reviewing process of the merger.

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<sup>3</sup> Divestiture in this case would have been equivalent to a formal prohibition due to market structure.

<sup>4</sup> C/230/10 TELE CINCO-CUATRO case.

In case the operation had been approved by the CNC without commitments and conditions, an alternative operator would probably have had difficulties to independently carry audiovisual signals to each of the ABERTIS transmission facilities to which access is desired.

During the first and second phase of the procedure, Abertis presented a proposal of commitments that was considered insufficient to solve competition concerns.

In order to solve these competition problems, conditions needed to be imposed to replicate the joint offers of audiovisual distribution and transmission services that AXIÓN and TELEDIFUSIÓN MADRID had been offering, directly or indirectly, to their customers in Andalusia and Madrid. In relation to radio distribution and broadcast services, the conditions to be imposed should be less strict than those for the equivalent television distribution and transmission services.

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In order to allow entry by new operators that could replicate the competitive pressure exerted by AXIÓN and TELEDIFUSIÓN MADRID on ABERTIS, conditions, which granted access to key assets, had to be imposed to generalise centre-to-centre interconnection in Andalusia and Madrid, where AXIÓN and TELEDIFUSIÓN MADRID already had rolled out TV transmission networks.

Furthermore, in order to be able to replicate the offers that AXIÓN and TELEDIFUSIÓN MADRID could offer to national or regional television operators in these geographic zones, ABERTIS had to be obliged to provide a complete transport and broadcasting wholesale service which allowed, by means of interconnection with ABERTIS at one or various points, a third party operator to immediately commence providing regional or national TV distribution and transmission services that cover the regions of Andalusia and Madrid.

This would make it feasible for UNIRED or other alliances of regional broadcasting operators to complete their offers to national television operators with the Madrid and Andalusia plaques, as they would have been able to do if AXIÓN and TELEDIFUSIÓN MADRID were to continue as independent operators in the markets. In addition, the above conditions would also allow replication of the competitive pressure that AXIÓN and TELEDIFUSIÓN MADRID had been exerting on ABERTIS in relation to converting local and regional televisions in Madrid and Andalusia into customers.

Nonetheless, granting access to key assets, such as interconnections to Abertis centers, was not enough to solve competitions concerns so a limit also needed to be placed on the duration of the contracts with the TV or radio operators contributed by AXIÓN and TELEDIFUSIÓN MADRID, giving the audiovisual operators a right of unilateral rescission as from the fifth year of life of those contracts among other obligations related to existing and future contracts.

Also, given that ever since ABERTIS signed the first sale-purchase agreement with the AXIÓN shareholders, the competitive pressure exerted by that entity on ABERTIS has been much weaker, the contracts that ABERTIS or AXIÓN had signed during this transitional period had to be allowed to go out onto the market again so that they could benefit from the competitive situation existing prior to the two concentration operations.

In any event, in order to prevent ABERTIS from exploiting its heightened market power after the acquisition of AXIÓN and TELEDIFUSIÓN MADRID, an obligation had to be imposed on ABERTIS to

respect the terms of service being provided to date by ABERTIS, AXIÓN and TELEDIFUSIÓN MADRID.

Lastly, the duration of the conditions to be imposed should be ten years. This time obligation in combination with the penalty-free unilateral rescission rights, could facilitate the existence of two windows of opportunity in the television broadcasting markets considered while the conditions are in force. Conversely, this duration for the conditions could be limited to five years in the case of the access obligations related to the AXIÓN radio broadcasting sites, because the competition issues detected there are less significant.

In view of all of the above, the Investigations Division prepared a proposal of conditions that could resolve the competition problems detected in the notified concentration operations. It is crucial to mention that conditions adopted by the CNC were focused on resolving competition concerns derived from the merger and not ex-ante regulatory problems.

The design of these conditions took into consideration both the commitments proposed by ABERTIS in relation to the ABERTIS / AXIÓN and TRADIA /TELEDIFUSIÓN MADRID concentration operations, and the ex-ante regulation then prevailing in the markets. The conditions imposed can be classified into three groups:

1. Conditions referred to granting access to key infrastructures in television and radio signal transport and broadcasting market or the Andalusia and Madrid regional plaques. Furthermore, to assure the compliance with these obligations, ABERTIS could not deny access to or use of the infrastructure, except with the prior approval of the CNC. The CNC would approve the conditions for access to or use of the infrastructure in relation to those issues not specifically provided for in the resolution. In this case, ABERTIS had to present also a proposal for Standard Benchmark Conditions for the different types of access referred to by the resolution, within three months after the approval of the Plan of Actions and keep them up to date at least on a half-yearly basis.
2. Conditions regarding the contracts that ABERTIS, AXIÓN or TELEDIFUSIÓN MADRID had signed for providing national, regional or local television signal transport and/or broadcasting services in the Autonomous Communities. These contracts would be subject to conditions related to rights of first refusal or redemption.
3. Conditions related to the monitoring process and the plan of actions in order to assure the success of a proposal of conditions which had been imposed by the CNC. The Investigations Division was named responsible for monitoring compliance with the conditions and it would draw up an annual report on enforcement of them. Within two months after the Resolution became final within the administrative jurisdiction for ABERTIS, the latter had to submit to the Investigations Division a detailed plan of actions and timetable for implementing the conditions, unless ABERTIS demonstrated before that time that it was not going to execute any of the concentration operations authorized subject to conditions.

In the Spanish system, conditions can be modified after the approval of the Council. In this specific case, it was set up that the CNC Council, at the request of ABERTIS, and upon prior report from the Investigations Division, could approve modifications of the conditions established in the resolution and in the timetable for their application, in the event of a significant change in the structure or regulation of the markets considered.

After the authorization of the operation subject to conditions, Abertis decided to abandon the acquisition. Nonetheless, one year after the first notification, Abertis decided to request a modification on conditions imposed by the CNC. To justify this modification, Abertis argued a change of structural conditions in the market but the CNC rejected this modification because it considered that the initial situation had not suffered relevant changes. The operation has been definitively abandoned.

#### **4.2 *Telecinco-Cuatro case***

The TELECINCO/CUATRO operation involved the merger of two of Spain's leading free-to-air television (FTA-TV) operators. The operation was notified on 28th April 2010 and it had been previously remitted to Spain by the European Commission for analysis by the CNC. On 30 June 2010 the CNC Council resolved to initiate the second phase of the proceedings, in order to be able to conduct a more detailed analysis of both operations.

This merger affected the entire value chain of the TV-related audiovisual sector, which runs from the production of audiovisual content to their broadcast to the end viewer. The main competition problems, however, were seen in the TV advertising market and in the market for acquisition of audiovisual content.

The TELECINCO-CUATRO group had a high market share in terms of total audience, so if the advertising of those channels was to be marketed jointly it could become an indispensable outlet for advertisers. Furthermore, the current arrangement of the TV advertising market could allow and encourage tacit co-ordination between the resulting entity and its main competitor, ANTENA 3.

The acquisition of audiovisual content would see a strengthening of the combined entity's bargaining power for purchasing that content, which would affect both TELECINCO's competitors in the FTA-TV market and the smaller providers of content.

On the basis of the resulting market structure and the barriers to entry, the Investigations Division of the Spanish competition Authority concluded the TELECINCO-CUATRO concentration operation, in the absence of certain commitments or conditions would generate risks to the maintenance of effective competition in some of the markets considered, especially in TV advertising in Spain.

The basis aim of commitments is to ensure competitive market structures. For that reason, remedies which are structural in nature are preferable from the point of view of effectiveness to solve competitive problems and because they do not require medium or long term monitoring measures.

The Investigations Division took into account the possibility of requiring divestiture commitments to solve competition problems but this possibility was refused because this type of commitments was considered inapplicable in this case.

In the first place, divestiture of a viable and competitive business was not possible due to regulation. CUATRO and TELECINCO obtained a license each one to manage one multiplex, composed by four FTA-TV channels. Divestiture of the license for the whole multiplex was equivalent to prohibition of the operation.

In the second place, divestiture of two channels would have solved competition problems which were cause, at the end, by the strong position of the new group in content market. A behavioral commitment of transferring this content to the purchaser of the disinvested business was impossible to monitor so it was dismissed.



Finally, commitments submitted by TELECINCO were behavioral and focused on restricting its commercial autonomy when it came to managing TV advertising and acquiring audiovisual content, which could help counteract the competition problems generated by the concentration operation.

The final list of remedies accepted can be separated in three groups:

- A first group of commitments is directly related to the TV advertising market and involves the commitment that TELECINCO cannot sell in one commercial package advertising for the two FTA-TV channels with the largest viewer levels of those that it manages, with the added condition that the aggregate viewership for the TV channels included in each commercial package cannot exceed 22% and it cannot apply tied-sale to advertisers of its various TV advertising commercial packages.

The possibility of establishing firewalls between advertisement commercial division of CUATRO and TELECINCO was taken into account but rejected for its difficulty to be monitored in the future.

These commitments allow advertisers to commercialize their products separately on the main television channels of the merged entity. In addition, they limit the maximum size of the television advertising packages offered by TELECINCO to an appropriate level to prevent TELECINCO's television advertising from becoming indispensable for a significant number of advertisers.

The effect of the above commitments on the TV advertising market is strengthened with the following commitments:

TELECINCO undertakes to break its agreements for joint management of advertising on free-to-air DTT channels of third parties and to sign no new agreements of this kind. In the case of advertising on pay-TV channels, TELECINCO undertakes to maintain the status quo, that is, to manage advertising of the pay-TV channels of third parties through a separate company and with clearly differentiated commercial policies.

In order to prevent the structural links of TELECINCO with PRISA and TELEFÓNICA in DIGITAL+ from affecting the TV advertising market, TELECINCO undertakes that for so long as it is a co-shareholder in DIGITAL+ with PRISA or TELEFÓNICA, it will not jointly market advertising with media managed by the other parties and that it will apply market conditions to its shareholders if they contract advertising.

- A second group of commitments serves to limit the power of TELECINCO in the FTA-TV market and which also indirectly serve to safeguard competition in the television advertising market. TELECINCO undertakes not to extend its offer of free-to-air TV channels by leasing DTT channels from third party operators and not to block quality enhancements in the television channels that may be launched by its competitors Net and La Sexta, with which the merged entity shares DTT multiplexes until 2015.

In addition, to prevent TELECINCO from using its strengthened position in the FTA-TV market and presence as controlling shareholder in DIGITAL+ to distort competition in the pay-TV market, TELECINCO undertakes, on certain conditions, to maintain its current policy of assigning its FTA channels to the pay-TV platforms free of charge.

- A third block of commitments is aimed at counteracting the vertical effects generated by the merged entity's heightened power as buyer of audiovisual contents. TELECINCO undertakes to limit the duration of its exclusive contents acquisition contracts to three years, without including preferential acquisition rights or rights of extension. This makes it possible for the exclusive rights that TELECINCO has acquired or may acquire over contents generator (for example producers of films and TV series) to come onto the market periodically. TELECINCO also limits the period for which it may exploit a particular film in exclusivity on FTA-TV to five years. TELECINCO undertakes to restrict its ability to exclude national television producers as suppliers of programs to FTA television competitors.

An initial period of three years was established for the commitments, extendable by a further two years if the market circumstances that made them necessary have not changed.

It is necessary to clarify that the different lists of remedies (including the final one) presented by TELECINCO and CUATRO were sent to interested third parties in order to receive feed-back and evaluate if they were appropriate to guarantee effective competition in the market (test of commitments).

## **5. Final remarks**

Remedies have to be proportionate and effective to ensure the maintenance of competition at pre-merger levels. They must guarantee that competition is not distorted but they must not be used to regulate the markets and improve their competitive outlook by solving preexisting problems, that is, that remedies must be only used to solve competitions concerns derived from the operation. The CNC has to find this equilibrium when accepting commitments or imposing conditions, which is not easy taking into account the complexity of the cases and the sectorial regulation involved in many of them.

As it has been mentioned, the CNC has run a case-by-case basis approach when deciding on acceptable remedies. Both structural and behavioral remedies have advantages and disadvantages.

Structural remedies are clear-cut and they present obvious advantages in the sense that they can be easily monitored but, in times of economic crisis, the search of a buyer can become extremely difficult. In this situation, the figure of an up-front buyer becomes more attractive in order to ensure the swift implementation of divestiture.

Behavioral remedies, instead, present some disadvantages in relation to their monitoring, because it is quite difficult to ensure that the merged entity keeps its obligations. Nevertheless, the adoption of this kind of solution may avoid the prohibition of the operation when structural measures cannot be implemented.

The conclusion would be that the appraisal of the effectiveness of any remedy in a particular case should not be based on a theoretical framework resulting in a preference for one kind of remedy over another. Instead, an effects-based assessment is required which, on a case-by-case basis, allows the competition authority to select the most appropriate and proportionate remedy to solve competition concerns.



## SWITZERLAND

### 1. Introduction

The Swiss merger control was introduced in 1995 and is structured into two phases. *Phase I* lasts one month and *Phase II* lasts a maximum of 4 months.

The substantive test used in Switzerland is a *dominance test*. In general, under a dominance test, a merger may be prohibited if it results in the creation or strengthening of a dominant position which significantly impedes effective competition. According to Art. 10 Para. 2 of the Swiss Cartel Act, a merger may however only be prohibited or authorized subject to conditions or obligations if it creates or strengthens a dominant position liable to eliminate effective competition.

The Swiss Supreme Court has therefore in the past advanced the view that the creation or strengthening of a dominant position which is likely to impede effective competition is not enough to block a merger. Rather, under the Swiss Cartel Act, a merger may only be prohibited if it is likely that competition in the concerned markets will be *eliminated*. In other words, in Switzerland a merger may only be blocked if it leads to an extremely high concentration in a market (e.g. a merger to monopoly). As a result, it is very difficult for the Swiss Competition Commission (ComCo) to prohibit a merger. This is highlighted by the fact that in the whole history of Swiss competition law only one merger in 2010 has been effectively blocked so far.<sup>1</sup>

This submission begins with a description of the general procedure to impose merger remedies, then deals with issues related to behavioral and structural remedies by considering some major cases where remedies were imposed. It ends with some conclusions.

### 2. Procedure for merger remedies

Merger remedies are typically offered and imposed during the in-depth investigation (*Phase II*) of a proposed merger but they can also be offered during the preliminary investigation (*Phase I*).<sup>2</sup>

There are no legal texts or guidelines which specify the procedure for imposing merger remedies. Usually, the merger parties wait for the so-called preliminary report before entering into discussions about possible remedies. The preliminary report is a detailed report which, based on the results of the in-depth investigation of the Secretariat of the Swiss Competition Commission (investigative body), describes the identified competitive concerns. This report is issued at about mid-time of the in-depth investigation period (about six weeks after the opening of the in-depth investigation) and ends – in problematic cases – with the

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<sup>1</sup> The ComCo blocked a „three to two merger“ in the Swiss telecommunication market on the grounds of an impending post-merger joint dominance: *France Télécom/Sunrise Communications AG*, Law and Policy of Competition (LCP), 2010/3, p. 499 sq.

<sup>2</sup> Examples of mergers where remedies were imposed in *Phase I* are *Glaxo Wellcome/Smith Kline Beecham* (LCP 2001/2, p. 341), *Pfizer/Pharmacia* (CLP 2003/4, p. 366), *Sanofi-Synthelabo/Aventis* (LCP 2004/3, p. 845) and *SWX Group/Verein SWX Swiss Exchange/SIS Financial Services Group AG/Telekurs Holding AG* (LCP 2007/4, p. 557 sq).

conclusion that the merger cannot be authorized in the proposed form. The parties have typically two weeks to comment in writing on the identified competitive concerns addressed in the preliminary report. The parties further have the possibility to be heard orally before the ComCo. During this hearing, the parties can *inter alia* suggest, if not already done before, possible remedies to cure the identified competitive concerns. After discussing the case in-depth, the ComCo decides whether the proposed remedies are acceptable, i.e. able to solve the competitive problems. If yes, the parties are invited to specify the details of the remedies in writing. The specified remedies may then be submitted to a non-public market test. Lastly, the ComCo integrates the merger remedies into a decision which also settles monitoring and reporting issues. Depending of the nature of the remedies, external monitoring trustees may be entrusted with these tasks. During several years, these trustees typically have to report to the ComCo on the implementation of the remedies, often on a yearly basis.

### 3. Issues related to behavioral remedies

One of the most important mergers in the recent history of the ComCo was the case *Migros/Denner*<sup>3</sup> in 2007, a merger in the retail sector. Migros, number one in the Swiss food retail market, decided to acquire 70% of Denner (number 3). In the opinion of the ComCo, this acquisition created/reinforced a post-merger joint-dominance between Migros and Coop (number 2) in the retail market. Given a joint market share of more than 80% of Migros and Coop, it was expected that this position could not be countervailed – at least in the short term – by newcomers such as the food discounters Aldi and Lidl. For this reason, the ComCo imposed three main remedies on Migros: (1) Migros has to keep Denner as a (independent) competitor in the market for 7 years, (2) Migros is not allowed to acquire any further competitor in the Swiss retail market and (3) Migros is not allowed to enter into any exclusivity contracts with its food suppliers. In particular the first remedy has aroused skepticism in the general public and in competition circles due to the difficulties to enforce a “keep separate order” in the same enterprise and in the same market. It is indeed not without problems to ensure in practice that Migros does not exert influence on Denner’s commercial strategy and that Denner stays a competitor to Migros. It cannot be excluded that part of the motivation to impose the mentioned remedies reflects the ComCo’s attempt to close the perceived gap between a need for action and the very high obstacles to prohibit a merger under the Swiss merger control regime (see introduction).

### 4. Issues related to structural remedies

Shortly after the *Migros/Denner* merger, a second merger was notified in the same market. Coop contemplated to acquire 12 large supermarkets from Carrefour (Switzerland)<sup>4</sup>. Carrefour – implementing its new global strategy – had at the time decided to exit its business activity in some national markets, *inter alia* the Swiss market. Once again, this merger brought up the issue of joint-dominance between Migros and Coop in the already very concentrated Swiss retail market. In this case, the ComCo imposed structural remedies. Carrefour argued that it was not possible to find – in Switzerland or abroad – another buyer than Coop for its 12 hypermarkets. However, based on a market test, ComCo identified competitors with an interest for smaller supermarkets. Therefore, the ComCo cleared the merger subject to the remedy that Coop would divest 20’000 sqm of retail surface in the problematic regions to competitors other than Migros.

As in the *UBS/SBS* case<sup>5</sup> in the banking sector, where the divestiture of branch offices was imposed as a remedy, the success of the divestiture of supermarkets was ambiguous. Most of the proposed

<sup>3</sup> *Migros/Denner*, LCP 2008/1, p. 129 sq.

<sup>4</sup> *Coop/Carrefour*, LCP 2008/4, p. 593 sq.

<sup>5</sup> For details about the *UBS/SBS* merger see the Swiss contribution on “Impact evaluation of mergers decisions” (Competition Committee, June 2011).

supermarkets were either not very attractive for Coop's competitors or the renting lease was too expensive for them. For instance, the concept of discounters often involves special standardized retail surfaces. Coop branches do however often not fulfill such requirements and it is therefore often more attractive for the discounters to build new supermarkets. It further proved impossible to find an upfront buyer for the whole package as there are few national competitors left and new competitors from abroad – with the exception of the above mentioned discounters – seemed not interested to enter the Swiss retail market given the predominant position of Migros and Coop. The solution that was finally implemented, namely the divestment of single branches to different buyers, seems second best: to sell all concerned supermarkets to a single buyer would have been likely to have a larger positive effect on the competitive environment in the Swiss retail sector.

## **5. Conclusion**

The success of merger remedies in Switzerland in the recent past, whether of structural or behavioral nature, can be rated as mixed. These experiences seem to have resulted in an increased reluctance of the ComCo to impose/accept merger remedies in concentrated markets with high entry barriers. The prohibition of the *Orange/Sunrise* merger in the mobile telecommunication market in 2010 may serve as an example: since no convincing and promising remedies became apparent, The ComCo finally renounced to impose or accept remedies and opted for a prohibition of the merger.



## TURKEY

This contribution is intended to give information on the approach of the Turkish Competition Authority (TCA) to merger remedies by assessing the important decisions of the Competition Board, the decision making body of the TCA.

First of all, it would be convenient to start with the relevant legislation. Both the Competition Act<sup>1</sup> and the new Communiqué No: 2010/4<sup>2</sup> concerning the Mergers and Acquisitions (Communiqué No: 2010/4) allow the Competition Board to clear mergers and acquisitions with remedies provided that the remedy removes the competitive concerns contrary to the Competition Act. In other words, the remedy should eliminate the problem caused by the merger; which is the creation or strengthening of a dominant position as a result of which competition is significantly lessened.

Although remedies are foreseen in the relevant legislation, there is neither a specific guideline nor a best practices text for implementing merger remedies and submission by the parties of commitments. Nevertheless, there is a draft text on merger remedies which is waiting to be approved by the Competition Board.

The draft text on merger remedies is mostly based on the European Commission's Commission Notice on remedies acceptable under the Council Regulation (EC) No: 139/2004 and under Commission Regulation (EC) No: 802/2004. However, in line with the experience obtained by the TCA, the draft text is simpler, easier to understand, and does not mention too many exceptions. It chooses fix-it first type to up-front buyers, and also does not mention crown jewels.

Although the draft text on merger remedies puts forward a particular procedure for presenting commitments; since it has not yet been approved, it would be suitable to explain the current system. Currently, there is no specific procedure for accepting a commitment as a remedy. However, commitments are evaluated under the Communiqué No: 2010/4. According to Article 14 of the Communiqué No: 2010/4, undertakings may give commitments completely eliminating competition problems arising from the merger.

Commitments may be offered by the parties during the preliminary examination (lasting 15-days)<sup>3</sup> or final examination (lasting 6 months)<sup>4</sup> phases. There is neither a specific time line for proposing or revising commitments, nor a responsibility on the parties to propose any commitment, nor a difference in procedure of proposing commitments in each examination phase. Although the parties usually present their remedies through commitments, there are some cases in which the Competition Board brought its own remedies by imposing obligations on the parties in its decisions.

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<sup>1</sup> Act No: 4054 on the Protection of Competition.

<sup>2</sup> Communiqué No: 2010/4 replaced the former Communiqué No: 1997/1 and entered into force on 1<sup>st</sup> of January 2011.

<sup>3</sup> In case the commitment is given during the preliminary examination phase, the notification shall be deemed to be made on the date the text of the commitment is received by the TCA.

<sup>4</sup> It may be extended up to another 6 months.



As mentioned before, there is not yet any specific policy or best practices guideline for merger remedies in Turkey. Therefore, there is no particular preference for structural remedies. However, in the past decisions of the Competition Board including remedies, we can observe both behavioral<sup>5</sup> and structural<sup>6</sup> remedies as well as hybrid<sup>7</sup> remedies depending on the characteristics of the case.

For a recently adopted structural remedy, a merger of the two most important spirit producers can be given as a good example for the procedure. The largest raki (a kind of highly alcoholic beverage similar to uzo) producer controlling almost 70-75% of the market intended to purchase its rival firm which then had almost 10-15% market share and was the second player in the market. Briefly, the merger was creating or strengthening the dominant position of the acquiring firm in raki, vodka and gin markets. After negotiations with the parties, they offered a commitment which was adopted by the Competition Board as a remedy containing divestitures in raki, vodka and gin markets and in the related liquor market due to portfolio effects. To ensure the success of the remedy, the acquirer committed to divest certain assets in a specific time frame. The commitment also included a clause that in case the divestiture could not be finalized in accordance with the time frame, a divestiture/sales trustee would implement the divestiture. Furthermore, a monitoring trustee has been appointed to examine the viability of the business to be divested. The functions like production and sales of the business to be divested were subject to a hold separate arrangement and would be managed separately from the merged firm in another facility.<sup>8</sup>

The above mentioned remedy includes a stand alone business divestiture in raki, gin and liqueur markets, and a carve-out concerning an interchange in vodka brands between the divesting entity and the merged firm. In other words, the divestiture of a stand alone business is possible under Turkish competition law. However, there is no defined policy adopted by the TCA to do so. Besides, there are cases where a divestiture of less than a stand alone business had been adopted by the Competition Board. A case where a divestiture of less than a stand alone business adopted is the *GıdaSA* case.<sup>9</sup> In this case the competition concerns in the industrial margarine market were eliminated by the condition to transfer licenses concerning two particular brands to third parties exclusively and indefinitely.

As an example to a behavioral remedy, the commitment adopted in the preliminary examination of the acquisition of the telecommunication firm Invitel's certain subsidiaries by Turkish telecommunication leader Türk Telekom can be given.<sup>10</sup> The Competition Board was of the opinion that the acquisition would strengthen the dominant position of Türk Telekom in both relevant markets of "infrastructure services

<sup>5</sup> See the decisions of the Competition Board, namely *THY/HAVAS/TGS*, dated 27.8.2009 and numbered 09-40/986-248, involving fair dealing clauses, *Mazıdağı/Toros*, dated 21.2.2008 and numbered 08-16/189-62, involving a production capacity limit; *THY&DoCo*, dated 29.12.2006 and numbered 06-96/1224-369 and 06-96/1225-370, involving dealing with the distributors on non-discriminatory terms; and *TUPRAS*, dated 21.10.2005 and numbered 05-71/981-270, involving facilitating access by importers to LPG importing facilities.

<sup>6</sup> See the decisions of the Competition Board, namely *Mey İçki/Burgaz*, dated 8.7.2010 and numbered 10-49/900-314; *Syngenta/Advanta*, dated 29.07.2004 and numbered 04-49/673-171, involving a divestiture in sunflower seed business; *GE/InVision Technologies*, dated 26.5.2004 and numbered 04-38/433-109, involving the divestiture of the acquired firm's assets in mobile NDT X-rays equipments market.

<sup>7</sup> See the decision of the Competition Board, namely *P&G/Gillette*, dated 08.09.2005 and numbered 05-55/836-228, involving a divestiture of the battery-powered toothbrush business and licensing clauses.

<sup>8</sup> See the decision of the Competition Board, namely *Mey İçki/Burgaz*, dated 8.7.2010 and numbered 10-49/900-314.

<sup>9</sup> See the decision of the Competition Board, namely *GıdaSA*, dated 7.2.2008 and numbered 08-12/130-46.

<sup>10</sup> See the decision of the Competition Board, namely *Türk Telekom/Invitel*, dated 16.9.2010 and numbered 10-59/1195-451.

supplied with fiber optic cables in Ankara-İzmir-İstanbul-Edirne route” and “infrastructure services supplied with abroad originated fiber optic cables in Thrace region”. In order to eliminate the competition concerns, the acquirer proposed commitments enabling access to those markets. With the commitments, Vodafone, which was purchasing infrastructure services from Memorex (a subsidiary of Invitel) before the transaction, would be able to operate as an alternative infrastructure service provider in both markets by renting fiber optic infrastructures for 18 years from Memorex. Thus, although Memorex and Türk Telekom merged, Vodafone entered the market and the number of players in the market remained the same. Although this remedy may enable Türk Telekom to complicate competitive behaviours of Vodafone and is not designed to facilitate other players to enter the markets, there is not yet any decision by the Competition Board finding violation of the Competition Act.

In practice, the Competition Board so far adopted behavioral remedies such as access remedies,<sup>11</sup> supplying periodical market information,<sup>12</sup> fair dealing clauses<sup>13</sup> and limiting production capacities.<sup>14</sup> Except access remedies, other behavioral remedies are largely adopted by the Competition Board if the competition concerns arising from the merger are less significant.

As mentioned above, monitoring trustees were employed to monitor the protection of the value of the to-be divested business in *Greencastle/Intergum* and *Mey İçki/Burgaz* cases.<sup>15</sup> The monitoring trustees supplied monthly reports providing the TCA with information on the performance of to-be divested businesses, the divestment procedure, the potential buyers as well as their own opinions on these issues. Moreover, for example in *Mey İçki/Burgaz* case, in order to hold separate the divested entity, a hold separate manager was appointed and the changes in key-personnel were reported.

It is not common for the TCA to require divestitures to be finalized before a merger closes. Usually after the remedies are adopted in the decision of the Competition Board, the merger can be finalized. However, there is no restraint on the Competition Board to require the implementation of the remedy before the merger can be finalized.

In order to ensure that commitments are implemented, the Competition Board prefers to adopt a specific time frame in its decisions. However, the time frame is generally relatively longer compared to that adopted by the European Commission or antitrust authorities in the US and it is not very exceptional to extend the time periods. An average of one to two years for implementation of the commitments/remedies is more common. For example in *Greencastle/Intergum*<sup>16</sup> case, the Competition Board required the parties to find a licensee in ten months and offered another six months for the divestiture trustee. However, in the last days of the ten-month period, an extra ten months was granted and the remedy was fulfilled close to the end of this period.

<sup>11</sup> See the decisions of the Competition Board, namely *Türk Telekom/Invitel*, dated 16.9.2010 and numbered 10-59/1195-451 and *Privatisation of TÜPRAŞ*, dated 21.10.2005 and numbered 05-71/981-27.

<sup>12</sup> See the decision of the Competition Board, namely *Borusan/Mannesmann*, dated 20.08.1998 and numbered 80/617-119.

<sup>13</sup> See the decisions of the Competition Board, namely *THY/DoCo*, dated 29.12.2006 numbered 06-96/1225-370 and, again *THY/DoCo* dated 29.12.2006 and numbered 06-96/1224-369.

<sup>14</sup> See the decision of the Competition Board, namely *Toros / Sümer Holding Mazıdağı Fosfat Tesisleri*, dated 21.02.2008 and numbered 08-16/189-62.

<sup>15</sup> See the decisions of the Competition Board, namely *Greencastle/Intergum*, dated 23.8.2007 and numbered 07-67/836-314; *Mey İçki/Burgaz*, dated 8.7.2010 and numbered 10-49/900-314.

<sup>16</sup> See the decision of the Competition Board, namely *Greencastle/Intergum*, dated 23.8.2007 and numbered 07-67/836-314.

Although it has not yet been experienced, it is legally possible to impose administrative fines on the firms which do not fulfill their commitments and require the parties to terminate the merger. In both breaching the principal commitments (the conditions) and the obligations related to procedure, it is possible to impose administrative fines.

To ensure that the divestiture satisfies the purpose of the remedies, the TCA also approves sale of the assets, which are subject to the divestiture, to the potential buyer. For instance, in a merger of two confectionary producers,<sup>17</sup> due to arising competition issues in sugar-free gum market, the Competition Board has approved the proposed buyer as it had the necessary sectoral experience, had no connection with the merging parties and did not lead to any competition concerns.

To control the fulfillment of the commitments, reporting requirements can be mentioned in the decision of the Competition Board. The professional staff of the TCA handling the case also controls the enforcement of the commitments and the remedy.

When the TCA is notified of a merger, it is announced in its official website. Thus, third parties have the opportunity to submit their opinions on the merger. However, if the case has important aspects or a remedy proposal, the professional staff of the TCA in charge of the case usually asks for opinions of the relevant third parties like rivals, suppliers or distributors.

To sum up, the TCA aims to improve its conduct and procedures in the merger remedies area as the cases and commitments get technically more complex and more detailed. Moreover, the TCA shows its increasing interest on the subject by working on publishing guidelines on merger remedies.

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<sup>17</sup> See the decision of the Competition Board, namely *Greencastle/Intergum*, dated 23.8.2007 and numbered 07-67/836-314.

## UNITED KINGDOM

### 1. Introduction

This document represents the submission of the UK Authorities (the Office of Fair Trading (OFT) and the Competition Commission (CC)) to the OECD WP3 meeting on 28 June 2011.

We have sought to answer the nine questions posed in the request for submissions. Our response is structured as follows:

- We have set out relatively high-level responses to questions 1 and 9 on the remedies process adopted by the UK Authorities;
- We have summarized our approach to different types of remedies including examples where appropriate (responding to questions 2, 3, 4, 7 and 8) and have attached a link to the CC's Merger Remedies Guidelines (the CC's Guidelines) which cover these aspects in more detail (see Annex);<sup>1</sup> and
- We have explored in more detail the UK Authorities' approach to interim measures (question 5) and the divestiture process (question 6) because these issues are covered in less detail in our Guidelines and we believe we are able to provide wider learning points.

### 2. Remedies process (response to questions 1 and 9)

*Question 1: What is your process for considering possible remedies for mergers that present competitive problems? Are parties responsible for proposing remedies, and are they required to follow particular procedures or time lines in order to do so? If your merger review system involves a 2-phase process, are there different procedures and standards for reviewing proposed remedies in the 2 phases?*

*Question 9: What role do third parties and the public have in commenting on proposed remedies? How have your courts assessed the agencies' remedies and efforts to enforce them?*

In the UK, there is a two-phase merger investigation process. The OFT is responsible for phase I and the CC is responsible for phase II. Remedies may be accepted by the OFT at phase I as undertakings in lieu of a reference to the CC, or required at phase II as a solution to the competition problem identified. In this section, we consider in more detail the remedies processes at phase I and phase II.

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<sup>1</sup> Merger Remedies: Competition Commission Guidelines (CC8), November 2008. [http://www.competition-commission.org.uk/rep\\_pub/rules\\_and\\_guide/pdf/cc8.pdf](http://www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/cc8.pdf).

## 2.1 *Phase I*

At the phase I stage, the OFT is under a duty to identify those mergers which raise a realistic prospect of a substantial lessening of competition (SLC) and to refer such mergers for in-depth investigation to the CC.

However, instead of referring the merger to the CC the OFT can accept remedies from the merger parties, known as undertakings in lieu of a reference (UILs).<sup>2</sup> The UILs must “remedy, mitigate or prevent” the potential competition problems identified in a clear-cut manner. The OFT accepts that it may therefore require a more extensive set of remedies than might ultimately be needed if the merger were to receive a detailed phase II investigation by the CC.

The OFT cannot impose remedies. Rather it is up to the merger parties to offer remedies to the OFT in order to avoid a phase II investigation.

In terms of process for considering phase I remedies, the OFT will put, in writing, its core arguments in favour of a reference to the CC to the merger parties before a final decision on the case is taken. The parties will then have the opportunity to respond to the OFT’s preliminary concerns, in a meeting as well as in writing. In its written response to the OFT’s preliminary concerns parties are free to include any remedy that they think fit. At this stage, as indeed at any stage of the phase I investigation, the OFT case team will seek to provide any guidance that it can on an informal basis to the parties on the desired elements of an UIL offer.

Remedy offers need to reach the OFT in good time before its internal deliberations on the case take place. This is so that the OFT has time to consider and properly evaluate the offer before any final decision is taken.<sup>3</sup> There is no prescribed timing for UIL offers and it is up to the case team to set a deadline for the parties.

The OFT takes care to ensure that the decision maker is not aware of any remedy offer before the decision on the SLC is taken. In this way the merger parties are safeguarded against any OFT decision maker accepting a remedy before properly considering if it is required.

Merger parties are free to offer to the OFT a range of UILs covering multiple eventualities. However, the OFT will only accept that UIL necessary to remedy the competition concern identified.

In some instances the UIL offered will be mostly but not quite sufficient to remedy the competition concerns. For such near miss cases the OFT may revert to the merger parties so that they have an opportunity to amend their remedy offer.

Once the OFT is satisfied that the UIL offer will restore competition to pre-merger levels, it is required by the Act to consult publicly on the remedy. For remedies with upfront buyer obligations, the OFT will consult on the effectiveness of both the proposed remedy and the proposed purchaser. For cases with no upfront buyer the OFT will consult on the proposed remedy only.

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<sup>2</sup> OFT guidance on UILs can be found in ‘Mergers: exceptions to the duty to refer and undertakings in lieu of a reference guidance’, OFT1122, December 2010.

<sup>3</sup> A fuller discussion of the OFT’s processes can be found in ‘Mergers: jurisdictional and procedural guidance’, OFT527, June 2009.

Following the consultation the OFT will assess comments received and take one of three courses of action as a result: (i) accept the UIL; (ii) amend the UIL and publicly consult on the amended version; or (iii) refer the merger to the CC.

Remedies decisions by either the OFT or CC are subject to judicial review by the Competition Appeals Tribunal (CAT). To date the CAT has upheld the OFT's clear cut standard in approving purchasers for divestment assets.<sup>4</sup>

## 2.2 *Phase II*

At phase II, where the CC finds that a relevant merger situation is expected to result in an SLC, it is required to decide whether action should be taken to remedy, mitigate or prevent the SLC or any adverse effect resulting from the SLC.

The CC is required to have regard to the need to achieve "as comprehensive a solution as is reasonable and practicable" to the SLC and any adverse effects resulting from it. In making its assessment of remedies, the CC seeks remedies that are effective in addressing the SLC and its resulting adverse effects and selects the least costly and intrusive remedy that it considers to be effective, subject to no remedy being disproportionate to the SLC and its adverse effects. The CC has a choice between implementing remedies by obtaining undertakings from the relevant merger parties or by making an Order.

The CC remedies process is set out in detail in paragraphs 1.21-1.30 of the CC's Guidelines. During this process, third parties have the opportunity to comment on the proposed remedies. The phase II remedies process and the extent of consultation can be summarized as follows:

- *Notice of possible remedies* – at the same time as its provisional finding on the SLC, the CC publishes a Notice containing details of possible remedies. This Notice is a starting point for discussion of remedies with the relevant parties to the inquiry.
- *Provisional decision on remedies* – the CC considers remedy options proposed by merger parties and other parties in addition to its own remedy proposals. The parties are expected to demonstrate that their proposed remedy options will address effectively the expected SLC and the resulting adverse effects. The CC consults with interested parties on its provisional decision on remedies.
- *Final decision on remedies* – having considered parties' views on the provisional decision, the CC sets out its final decision on remedies in its final report. The process between publication of the Notice of possible remedies and final report typically takes 8-11 weeks. The length of this process is limited by the statutory limit of 24 weeks for the whole merger inquiry (although extensions are possible in exceptional circumstances).
- *Acceptance of undertakings or making of an order* – the text of the undertakings or order are drafted based on the remedies set out in the final report. This stage is not time-constrained by statute. In the case of straightforward divestiture remedies, the CC will generally seek to obtain final undertakings within 8 weeks of publication of the final report. More complex remedies will take longer. The CC consults publicly on all undertakings and orders (15 days for undertakings and 30 days for orders).

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<sup>4</sup> Co-operative Group (CWS) Limited v OFT [2007] CAT 24.

- *Implementation of remedies* – the CC is responsible for overseeing the implementation of divestitures; responsibility for monitoring and enforcement of behavioural remedies passes back to the OFT.

The CAT has considered the CC's approach to final remedies in three CC merger cases to date namely, Somerfield/Morrison, BSkyB/ITV and Stagecoach/Preston Bus . In these cases the CAT has broadly endorsed the approach taken by the CC in relation to the CC's approach to restoring competition and ability to determine which assets were to be sold (Somerfield PLC v CC), the level to which shares should be divested (in a material influence case, BSkyB/ITV) and the design and proportionality assessment of a divestiture remedy (Stagecoach/Preston Bus).<sup>5</sup>

### **3. Approach to different types of remedies (response to questions 2, 3, 4, 7 and 8)**

*Question 2: When crafting merger remedies, does your agency employ structural remedies? Do you employ behavioural remedies or hybrid remedies? How do you decide what remedy or combination of remedies best cures the competitive harm of concern? Is the approach different in horizontal and vertical mergers?*

*Question 3: When seeking structural relief, under what circumstances do you require the divestiture of a stand-alone business? Do you ever require the divestiture of identified assets that are not a stand-alone business? Do you ever require the divestiture of intellectual property in lieu of the divestiture of a stand-alone business or a collection of physical assets? When do you use each type of divestiture remedy?*

*Question 4: What types of behavioural remedies does your agency use? In what circumstances have you used firewalls, fair dealing clauses, transparency requirements, anti-retaliation provisions or prohibitions on anticompetitive contracting practices?*

*Question 7: How do you ensure that parties comply with your remedy order? Do you include reporting requirements or inspection clauses in your orders? Do you have staff dedicated to enforcement of remedies?*

*Question 8: Is your experience in enforcing remedies reflected in documents describing your best practices or in other guideline documents? If not, are you planning to issue guidance in the near future?*

The CC's Guidelines set out its approach to different types of merger remedies: choosing between structural and behavioural remedies in different types of mergers (question 2); the type of divestiture (question 3); types of behavioural remedies (question 4); and appropriate monitoring and enforcement requirements (question 7).

In the remainder of this section, we summarize the UK Authorities' approach in these areas.

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<sup>5</sup> Somerfield PLC v CC [2006] CAT 4 <http://www.catribunal.org.uk/238-615/1051-4-8-05-Somerfield-PLC.html>, British Sky Broadcasting Group plc v (1) CC (2) the SoS [2009] CAT 20 <http://www.catribunal.co.uk/237-656/1095-4-8-08-British-Sky-Broadcasting-Group-plc.html> and Court of Appeal [2010] EWCA Civ 2, <http://www.catribunal.co.uk/238-656/1095-4-8-08-British-Sky-Broadcasting-Group-plc.html> Stagecoach Group Plc V CC [2010] CAT 14 <http://www.catribunal.org.uk/238/Judgments.html>.

### 3.1 *Choosing between different types of remedies*

The UK Authorities consider both structural remedies (divestiture and prohibition) and behavioural remedies (including intellectual property remedies, enabling measures and measures to control outcomes).<sup>6</sup>

The choice of remedies will reflect the circumstances of each inquiry but the UK Authorities seek to select remedies that effectively address the SLC and its resulting adverse effects and that are the least costly, effective remedies.

In merger inquiries, the UK Authorities generally prefer structural remedies, such as divestiture or prohibition, rather than behavioural remedies because they are likely to deal with the competition problem directly and comprehensively at its source; behavioural remedies may create significant distortions in market outcomes; and structural remedies do not normally require monitoring and enforcement once implemented.

- As a phase I body the OFT looks to accept only structural UILs and has done so in over 95 per cent of its remedy cases. Without the benefit of an in-depth phase II investigation, the OFT is extremely reluctant to accept behavioural remedies.<sup>7</sup>
- The CC has selected structural remedies in the great majority of merger inquiries: 21 of the 26 SLC findings (81 per cent) under the Enterprise Act 2002 (that is, since 2003) have had structural aspects to the remedy (prohibition, divestiture, partial divestiture or divestiture plus some enabling measures).

The overall approach of the UK Authorities to assessing remedies in horizontal and vertical mergers is the same but the factors that are taken into account may differ. In particular, vertical mergers may give rise to relevant customer benefits<sup>8</sup> that may be substantial compared with the adverse effects of the merger. These benefits would be largely preserved by behavioural remedies but not by structural remedies. A rare example of this occurring is in Macquarie UK Broadcast Ventures/National Grid Wireless Group (2008) where significant customer benefits arising from the merger contributed to the selection of a behavioural remedy instead of a structural one.

### 3.2 *Divestiture remedies*

The UK Authorities' approach to divestiture remedies and intellectual property remedies is set out in the CC's Guidelines.<sup>9</sup>

In defining the scope of a divestiture package that will address the SLC, the UK Authorities will normally seek to identify the smallest viable, stand-alone business that can compete successfully on an ongoing basis and that includes all the relevant operations pertinent to the area of competitive overlap. This may comprise a subsidiary or a division or the whole of the business acquired.

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<sup>6</sup> Paragraphs 2.1-2.24 of the CC's Guidelines. The CC also considers whether to make recommendations to the Government, but this aspect of the 'remedies universe' is not considered further in this paper.

<sup>7</sup> The OFT has accepted only two behavioural remedies since the introduction of the Enterprise Act 2002.

<sup>8</sup> Relevant customer benefits are defined in statute. They must accrue from or be expected to accrue from the merger and must be unlikely to accrue without the merger.

<sup>9</sup> Paragraphs 3.1-3.33.



At the phase I stage, almost all the structural remedies accepted by the OFT have involved the divestment of existing business units operated as a going concern (the only exception is the divestment of airport slots). At the phase II stage, although many (42 per cent) of the divestitures required by the CC under the Enterprise Act 2002 have related to only part of the business or assets acquired, the vast majority of these have been considered viable, stand-alone businesses.<sup>10</sup>

Consideration of intellectual property (IP) remedies is set out in paragraphs 3.28-3.33 of the CC's Guidelines. The UK Authorities have used an IP licensing remedy in one case under the Enterprise Act 2002 - Tetra Laval/Carlisle (2006).<sup>11</sup>

### 3.3 *Behavioural remedies*

The UK Authorities have considered a range of behavioural remedies. These behavioural remedies include:

- enabling measures that remove obstacles to competition (e.g. access remedies, firewall measures, prohibiting certain contractual practices); and
- measures that control outcomes by restricting the adverse effects of the SLC rather than addressing the SLC itself (e.g. price controls).

The CC's approach to assessing these types of remedies is set out in paragraphs 4.1-4.35 of the CC's Guidelines.

The applicability of these types of remedy depends upon the circumstances of the case. However, given the UK Authorities' stated preference for using structural remedies, behavioural remedies are used (on their own or in combination with structural remedies) much less frequently (in only two phase I cases and in 7 of the 26 cases requiring phase II remedies under the Enterprise Act 2002).

Question 4 refers to a number of different types of behavioural remedy. In general one or more of the following conditions will normally apply in the unusual circumstances where the UK Authorities select behavioural remedies:

- Divestiture and/or prohibition is not feasible or the relevant costs of any feasible structural remedy far exceed the scale of the adverse effects of the SLC;
- The SLC is expected to have a relatively short duration (eg two to three years);
- Relevant customer benefits are likely to be substantial compared with adverse effects of the merger and these benefits would largely be preserved by behavioural remedies but not be structural remedies.

The following two phase II cases include remedies that cover the use of firewall measures, fair dealing clauses, transparency requirements and prohibitions on anti-competitive contracting practices:<sup>12</sup>

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<sup>10</sup> Capita Group plc/IBS Opensystems plc (2009) is an example of a phase II case where assets have been sold that have not been considered a stand-alone business.

<sup>11</sup> The remedy was an irrevocable exclusive perpetual licence of all copyrights (including design drawings), design rights, know-how, manuals and confidential information. Anticipated acquisition by Tetra Laval Group of part of Carlisle Process Systems, 20 November 2006.

- In Kemira GrowHow Oyj/Terra Industries Inc (2007), the remedies included:
  - measures preventing the communication of commercial information relating to CO2 produced at one plant to personnel involved in commercial negotiations at another plant, and vice-versa;
  - a requirement to renew a lease under equivalent terms and conditions to those currently in force; and
  - a requirement for a contract not to be terminated.
- In Macquarie UK Broadcast Ventures/National Grid Wireless Group (2008), the remedies included:
  - provisions to ensure confidentiality of information; and
  - the option for contract renewals to be based on the same prices and terms as the existing contract or to be determined on cost-oriented and FRND terms plus an independent adjudicator to resolve disputes.

### 3.4 *Compliance and enforcement*

UK legislation<sup>13</sup> places a duty on any person to whom an Order or undertaking applies to comply with it. Subject to the defences in the Act, any person who suffers loss or damage due to a breach of this duty may bring an action. UK legislation also provides that the UK Authorities can seek to enforce an Order or undertaking by civil proceedings for an injunction or for any other appropriate relief or remedy.

Under the Act, the OFT is responsible for monitoring and enforcement of undertakings and orders irrespective of whether the undertakings were accepted by the OFT or the CC. Given the UK Authorities' strong preference for structural remedies, there are relatively few ongoing behavioural remedies for the OFT to monitor. In terms of monitoring compliance with behavioural remedies, the UK Authorities rely primarily on affected third parties to raise non-compliance concerns.

Where appropriate, undertakings or orders for behavioural remedies may include reporting requirements or inspection clauses. The need for such measures is assessed on a case by case basis and depends on the complexity of the behavioural remedy. By way of example from phase II cases:

- In FirstGroup plc/Scotrail (2004), the parties are required to appoint and pay for a third party monitor to assist the UK Authorities in reviewing compliance. The monitor's duties include preparing and submitting a compliance report and conducting spot checks to assess compliance.
- In the Macquarie UK Broadcast Ventures/National Grid Wireless Group (2008), in addition to appointing an independent adjudicator to oversee contractual disputes, Arqiva is required to deliver an annual compliance report. This report includes details of steps to ensure compliance and instances of any breach or potential breach with steps taken to rectify the breach.

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<sup>12</sup> There are no examples under the Enterprise Act 2002 of anti-retaliation provisions.

<sup>13</sup> Section 167 of the Enterprise Act 2002.

In most behavioural remedies, the UK Authorities have not put in place sunset clauses. Instead there is a statutory duty for the OFT, from time to time, to review a remedy in order to assess the likelihood that the remedy is no longer appropriate because of changes in the marketplace. However, in the main, in these instances the OFT relies on those parties subject to the remedy to draw to the OFT's attention the relevant change of circumstance. In those instances where the OFT considers a change of circumstances has occurred, it provides advice to the CC. Responsibility for deciding on variation or termination of undertakings or orders lies with the CC in all but a very limited number of undertakings and orders

#### **4. Interim measures (response to question 5)**

*Question 5: Do you have experience protecting the to-be-divested assets or businesses prior to divestiture? Have you required that assets or businesses be held separate or otherwise preserved? Have you employed monitoring trustees?*

The UK merger regime has no mandatory pre-notification requirement. The UK Authorities therefore often find themselves investigating completed mergers (around 40 per cent of phase II merger inquiries are completed mergers). These completed mergers can in some cases have been subject to significant integration between the merging parties prior to the UK Authorities putting in place interim measures to prevent further integration (for example, the OFT can claim jurisdiction over a completed merger during the period of up to four months after it has been completed, which means considerable integration may have taken place before the OFT investigation has even started).

Statutory restrictions preventing certain dealings subject to the consent of the CC (when interim measures are not in place) apply once a merger is referred to the CC but there are no equivalent measures at phase I. For completed mergers, these restrictions prevent the completion of arrangements (including completing outstanding matters, making further arrangements and transferring ownership or control) to the extent these have not occurred prior to the reference being made. For anticipated mergers, the statutory restrictions prevent the acquisition of the shares. They do not prevent integration or the transfer of assets. In the light of these limitations, the need to have in place interim measures may fall to one or both UK Authorities in a particular case.

##### **4.1 Phase I interim measures**

At phase I, the OFT will seek voluntary initial undertakings from the parties. This is quicker and more effective than obtaining interim measures via a court order (speed is crucial in such matters). Under UK law, the interim measures will prevent further integration but cannot unwind changes or integration that has already taken place.

The OFT prefers to use a template for initial undertakings since this greatly speeds up the process. If necessary, the OFT can on a case-by-case basis grant derogations from the initial undertakings.

If the merger parties are not willing to voluntarily offer initial undertakings to the OFT in a timely manner, the OFT has the power to impose interim measures to prevent pre-emptive integration when it has reasonable grounds for suspecting that it has jurisdiction to examine the merger and that pre-emptive action is in progress or contemplation.

##### **4.2 Phase II interim measures**

Soon after the phase II reference has been made, the CC adopts any initial undertakings accepted at phase I.

Irrespective of whether or not there were initial undertakings at phase I, the CC will consider whether it needs to put in place (further) interim measures. Depending on the circumstances of case, the CC has available a range of interim measures which it may use throughout the course of the inquiry (see appendix A of the CC's Guidelines):

- *Appointment of a Monitoring Trustee (MT)* – to assess the need for further interim measures and to monitor compliance with any further measures. The costs of the MT are borne by the merger parties (see below for further detail);
- *Additional interim measures to prevent pre-emptive action* – for example, preventing the sharing of confidential information between the acquirer and the target, ensuring effective management arrangements remain in place (e.g. key staff such as the Managing Director or Finance Director). The CC may also choose to unwind previous integration. This is a feature unique to the UK system but the CC has in several cases had to unwind certain aspects of integration that have taken place prior to the start of investigation by the UK Authorities (see examples below).
- *Appointment of hold separate managers (HSMs)* with executive powers to operate the acquired business separately from the acquirer and in line with the interim measures for the duration of the investigation (see examples below).

#### 4.2.1 *Monitoring trustees*

The appointment of an MT is likely where one or more of the following risk factors have been identified:

- there have been breaches of the interim measures;
- there has been substantial integration of the two businesses prior to implementation of the interim measures;
- there is a need for further or continued integration of the business throughout the inquiry subject to the necessary consents from the CC, for example if the acquired business were not a stand-alone business;
- there is a high risk of deterioration of the business, for example through loss of key customers or members of staff;
- the pre-merger senior management of the acquired business is absent and/or strong incentives exist for the current senior management of the acquired business to operate the acquired business on behalf of the acquirer. This last risk factor, in particular, will suggest the need for the appointment of an HSM.

The appointment of a MT has become a common feature of phase II completed merger inquiries. Since 2008, MTs have been appointed on over two-thirds of phase II completed mergers. In these cases, within the first few weeks of the phase II reference, the CC usually directs under the interim undertakings that an MT should be appointed.

The MT needs to be the 'eyes and ears' of the CC. The MT typically has three roles:

- Assessing the extent of integration;

- Monitoring compliance with interim measures; and
- Overseeing any subsequent divestiture process.

For the MT to be effective, it is crucial for the MT to report on a regular basis. The reporting frequency will depend on the case - it is typically monthly, but in some cases it may be more frequent (e.g. fortnightly) or less frequent (e.g. based on specific milestones or events); and it may be varied during the course of the inquiry.

The usual process for appointing a MT, is that following the directions being made under the interim undertakings, the parties will be asked to provide a proposed MT within a set period of time (usually one week). In some cases, the parties have asked the CC for suggested MT appointments. The CC maintains a list of past MTs and periodically seeks to expand the list and meet with potential candidates. Upon request, the list of potential MTs is supplied to merger parties (typically via their legal advisers), so that a selection process and commercial negotiation can be undertaken by the merger party. The CC will only approve an MT if it is satisfied that the MT is suitable and the proposed appointment is independent of the merger parties and free of conflicts of interest.<sup>14</sup>

In deciding whether a proposed MT is suitable, there are typically several broad categories of expertise that are likely to be relevant:

- Commercial experience/industry knowledge/technical skills – e.g. to provide advice on the potential implications of commercial actions or issues that may arise at the acquired or acquiring party during the inquiry (via a process of consent under the interim undertakings). The extent of specific industry knowledge required may vary from case to case;
- Forensic accounting and investigation techniques – e.g. to provide assurance of compliance with undertakings during the inquiry;
- Corporate finance/corporate recovery – e.g. in the event that a divestiture is required following an SLC finding, to provide advice in relation to the progress of a divestiture process and assist in gathering evidence for the purchaser suitability assessment; and
- Other professional skills (such as legal, tax or pensions expertise) – e.g. to provide advice in particular specialised areas of corporate activity, depending on the nature of the inquiry.

#### 4.2.2 *Additional interim measures to prevent pre-emptive action and appointment of HSMs*

In many completed mergers the CC has opted to put in place additional interim measures, including confidentiality provisions, approaches to bidding for new contracts and retention of key staff. These interim measures are reinforced by clear compliance requirements.

The CC has required the appointment of an external HSM in three merger cases under the Act. In a number of other completed merger cases, the CC has stopped short of requiring an external HSM to be appointed but has achieved hold separate arrangements by requiring existing employees of the merged entities to act independently in key managerial roles in the acquired firm.

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<sup>14</sup> Examples of potential conflicts of interest that would usually preclude the appointment of an MT would be an audit or significant advisory relationship with the merger parties.

The following two phase II cases provide the most significant examples of how the CC has imposed further interim measures and required appointment of an HSM:

- In Stericycle International LLC/Sterile Technologies Group Limited (2007), the acquired business had been almost completely integrated, with a single managing director and shared personnel. The CC imposed an order to reverse much of the integration, prevent the closure of various plants and prevent staff redundancies. An HSM was appointed to ensure the business was run independently. This meant that the CC was able to implement its preferred divestment remedy. The CC's approach to interim measures in this case was upheld by the CAT.<sup>15</sup>
- In Stonegate Farmers Ltd/Deans Food Group Ltd (2007), the integration of the business, including the closure of a number of depots, the substantial integration of the IT, sales and marketing functions and loss of key personnel led to the weakening of Stonegate as a viable business, with a loss of reputation and capability serious enough that it was in danger of losing customers. An HSM was appointed and helped to reverse much of the integration so as to prevent Stonegate from being an unviable divestment package.

## 5. Divestiture process (response to question 6)

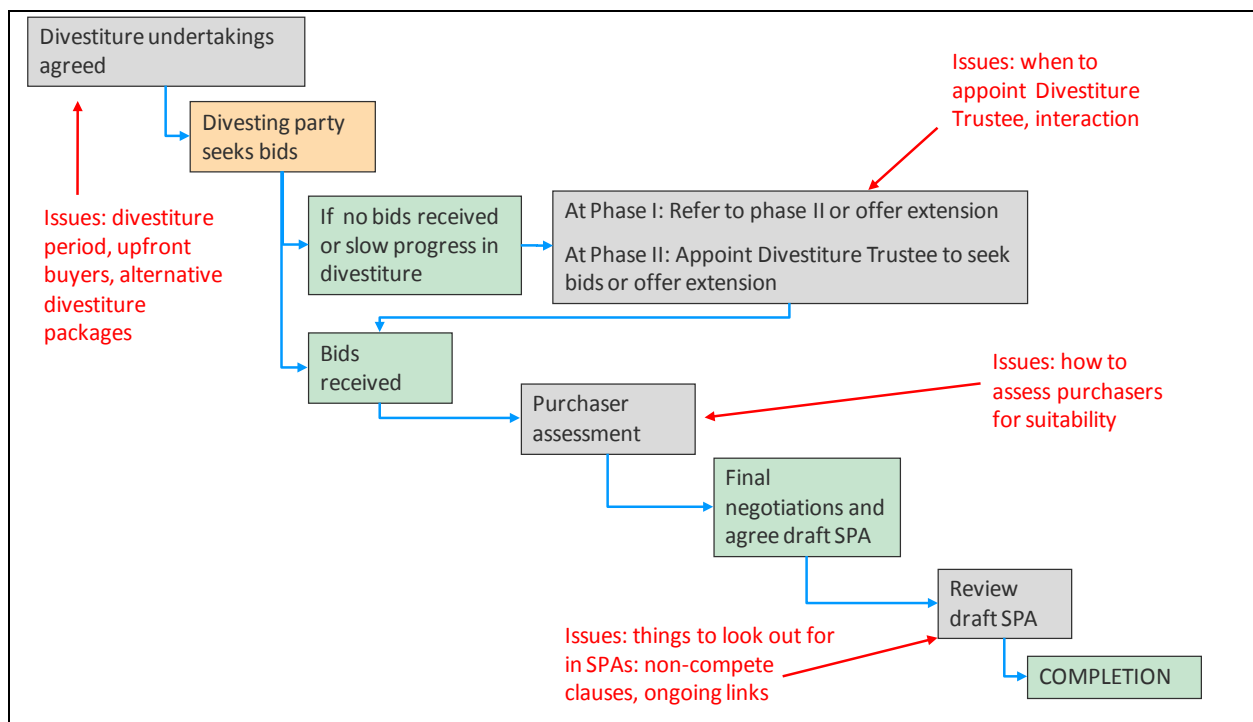
*Question 6: How do you ensure an expeditious and successful divestiture? Do you require divestitures be finalized before a merger closes? If not, how quickly do you require divestiture? What happens if the divestiture has not timely occurred? Do you use sales trustees? Do you insist on enhanced asset packages when sales are not timely? How do you ensure that a sale to a proposed divestiture buyer and the terms of the divestiture will accomplish your remedial goals?*

Figure 1 below shows a simplified divestiture process:

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<sup>15</sup> Judgment of the CAT in Stericycle International LLC and Stericycle International Limited v CC (2007).

Figure 1



Source: the UK Authorities

The UK Authorities consider three broad categories of risks that may impair the effectiveness of divestiture remedies as follows:

- *Composition risks*—these are risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market.
- *Purchaser risks*—these are risks that a suitable purchaser is not available or that the merger parties will dispose to a weak or otherwise inappropriate purchaser.
- *Asset risks*—these are risks that the competitive capability of a divestiture package will deteriorate before completion of divestiture, for example through loss of customers or key members of staff.

As shown in Figure 1, the UK Authorities use a number of tools to minimize composition, purchaser and asset risks:

- Setting an appropriate scope of divestiture package;
- Requiring a divestiture be finalized before the merger can be completed (so called ‘upfront buyers’);
- Requiring an alternative divestiture package in the event that the preferred divestiture package is unsuccessful;
- Setting a challenging but achievable divestiture period;

- Maintaining the threat of a Divestiture Trustee (at phase II only – at phase I the threat of reference to phase II is used instead);
- Properly assessing the short-listed purchasers; and
- Reviewing the sale documentation.

We consider each of these below. Many of these factors are taken into account in drafting the undertakings or order that require the divestiture of the relevant assets or business.

On average, phase I and II divestitures take less than six months to complete but experience at both phases is wide-ranging: there are some quick divestitures (within a matter of days of undertakings being accepted), and some slow, requiring the use of Divestiture Trustees, for example.

### **5.1 Scope of divestiture package**

In identifying a divestiture package, the UK Authorities will take, as their starting point, divestiture of all or part of the acquired business. This is because restoration of the pre-merger situation in the markets subject to an SLC will generally represent a straightforward remedy.<sup>16</sup>

In defining the scope of a divestiture package that will satisfactorily address the SLC, the UK Authorities will normally seek to identify the smallest viable, stand-alone business that can compete successfully on an ongoing basis and that includes all the relevant operations pertinent to the area of competitive overlap. This may comprise a subsidiary or a division or the whole of the business acquired.

The scope of the divestiture package will be specified in detail in the undertakings accepted or orders made by the UK Authorities when implementing the remedy. At the phase II stage the parties to the merger may also add further assets to the specified package at their request with the approval of the CC, or may be required to do so by the CC, to secure divestment to a suitable purchaser.

In some cases, it is appropriate to leave the precise scope of the divestiture package open in the undertakings because:

- It may not be clear which package will be most easily divested (e.g. Stagecoach Group plc/Scottish Citylink (2006) – in which the precise bus routes included in the divestiture package depended upon the identity of the purchaser); or
- Several different packages may be capable of addressing the SLC (for example, this may be the case in local retail market or local bus market mergers).

### **5.2 Upfront buyers**

Where the UK Authorities are in doubt as to the viability or attractiveness to purchasers of a proposed divestiture package (ie composition risk) or believe there may be only a limited pool of suitable purchasers (ie purchaser risk), they may require the merger parties to obtain a suitable purchaser that is *contractually*

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<sup>16</sup> This approach was upheld by the Competition Appeal Tribunal in the Somerfield PLC V Competition Commission case (2006). ‘in our view it is not unreasonable for the CC to consider, as a starting point, that ‘restoring the status quo ante’ would normally involve reversing the completed acquisition unless the contrary were shown’ (paragraph 99).



*committed*<sup>17</sup> to the transaction (a so-called upfront buyer) before permitting a proposed merger to proceed or a completed merger to progress with integration. The upfront buyer mechanism also incentivizes the parties to find a purchaser in good time.

Where the UK Authorities consider that the competitive capability of the divestiture package may deteriorate pending the divestiture (ie asset risk) or completion of the divestiture may be prolonged, it may also require that the upfront buyer *completes* the acquisition before the merger may proceed or, in the case of a completed merger, before the merger parties may progress with integration.

The key difference between a divestiture with an upfront buyer and otherwise, is that in an upfront buyer scenario the UK Authorities will not accept a divestiture remedy until it has given its approval to a specific purchaser. Where there is no upfront buyer, the UK Authorities accepts the divestiture remedy and the merger parties seek approval for a purchaser at some future date.<sup>18</sup>

Examples of upfront buyers required at phase I and phase II are:

- Phase I - Co-operative Group / Somerfield (supermarkets, 2008), GB Oils/Brogan (heating oils, 2010); and
- Phase II - Kemira GrowHow/Terra Industries (2007), Hamsard /Academy Music Holdings (2007)

### 5.3 *Alternative divestiture packages*

At the phase I stage the OFT has tended to favour the use of upfront buyers in order to minimise the risk that a divestment will not be successful. It has not used alternative divestiture packages.

At phase II, where partial divestitures are more common, it may be important to maintain a credible threat of expanding the divestiture package by defining a more extensive and/or more marketable divestiture package ('alternative divestiture packages'<sup>19</sup>) which the CC would require the parties to sell if the initially proposed divestiture package were not sold within a specified period. Alternative divestiture packages may be appropriate if there is doubt as to the marketability of the initially proposed divestiture package or where a business is subject to major asset risks and speed of divestiture is likely to be a critical requirement. As a general rule, any 'back stop' remedy should be no more attractive to the parties than the preferred remedy; otherwise the parties will have weakened incentives to implement the preferred remedy. The existence of an alternative divestiture package may be excised from the CC's final report if it is considered that disclosure to third parties may undermine the divestiture process.

To date, the CC has not required the sale of an alternative divestiture package, though an alternative divestiture package has been identified in a number of undertakings, for example:

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<sup>17</sup> Contractual commitment may occur, for instance, through exchange of contracts subject to limited conditions.

<sup>18</sup> The distinction is important at phase I since once the OFT accepts an UIL it can no longer refer the merger to the CC (or re-open its own investigation). Therefore, the OFT will seek an upfront buyer obligation if the risk profile of the remedy warrants it – for example, if there are only a small number of likely purchasers for the divestment asset. The added advantage of using upfront buyers for the OFT is (as mentioned above) the OFT does not formally accept the remedy before a suitable buyer is put in place. Thus if a suitable buyer is not put in place in a timely manner the OFT can still refer the merger to the CC which has stronger investigative and remedial powers.

<sup>19</sup> Such packages are sometimes referred to as 'Crown Jewel' packages.

- In EWS Railway Holdings / Marcroft Engineering (2006), the existence of an alternative divestiture package (but not the details) was revealed in the public version of the final report.
- In Capita Group plc/IBS Opensystems plc (2009), the parties proposed a partial divestiture package that was acceptable but concerns remained over asset risk and speed of divestiture. As a result, the CC said that ‘should a successful divestiture of the IBS R&B division not be achieved by Capita within a reasonable period, we will review whether we need to widen the scope of the divestiture package to a full divestiture of the IBS business’.

#### **5.4 *Divestiture period***

The CC will state in its final report the period in which the parties should achieve effective disposal of a divestiture package to a suitable purchaser (ie the ‘initial divestiture period’). However, this period may be excised from the final report if it is considered that disclosure to third parties may undermine the divestiture process.

The length of this period will depend on the circumstances of the market but will normally have a maximum duration of six months (and have been as short as two months). The UK Authorities, when determining the initial divestiture period, will seek to balance factors which favour a shorter duration, such as minimizing asset risk and giving rapid effect to the remedy, with factors that favour a longer duration such as canvassing a sufficient selection of potential suitable purchasers and facilitating adequate due diligence.

#### **5.5 *Divestiture trustees***

If the merger parties cannot procure divestiture to a suitable purchaser within the initial divestiture period, then, unless this period is extended, an independent divestiture trustee may be mandated to dispose of the package within a specified period (the trustee’s divestiture period) at the best available price in the circumstances, subject to prior approval by the UK Authorities of the purchaser and the divestiture arrangements. This option is available at both the phase I and phase II stages. The CC’s usual practice is to include in the undertakings provisions for the appointment of a Divestiture Trustee.

The role of a Divestiture Trustee is distinct from that of a Monitoring Trustee, but the two roles may be performed by the same person, subject to consideration of conflicts of interest. Their identity depends on the circumstances of the case – for example, a real estate specialist may be required to sell retail stores.

The key challenge with appointing a Divestiture Trustee is deciding when to appoint. If the UK Authorities have reason to expect that the merger parties will not procure divestiture to a suitable purchaser within the initial divestiture period, the UK Authorities may require that a divestiture trustee is appointed before the end of the initial divestiture period, or in unusual cases, at the outset of the divestiture process. However, appointment of a Divestiture Trustee can be disruptive and costly – there is a careful balance to be struck to ensure parties are given a fair opportunity to divest the divestiture package. Advice from a Monitoring Trustee, if in place, can be particularly informative in deciding when to appoint the Divestiture Trustee.

Since 2003, Divestiture Trustees have been used in three cases:

- In Somerfield / Morrisons (2005), a Divestiture Trustee was appointed after 13 months of the divestiture process. The Divestiture Trustee was unable to sell two remaining stores and was stood down when it became clear that there was no realistic prospect of a sale;

- In Stonegate Farmers Ltd/Deans Food Group Ltd (2007) a Divestiture Trustee was appointed after 7 months of the divestiture process and the sale of Stonegate to the purchaser was completed 3 months later.
- In Tesco/Co-op Slough (2007), as there were highly unusual circumstances and the CC recognized the importance of the sale process to the effective implementation of its chosen remedy, the CC required a Divestiture Trustee from the outset of the divestiture process. Divestiture was completed after 7 months.

## 5.6 *Approval of purchaser*

The UK Authorities will wish to satisfy themselves that a prospective purchaser is independent of the divesting parties, has the necessary capability to compete, is committed to competing in the relevant market(s) and divestiture to the purchaser will not create further competition concerns. The relative importance that the UK Authorities attribute to each of these criteria will depend on the circumstances of the case. These criteria are considered in more detail below:

- *Independence*—The purchaser should have no significant connection to the divesting parties that may compromise the purchaser’s incentives to compete with the divesting entity, for example, an equity interest, shared directors, reciprocal trading relationships or continuing financial assistance.
- *Capability*—The purchaser must have access to appropriate financial resources, expertise and assets to enable the divested business to be an effective competitor in the market. This access should be sufficient to enable the divestiture package to continue to develop as an effective competitor. For example, a highly leveraged acquisition of the divestiture package that left little scope for competitive levels of capital expenditure or product development is unlikely to satisfy this criterion.
- *Commitment to relevant market*—The UK Authorities will wish to satisfy themselves that the purchaser has an appropriate business plan and objectives for competing in the relevant market(s).
- *Absence of competitive or regulatory concerns*—Divestiture to the purchaser should not create a realistic prospect of further competition or regulatory concerns.

Criteria relating to capability and commitment to the relevant market are the most common reasons for not approving purchasers. It is difficult to give examples here as reasons for not approving purchasers remain confidential. However, it is insightful to understand how the UK Authorities assess these two criteria and past reasons for these criteria not being met.

### 5.6.1 *Capability*

To assess capability the UK Authorities usually:

- Review financial statements of the acquirer, for example, by examining basic financial ratios – in some cases a high-level of gearing can threaten the ongoing sustainability of the acquirer;<sup>20</sup>

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Both the OFT and CC employ staff with specialist financial skills.

- Assess the financeability of the acquisition – in some cases insufficient funds have been available to potential acquirers (e.g. not enough access to equity, doubts as to the likelihood of loans being approved)
- Review the proposed management structure – in some cases the UK Authorities have found the management team to be insufficiently experienced or the management structure to be poorly defined;
- Assess whether necessary assets are available to the acquirer or whether transitional arrangements are required.

#### Commitment to relevant market

To assess the prospective purchasers' commitment to the relevant market the UK Authorities usually review business plans using sensitivity testing on key drivers such as sales forecasts. The UK Authorities cross-check business plans to the financial capability assessment. In some cases substantial business plans have not been produced; in other cases business plans have made unrealistic assumptions. Any serious purchaser would be expected to be able to address these two concerns.

### 5.7 *Review of sale documentation*

Prior to completion of the divestiture, the UK Authorities ensure that the sale documentation does not contain any clauses that might undermine the remedy. Here we consider two specific areas: (a) ongoing links and (b) non-compete clauses.

#### 5.7.1 *Ongoing links*

A purchaser should not have continuing links with the merger parties after divestiture that may compromise the purchaser's incentives to compete with these parties, eg financial (including landlord/tenant relationships), ownership or management links. However, purchasers may require access to key inputs or services at appropriate terms from the merger parties, on an interim basis, in order to enable the divestiture to operate effectively. Such arrangements may be permitted by the UK Authorities for a limited period. Their duration depends on the length of dependency - if a purchaser will establish own capacity in due course, then restrictions will be temporary. The end date may be set at some specific date or some substantive trigger (eg establishment of purchaser's own capacity).

#### 5.7.2 *Non-compete clauses*

The UK Authorities may also permit or require non-solicitation clauses (e.g. of customers or key staff) or other measures to protect the purchaser from the merger parties for a limited period (eg one year) and to enable the purchaser to become established as an effective competitor in the relevant market(s). Their duration will be temporary and will depend upon the circumstances of the case – there is a careful balance to be struck between allowing competitive conditions to emerge and protecting the purchaser for a limited period of time.

**ANNEX – RELEVANT GUIDELINES**

*Merger Remedies: Competition Commission Guidelines (CC8), November 2008.* [http://www.competition-commission.org.uk/rep\\_pub/rules\\_and\\_guide/pdf/cc8.pdf](http://www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/cc8.pdf)

*Mergers: exceptions to the duty to refer and undertakings in lieu of a reference guidance, OFT1122,* December 2010 ([http://www.offt.gov.uk/shared\\_offt/mergers/Consultations/oft1122.pdf](http://www.offt.gov.uk/shared_offt/mergers/Consultations/oft1122.pdf))

*Mergers: jurisdictional and procedural guidance, OFT527, June 2009.*  
([http://www.offt.gov.uk/shared\\_offt/mergers\\_ea02/oft527.pdf](http://www.offt.gov.uk/shared_offt/mergers_ea02/oft527.pdf))

## UNITED STATES

This paper is intended to articulate the principles and practices employed by the United States competition enforcement agencies—the Antitrust Division of the United States Department of Justice (“Antitrust Division”)<sup>1</sup> and the United States Federal Trade Commission (“Federal Trade Commission”) (together, the “Agencies”)—in analyzing, implementing, and enforcing merger remedies.

### 1. Background

Understanding the United States’ approach to merger<sup>2</sup> remedies requires an appreciation of how the United States’ premerger notification system functions. The United States has two key substantive merger control statutes, the Sherman Act<sup>3</sup> and the Clayton Act.<sup>4</sup> The Hart-Scott-Rodino Act<sup>5</sup> governs premerger notification and requires merging parties whose mergers meet certain dollar thresholds to notify the Government and observe waiting periods before consummating their merger. One of the Agencies will then review the merger and determine whether it is anticompetitive.

If the reviewing Agency determines that a proposed merger is anticompetitive, it may seek a preliminary injunction in federal court before the merger takes place. The purpose of the preliminary injunction is to halt the merger until the Agency can fully litigate the likely competitive effects of the proposed merger. If the court issues a preliminary injunction, there will subsequently be a full trial to determine whether the injunction should be made permanent or whether the merger should be allowed to proceed.<sup>6</sup>

In practice, however, most parties propose and negotiate a settlement with the Government before litigation, usually by offering to eliminate the anticompetitive aspects of the merger by making a divestiture, proposing limits on their post-consummation conduct, or both.<sup>7</sup> However, while the issues posed by most anticompetitive mergers are resolved through negotiation rather than litigation, the possibility that the reviewing Agency will seek to block the merger drives the negotiation process, including the remedy policies discussed in this paper.

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<sup>1</sup> The Antitrust Division has recently released an updated version of its Policy Guide to Merger Remedies. See <http://www.justice.gov/atr/public/guidelines/272350.pdf>.

<sup>2</sup> The term “merger” is used throughout this paper to include acquisitions and any other similar transactions subject to the statutes enforced by the Agencies.

<sup>3</sup> 15 U.S.C. §§ 1-2.

<sup>4</sup> 15 U.S.C. § 18.

<sup>5</sup> 15 U.S.C. § 18a.

<sup>6</sup> The Federal Trade Commission generally conducts such full trials under its own rules for administrative adjudication, and the result is an order from the Commission, either allowing the merger to go forward, or prohibiting it. The Department of Justice conducts such trials before the court that issued the injunction.

<sup>7</sup> As described below, the Antitrust Division’s remedies are embodied in “decrees” (and “consent decrees”), which are issued by a federal court; the Federal Trade Commission’s remedies are in “consent orders,” which the Commission itself issues. We will use both terms interchangeably throughout this paper.

This paper discusses mainly settlements and orders that are entered before a merger is consummated. The Agencies apply a similar analysis when seeking to remedy anticompetitive mergers that already have been consummated. The law in the United States is clear that a merger may be challenged after it occurs, whether or not it had been subject to the premerger reporting laws. The same law and analysis applies to both consummated and unconsummated mergers. The expiration of waiting periods does not create any legal “safe harbor” for an anticompetitive merger.<sup>8</sup>

## 2. Key principles of merger remedies policy

Because mergers can vary significantly, effective merger remedies also vary from case to case. However, the Agencies apply certain basic principles to all their merger remedies. First, effectively preserving (or restoring) competition is the key to an appropriate merger remedy. The Agencies will consider only remedies that resolve the competitive problems posed by a merger. Second, the Agencies’ central goal is preserving competition, not determining market outcomes. Therefore, the Agencies’ remedy provisions are designed to preserve competition generally, rather than protect or favor particular competitors. The Agencies will seek merger remedies that protect the competitive landscape by effectively preserving competition without reducing the incentive for individual firms to compete. Third, a remedy closely tailored to the theory of the violation in a particular case is the best way to ensure that the relief obtained cures the competitive harm. The Agencies will accept a proposed remedy only if they are satisfied that there is a close, logical nexus between the proposed remedy and the alleged violation—that the remedy fits the violation and flows from the theory of competitive harm. Effective merger remedies also preserve the efficiencies created by the merger, to the extent possible, without compromising the benefits that result from maintaining competitive markets.<sup>9</sup>

The Agencies’ focus is on identifying effective relief for the particular merger presented. In certain factual circumstances, structural relief may be the best choice to protect consumers. In different circumstances, conduct relief may be the best choice. And, in still other circumstances, a combination of structural and conduct relief may be the most effective approach.<sup>10</sup>

The Agencies’ remedies analysis is fact-intensive, as is the case analysis itself. The Agencies typically will determine what competitive harm the merger has caused or likely will cause and what kind of relief, if any, will remedy that particular competitive harm.

## 3. Types of remedies

The Agencies’ merger remedies typically include structural or conduct provisions, or a combination of both, depending on the factual circumstances presented. Structural remedies generally involve the sale of physical assets by the merging firms or, in some instances, the sale or licensing of intangible assets, such as intellectual property, or a combination of both. The Agencies rely on structural remedies to preserve competition in the vast majority of cases when a competitive problem results from a horizontal merger.

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<sup>8</sup> In *Chicago Bridge and Iron*, at <http://www.ftc.gov/os/adjpro/d9300/050106finalorder9300.pdf>, the FTC challenged a consummated merger in several markets for high pressure storage tanks, and ordered the firm to split up and divest half. The FTC’s order was affirmed by the court of appeals, 534 F.3d 410 (5th Cir. 2008).

<sup>9</sup> A remedy is not effective simply because it preserves a proposed transaction’s claimed efficiencies. Rather, a remedy’s effectiveness depends fundamentally on its impact on consumers and competition.

<sup>10</sup> In appropriate circumstances, the Agencies also may consider seeking disgorgement in consummated merger challenges, either instead of or in addition to unwinding the transaction. See also FED. TRADE COMM’N, POLICY STATEMENT ON MONETARY EQUITABLE REMEDIES IN COMPETITION CASES (July 25, 2003), available at <http://www.ftc.gov/os/2003/07/d disgorgementfrn.shtm>.

The Agencies sometimes use structural remedies in the vertical merger context as well. Conduct remedies usually entail provisions that restrain the merged firm's post-consummation business conduct. Conduct remedies can be particularly effective for dealing with competitive problems raised by vertical mergers and also are sometimes used to address issues raised by horizontal mergers (usually in conjunction with a structural remedy). In cases in which neither structural nor conduct relief, nor a combination of the two, would effectively preserve competition, the Agencies will seek to block the merger (or unwind a consummated merger).

### **3.1      *Structural remedies***

For a structural remedy to be effective, the purchaser of the divested assets must possess both the means and the incentive to preserve competition in the affected market(s). Therefore, any divestiture must include all the assets, physical and intangible, necessary for the purchaser to effectively compete with the merged entity. This often requires the divestiture of an existing business entity that already has demonstrated its ability to compete in the relevant market. An existing business entity typically possesses not only all the physical assets, but also the personnel, intangible assets, and management infrastructure necessary for the efficient production and distribution of the relevant product, and it already has succeeded in competing in the market.

The Agencies sometimes will accept divestiture of less than an existing business entity, if circumstances warrant. For example, the Agencies may consider such a divestiture if there is no relevant business entity smaller than either of the merging firms, a set of acceptable assets can be assembled from the merging firms, and the Agencies are persuaded that these assets will create a viable entity that will effectively preserve competition. The Agencies also may consider divestiture of less than an existing business entity when certain of the entity's assets already are in the possession of, or readily obtainable in a competitive market by, the purchaser. In those circumstances, the Agencies typically would need to know the purchaser's identity in advance.

The Agencies also may consider divestiture of more than an existing business entity, where that is necessary to preserve competition. For example, in some industries, it is difficult to compete without offering a "full line" of products. In those circumstances, the Agencies may seek to include a full line of products in the divestiture package, even if their antitrust concern relates to only a subset of those products, so that the purchaser has similar "scope" economies as the merged firms.

In some situations, the assets necessary for the purchaser to compete effectively are intangible assets—for example, when firms with alternative patent rights for producing the same final product are merging. In those cases, structural relief must provide one or more purchasers with rights to those assets, either by sale to a different owner or through licensing.

### **3.2      *Conduct remedies***

Conduct remedies can be particularly effective for dealing with competition issues raised by vertical mergers and sometimes are used to address issues raised by horizontal mergers, usually in conjunction with a structural remedy. There is a range of conduct remedies that may be effective in preventing consumer harm.

The most common forms of conduct relief are firewalls, non-discrimination, mandatory licensing, transparency, and anti-retaliation provisions, and prohibitions on certain contracting practices.



Firewalls are designed to prevent the dissemination of information within a firm.<sup>11</sup> Monitoring is required to ensure that the firewall provision is adhered to and is effective.

Non-discrimination provisions incorporate the concepts of equal access, equal efforts, and equal terms.<sup>12</sup> When including a non-discrimination clause in a remedy, the Agencies may insist on an arbitration provision that will allow complainants to resolve controversies regarding the merged entity's conduct under the clause without direct Agency involvement. The Agencies will monitor the implementation of the arbitration provision and in all cases retain responsibility for enforcement.

In certain circumstances, parties may propose, as part of a settlement, to license certain technology or other assets on terms that would prevent harm to competition. Licensing terms of this sort may alleviate competitive concerns by enabling competitors to adjust to the change in ownership of a key input necessary to effectively preserve competition.<sup>13</sup> Licensing agreements of this type can be enforced through mandatory arbitration provisions.

The Agencies sometimes employ transparency provisions as a form of relief in vertical merger cases.<sup>14</sup> These provisions usually require the merged firm to make certain information available to a regulatory authority that the firm otherwise would not be required to provide.<sup>15</sup>

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<sup>11</sup> For example, if an upstream dominant firm proposes to merge with one of three downstream firms competing in the same relevant market, the Agencies may be concerned that the upstream firm will share information with its acquired downstream firm (and perhaps with the two other downstream firms) that will facilitate anticompetitive conduct. A firewall could prevent that. *See, e.g.,* United States v. Northrop Grumman Corp., 1:02-cv-02432, Competitive Impact Statement 18-19 (D.D.C. 2002) (establishing firewall between Northrop's payload and satellite prime businesses). Similarly, in *PepsiCo, Inc.*, PepsiCo, which manufactures soft drink concentrates but sells through independent bottlers, was acquiring the major national third-party bottlers who handle both PepsiCo and Dr Pepper/SevenUp brands. The FTC was concerned that PepsiCo would be able to obtain competitively sensitive information about the marketing plans of concentrate-manufacturer Dr Pepper/SevenUp (separate from distribution plans of the bottler); the Commission's order establishes firewalls that prevent such information flowing up to the concentrate portion of PepsiCo's business. *See* <http://www.ftc.gov/os/caselist/0910133/100928pepscode.pdf> (2010).

<sup>12</sup> *See e.g.,* United States v. Comcast Corp., 1:11-cv-00106, Competitive Impact Statement 30-33 (D.D.C. 2011), available at <http://www.justice.gov/atr/cases/f266100/266158.pdf>. If, for example, an upstream monopolist proposes to merge with one of three downstream firms competing in the same relevant market, the Agencies may be concerned that the upstream firm will have an incentive to favor the acquired downstream firm by offering less attractive terms to, or refusing to deal with, the acquired firm's competitors. In certain circumstances, depending on the information available regarding competitive prices in the relevant market, the Agencies will consider employing a non-discrimination clause requiring the upstream firm to offer the same terms to all three downstream competitors. The Agencies will be careful to ensure that any such provision will effectively protect against the independent downstream firms getting lesser quality product, slower delivery times, reduced service, or unequal access to the upstream firm's products.

<sup>13</sup> *See* United States v. Google, 1:11-cv-00688, Competitive Impact Statement 9-13 (D.D.C. 2011); *Comcast*, 1:11-cv-00106 at 30-33.

<sup>14</sup> *See, e.g.,* United States v. MCI Commc'ns Corp., 1994-2 Trade Cas. ¶70,730, \*1-7 (D.D.C. 1994) (requiring disclosure of various data, including prices, terms, and conditions of telecommunications services, volumes of telecommunications services traffic, and average time between order and delivery of circuits between certain entities). Similarly, in *Entergy and Entergy-Koch* (2001), the FTC was concerned that the vertical combination would allow the merged firm to avoid certain rate regulation by the Louisiana or Mississippi (state) Public Service Commissions; the FTC's order requires Entergy to post certain pricing information, in the form of requests for proposals, in a public manner, so that the state regulatory agencies can see and monitor them. *See*, <http://www.ftc.gov/os/2001/01/entergydo.pdf>. In considering requiring a

Anti-retaliation provisions also may prove effective in preserving competition. Such provisions may bar the merged entity from retaliating against customers or other parties who enter into (or contemplate entering into) contracts or who do business with the merged entity's competitors.<sup>16</sup> They also may prohibit the merged entity from discriminating or retaliating against an entity for providing information to the Agencies about alleged non-compliance with a decree or for invoking any of the provisions of a decree or a regulatory agency's rule or order.<sup>17</sup>

In some circumstances, the Agencies may require prohibitions on restrictive contracting practices by the merged entity. Restrictive or exclusive contracts can be competitively neutral, procompetitive, or anticompetitive, depending on a number of factors. In some situations a merged entity might use restrictive or exclusive contracting anticompetitively to block competitors' access to a vital input. Or, a merged entity might enter into short-term contracts with key customers that include automatic renewal provisions to foreclose or slow a competitor's entry. In these types of situations, it may be appropriate to impose limits on the merged entity's ability to enter into restrictive or exclusive contracts.<sup>18</sup> Prohibitions on restrictive contracting may be particularly appropriate in vertical mergers in which the merged entity will control an input that its competitors must access to remain viable.

No matter what form a conduct remedy takes, clear and careful drafting is especially important. Remedial provisions that are too vague to be effectively enforced or that could be misconstrued and thereby fail to achieve their intended purpose risk rendering useless the effort devoted to investigating the merger and obtaining the decree, leaving the competitive harm unchecked. Conduct remedies must precisely and unambiguously spell out a defendant's obligations, so that it is clear what must or must not be done to satisfy the terms. A decree that is not clearly and carefully crafted can be an invitation for a defendant to try to evade the intent of the decree.

### 3.3 *Hybrid remedies*

In some circumstances, the most effective remedy will include both structural and conduct provisions. This may be the case, for example, when a merger involves multiple markets or products and competition is best preserved by structural relief in some relevant markets and by conduct relief in others. Or, a merger involving one type of market may require both structural and conduct relief. For example, for certain kinds of mergers an effective remedy might involve requiring the merging firms to divest certain customers' contracts (structural relief) and also preventing abusive contracting practices (conduct relief).

In other circumstances, temporary conduct relief will be necessary to help strengthen structural relief. For example, the Agencies might require a supply agreement to accompany a divestiture if the purchaser is unable to manufacture the product for a transitional period (perhaps as plants are reconfigured, product

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transparency provision, the Agencies are alert to the possibility that increased transparency could, under some conditions, facilitate co-ordination in certain industry settings.

<sup>15</sup> For example, a consent order may require a telecommunications firm to inform a regulatory agency of the prices the firm is charging customers for telecommunications equipment, even though the regulatory agency may not have the authority to regulate those prices. The additional information can aid the regulatory agency in preventing the firm from engaging in regulatory evasion by, for example, charging telecommunications equipment clients with which it competes for provision of telecommunications services higher prices than it charges its other telecommunications equipment customers.

<sup>16</sup> See, e.g., *Ticketmaster*, 2010-2 Trade Cas. at \*25-26.

<sup>17</sup> See, e.g., *Comcast*, 1:11-cv-00106, Competitive Impact Statement 34, 40.

<sup>18</sup> See, e.g., *id.* at 34-37.

mixes are altered, or the purchaser obtains government approvals or customer qualification).<sup>19</sup> In those circumstances, a supply agreement can help prevent the loss of a competitor from the market, even temporarily. Similarly, temporary limits on the merged firm's ability to reacquire personnel may at times be appropriate as part of a divestiture to ensure that the purchaser will be a viable competitor.<sup>20</sup> The Agencies may also require the merged firm to provide certain interim technical assistance to a purchaser, especially in cases involving highly technical and complex production markets.

#### 4. Implementing effective remedies

Merger remedies are effective only when properly implemented. Proper implementation involves determining the timing of the remedy and the steps necessary to ensure that the remedy is effectively executed.

##### 4.1 Timing

The timing of merger remedies in the United States varies depending on the factual circumstances of particular mergers. In some cases, the merging parties may choose to pursue a pre-consummation remedy that may resolve the Agencies' competitive concerns without requiring the Agencies to bring suit. In other cases, the parties will propose the divestiture of a specific package of assets to a particular buyer ("upfront buyer"). In many other instances, the parties, or a selling trustee, will have a deadline to find a buyer for a specific package of assets.

A fix-it-first remedy is used at times at the Antitrust Division; it is a structural solution that the parties implement and the Division accepts before a merger is consummated. To accept a fix-it-first proposal, the Division must be satisfied that the remedy will effectively preserve competition. An acceptable fix-it-first remedy contains no less substantive relief than the Division would seek if it filed a case in court. The Division, therefore, will conduct an investigation sufficient to determine both the nature and extent of the likely competitive harm and whether the proposed fix-it-first remedy will resolve it. In certain circumstances, a fix-it-first remedy may preserve competition in the market more immediately and effectively than would a decree, allowing the Division to use its resources more efficiently. However, if the competitive harm from a particular merger requires remedial provisions that entail continuing, post-consummation obligations on the part of the merged firm, the Division will reject a fix-it-first remedy because an order will be necessary to enforce and monitor the ongoing obligations. The FTC does not have

<sup>19</sup> The Agencies pay close attention to determining the appropriate duration of these types of supply agreements: agreements that are too short may not give a purchaser sufficient time to establish a viable operation, while agreements that are too long may reduce a purchaser's incentives to compete effectively as an independent entity. Long-term supply agreements between the merged firm and third parties on terms imposed by the Agencies can raise serious competitive issues. Given the merged firm's incentive not to promote competition with itself, competitors reliant upon the merged firm for product or key inputs may be disadvantaged in the long term. Contractual terms can be difficult to define and specify with the requisite foresight and precision, and a firm compelled to help another compete against it is unlikely to exert much effort to ensure the products or inputs it supplies are of high quality, arrive as scheduled, match the order specifications, and satisfy other conditions that are necessary to effectively preserve competition. Moreover, close and persistent ties between two or more competitors (as created by such agreements) can serve to enhance the flow of information or align incentives that may facilitate collusion or cause the loss of a competitive advantage. Therefore, supply agreements in Agency decrees generally will be short-term and used as a transitional mechanism until the purchaser is able to secure another source of supply.

<sup>20</sup> See, e.g., *United States v. AlliedSignal*, 2000-2 Trade Cas., ¶ 73,023 \*21-23 (D.D.C. 2000); *United States v. Aetna*, 1999-2 Trade Cas., ¶ 72,730 \*15-16 (N.D. Tex. 1999). And see, e.g., *BASF SE*, at paragraph VII.B. for a typical such provision in an FTC order. <http://www.ftc.gov/os/caselist/0810265/090526basfdo.pdf> (2009).

a formal policy of using fix-it-first remedies. Nevertheless, parties in rare instances (after it becomes clear where the FTC staff's concerns lie) have unilaterally sold off the relevant assets in an acceptable manner, at which point the FTC has decided that no further relief is required. In those rare instances, the FTC has not required a formal order.

In some cases the parties may propose an upfront buyer for a specific package of divestiture assets. The Agencies may enter into a consent order agreeing to this type of proposal if they determine that the proposed sale will effectively preserve competition in the relevant market post-merger. This type of arrangement can benefit both the merging parties and the Agencies. The parties benefit because the divestiture process is generally shorter and more certain than if they shopped a broader package of assets to a number of potential purchasers for a post-consummation sale. The Agencies and consumers benefit from avoiding any loss of competition during the search for purchasers, and avoiding costs arising in a longer investigation and post-consummation sale process. The Agencies also gain the certainty that the divestiture will occur, and thus effectively preserve competition. The FTC generally requires upfront buyers if there is any real risk that approvable purchasers might not exist for a divestiture package, or if there is concern about the viability of the divestiture package during the divestiture period. For example, the FTC routinely requires upfront buyers in mergers involving pharmaceutical products, because a successful divestiture requires finding an approvable and interested purchaser from a very small group of candidates (other pharmaceutical manufacturers who do not have overlapping products). The FTC also routinely requires upfront buyers in food retailing mergers, because retailing assets are particularly susceptible to competitive diminishment (loss of consumer interest or "franchise") during the divestiture period.

In all merger cases with divestiture orders, the Agencies will require identification of a package of assets to be divested pursuant to the order or decree (even for upfront buyers). In the absence of an upfront buyer, the Agencies must be satisfied that the asset package will be sufficiently broad to attract a purchaser in whose hands the assets will help preserve competition – that is, that the package contains everything a competitor would need. The Agencies also will need to confirm, in their investigation, that there will be at least one acceptable potential purchaser for the specified asset package. The Agencies do this by interviewing likely interested purchasers.

When parties dispute what assets must be included in the divestiture package, the Agencies may agree to the parties' proposed package on the condition that, if an acceptable purchaser cannot be found for that package, the parties must include additional valuable assets – "crown jewels" – to increase the likelihood that an appropriate purchaser will emerge.<sup>21</sup> The Agencies must approve any proposed purchaser. Generally, the Agencies will allow the parties an opportunity to find a purchaser on their own within sixty to ninety days. The Agencies will reserve the right to appoint a selling trustee to complete the sale if the parties are unable to do so in that timeframe.

## **4.2 Implementation**

Once a divestiture package has been identified, the Agency generally will require certain measures to safeguard effective implementation of the remedy, including a hold separate provision, provisions for operating, monitoring, and selling trustees, and the right to disapprove a proposed purchaser.

Consent decrees or orders mandating post-consummation divestiture will require the merged firms to take all steps necessary to ensure that the assets to be divested are maintained as separate, distinct, and saleable. A hold separate agreement or order is designed to maintain the independence and viability of the

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<sup>21</sup> The use of crown jewels and upfront buyers are related: if there is doubt that the offered package is viable or sellable, the Agencies can insist on an upfront buyer (to test the offer before a settlement is reached), or may instead agree to a crown jewel provision.

divested assets and to preserve competition in the market during the pendency of the divestiture. The remedy also often includes an asset preservation clause, which requires the defendant to preserve and maintain the value and goodwill of the divestiture assets during the divestiture process. Because hold separate and asset preservation provisions will not in all cases entirely preserve competition, these provisions do not eliminate the need for a speedy divestiture.

If the Agencies are concerned that a defendant has the ability and incentive to mismanage the divestiture assets during the typical divestiture period, thereby reducing the likelihood that the divestiture will effectively preserve competition, the Agencies will consider appointing an operating trustee or manager to oversee day-to-day management of the assets and to assure that they will be operated competitively. The Agencies also may appoint a monitoring trustee to review a defendant's compliance with its obligations to sell the assets to an acceptable purchaser as a viable enterprise and to abide by injunctive provisions to hold separate certain assets from the defendant's other business operations. Similarly, the Agencies may consider appointing a monitoring trustee to oversee compliance with a conduct remedy involving ongoing obligations, especially when effective oversight requires technical expertise or industry-specific knowledge.

The Agencies must have the ability to seek appointment of a selling or divestiture trustee to sell the divestiture assets if a defendant fails to complete the ordered sale by the ordered deadline. Therefore, the Agencies' divestiture decrees always include a provision for the appointment of a selling trustee. In most cases, the Agencies will allow the defendant a reasonable opportunity to divest the assets to an acceptable purchaser before they ask the court to appoint a trustee to complete the sale.<sup>22</sup> However, in rare circumstances, in which the Agencies have reason to believe that the defendant will not complete the ordered divestiture within a reasonable time, the Agencies may require the immediate appointment of a selling trustee.

The Agencies must approve any proposed purchaser. The Agencies condition their approval on the satisfaction of three fundamental tests. First, divestiture of the assets to the proposed purchaser must restore the lost competition and must not itself cause competitive harm. Second, the Agencies must be certain that the purchaser has the incentive to use the divestiture assets to compete in the relevant market. The Agencies will not approve a divestiture if the divested assets will be redeployed elsewhere. Third, the Agencies will determine whether the proposed purchaser has sufficient acumen, experience, and financial capability to complete the acquisition and to compete effectively in the market over the long term.

## **5. Public comments and judicial review**

The Antitrust Division and the Federal Trade Commission have different procedures for seeking public comment and final approval of a proposed remedy, but they serve the same goal of announcing the settlement and inviting public comment.

The Antitrust Division must file suit in federal court to block or otherwise challenge a merger. When the parties and the Antitrust Division agree on a remedy that will cure the merger's anticompetitive impact, the Division must file a proposed consent decree embodying the remedy with the relevant court. Under the Antitrust Procedures and Penalties Act ("APPA"),<sup>23</sup> proposed consent judgments in antitrust cases brought by the United States are subject to a sixty-day comment period, after which the court must determine whether entry of the proposed final judgment "is in the public interest." Third parties and the public have the opportunity, during the sixty-day comment period, to file public comments on the proposed final

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<sup>22</sup> The FTC's orders allow the Commission itself to appoint the divestiture trustee (as well as monitors), if the Commission decides it is necessary.

<sup>23</sup> 15 U.S.C. §16(b)-(h).

judgment. In determining whether to approve the proposed remedy, the reviewing court generally will consider, among other factors, the relationship between the remedy secured and the specific allegations set forth in the Government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may cause harm to third parties. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public."<sup>24</sup>

The Federal Trade Commission must also ask a court to block a proposed merger. In other respects, however the Commission uses its own administrative procedures to settle cases. When the parties reach a settlement agreement with the Commission's staff, the Commission must vote to accept the agreement for public comment. During the 30-day public comment period (which begins with a Commission press release and publication of the proposed complaint and consent order), anyone may file comments concerning the case. Following the public comment period, the Commission will determine whether to issue the proposed order as final. The Commission may renegotiate terms, if information indicates that that is appropriate. Or (very rarely), the Commission may decide to close the investigation and not issue an order at all. None of these decisions require approval of the courts.<sup>25</sup>

## 6. Compliance

The Agencies devote significant resources to ensuring that their decrees and orders are fully implemented. When an order requires a divestiture, the responsible Agency will closely monitor the sale, including reviewing (a) the sales process, (b) the competitive, financial, and managerial viability of the purchaser, (c) any documents related to the sale, and (d) any relationships between the purchaser and defendants, to ensure that no such relationships will inhibit the purchaser's ability or incentive to compete vigorously. For a decree that requires affirmative acts, the responsible Agency will determine whether the required acts have occurred and evaluate the sufficiency of compliance. When a decree prohibits certain actions, the responsible Agency or a monitoring trustee will conduct periodic or ongoing inquiries to determine whether defendants are observing the prohibitions.

Merger orders and decrees must include provisions allowing the Agencies to monitor compliance. These decrees may require defendants to submit written reports and permit the Agencies to inspect and copy all relevant books and records and to interview defendants' officers, directors, employees, and agents, as necessary, to investigate any possible decree violations. Agency orders also may require firms to regularly provide to the relevant Agency certain data useful for decree oversight or to self-report decree violations or allegations of violations. Although the Agencies may issue civil investigative demands (and otherwise use their full investigative authority) to investigate compliance, the Agencies will also require that access terms be included in the decree, both to monitor compliance and to examine possible decree modification or termination.

If the Agencies conclude that a consent decree has been violated, they will institute an enforcement action. Both the Antitrust Division and the Federal Trade Commission will bring their enforcement actions in federal court. The Antitrust Division can pursue either or both civil and criminal contempt actions. Civil contempt has a remedial purpose—compelling compliance with the court's order or compensating the complainant for losses sustained. The Antitrust Division may consider seeking both injunctive relief and fines that accumulate on a daily basis until compliance is achieved. Criminal contempt is not remedial – its purpose is to punish the violator, to vindicate the authority of the court, and to deter others from engaging

<sup>24</sup> United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988).

<sup>25</sup> The Commission might also determine that more relief is required, and if the parties do not consent the Commission will begin administrative litigation to obtain that relief. Parties may appeal any resulting order to the federal appeals courts.

in similar conduct in the future. The penalty may be a fine, or imprisonment, or both. The Division must prove any criminal case beyond a reasonable doubt, which is a higher burden than the burden for civil actions.

The Federal Trade Commission may seek daily civil penalties and injunctive relief, both to obtain compliance and to punish past or ongoing non-compliance. The civil penalty proceeding is similar to a civil contempt proceeding but is a separate proceeding established by statute. The Commission may bring an enforcement action either in its own name, or, with the help of the Department of Justice, in the name of the United States.

## 7. Guidance

The remedies principles described in this paper are addressed in more detail in publicly available guidelines documents issues by the Agencies. The Antitrust Division has recently released an updated version of its Policy Guide to Merger Remedies.<sup>26</sup> The Federal Trade Commission's Bureau of Competition has released two related guides: a statement on negotiating merger remedies,<sup>27</sup> and frequently asked questions about merger remedies.<sup>28</sup> Both Agencies also at times discuss these issues during speeches and at bar and other public meetings.

## 8. International consultation and co-operation

Increasingly, the Agencies review mergers that also are reviewed by other competition agencies around the world. For example, in early 2010, the Antitrust Division took into account the commitments that the parties in the *Cisco/Tandberg* merger gave to the European Commission regarding interoperability in concluding that the proposed merger was not likely to be anticompetitive.<sup>29</sup> The Division and the European Commission worked together very closely on their investigations and closed them on the same day. The Division also worked closely with the German Federal Cartel Office (FCO) on the acquisition of certain patents and patent applications from Novell Inc. by CPTN Holdings LLC.<sup>30</sup> At the request of the two agencies, CPTN – a holding company owned originally by Microsoft Inc., Oracle Corp., Apple Inc. and EMC Corp. – made revisions to the transaction agreements that were necessary to protect competition and innovation in the open source software community. The close co-operation between the agencies was aided by waivers from the parties that allowed the sharing of information and assessments of likely competitive effects and co-ordination on potential revisions to the parties' agreements. Finally, in May 2011, the Division entered into a consent decree with Unilever and Alberto-Culver requiring the parties to divest two hair care brands in order to proceed with Unilever's \$3.7 billion acquisition of Alberto-Culver.<sup>31</sup> The Division communicated with the UK Office of Fair Trading, the Mexican Federal Competition Commission and South Africa's Competition Commission – although the differences in products and markets were such that the outcomes in the various jurisdictions were not identical. Both Unilever and Alberto-Culver provided waivers, in a timely way, to facilitate the international co-operation in this case. Some recent FTC enforcement actions that involved co-operation with the European Union include *BASF SE*, cited earlier,<sup>32</sup> which involved divestitures in high performance pigments markets, and *Agilent*

<sup>26</sup> See press release at [http://www.justice.gov/atr/public/press\\_releases/2011/272365.htm](http://www.justice.gov/atr/public/press_releases/2011/272365.htm).

<sup>27</sup> <http://www.ftc.gov/bc/bestpractices/bestpractices030401.shtm>.

<sup>28</sup> <http://www.ftc.gov/bc/mergerfaq.shtm>.

<sup>29</sup> See press release at [http://www.justice.gov/atr/public/press\\_releases/2010/257173.htm](http://www.justice.gov/atr/public/press_releases/2010/257173.htm).

<sup>30</sup> See press release at [http://www.justice.gov/atr/public/press\\_releases/2011/270086.htm](http://www.justice.gov/atr/public/press_releases/2011/270086.htm).

<sup>31</sup> See press release at [http://www.justice.gov/atr/public/press\\_releases/2011/270854.htm](http://www.justice.gov/atr/public/press_releases/2011/270854.htm).

<sup>32</sup> See press release at <http://www.ftc.gov/opa/2009/04/basf.shtm>.

*Technologies*, which involved world-wide divestitures in mass spectrometry and gas chromatography markets.<sup>33</sup> In such investigations, the agencies seek to co-ordinate and co-operate as much as possible with their sister agencies in other jurisdictions.

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<sup>33</sup> See press release at <http://www.ftc.gov/opa/2010/05/agilent.shtm>, noting the FTC's co-operation with Australia's Competition and Consumer Commission, the European Commission, and the Japan Fair Trade Commission.





## EUROPEAN UNION

The Commission set out its policy for accepting remedies under the EU Merger Regulation (“EUMR”)<sup>1</sup> in the Commission’s Remedies Notice,<sup>2</sup> as revised in 2008 (the “Remedies Notice”). The guiding principle – already explained in the EU Merger Regulation, endorsed by the European Courts<sup>3</sup> and set out in detail in the Remedies Notice – is that remedies have to eliminate the competition concerns raised by a concentration entirely and must be comprehensive and effective from all points of view.<sup>4</sup>

**1. What is your process for considering possible remedies for mergers that present competitive problems? Are parties responsible for proposing remedies, and are they required to follow particular procedures or time lines in order to do so? If your merger review system involves a 2-phase process, are there different procedures and standards for reviewing proposed remedies in the 2 phases**

Under the EU Merger Regulation, the Commission may clear a notified transaction subject to commitments by the notifying parties if those commitments remedy the anti-competitive effects which the transaction would have otherwise given rise to. Consequently, remedies in EU merger investigations have to be proposed by the parties and the Commission cannot unilaterally impose them. Where a transaction would significantly impede effective competition and where no or no adequate remedies have been offered, the Commission must prohibit the transaction. The Commission’s remedies policy therefore focuses on the “commitments” of the parties.

The Commission’s merger control system involves a two-phase procedure and the Commission may accept commitments in either phase of the procedure. Different standards are being applied for remedies in Phase I and Phase II: For commitments to be accepted in Phase I, they must clearly rule out “serious doubts” that the concentration may significantly impede effective competition (as this is the test for the Commission to open Phase II proceedings).

This means that Phase I remedies are acceptable only when the competition problem is readily identifiable and can easily be remedied (as already set out in Recital 30 EUMR), given that an in-depth investigation can only be carried out in Phase II. Also, the remedies need to be clear-cut given the time constraints of Phase I. Remedies need to be submitted within 20 working days after notification, triggering an extension of the Phase I proceedings in order to allow for a proper market testing of the commitments

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<sup>1</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 20.1.2004, p. 1-22.

<sup>2</sup> Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22.10.2008, p. 1-27.

<sup>3</sup> See judgments from the General Court in Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, para. 52 (“*General Electric*”) and Case T-87/05 *EDP v Commission* [2005] ECR II-3745, para. 105 (“*EDP/GDP/ENI*”).

<sup>4</sup> See recital 30 of the EU Merger Regulation; paragraph 9 of the Remedies Notice and judgments from the General Court in Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, para. 52 (“*General Electric*”) and Case T-87/05 *EDP v Commission* [2005] ECR II-3745, para. 105 (“*EDP/GDP/ENI*”).

submitted. After the deadline, only limited modifications of already submitted commitments are acceptable.

In Phase II, the parties have to submit remedies by working day 65 after opening of Phase II proceedings. If the parties submit commitments within 10 working days before day 65, the overall deadline for Phase II proceedings is extended by 3 weeks to 105 working days, again, in order to allow for proper market testing of the remedies proposed. After the deadline for the submission of commitments, the Commission may accept modifications of the remedies submitted if there is still sufficient time for the necessary procedural steps, in particular a further market test, if required.

In terms of standard, the substantive test for the finding of concerns changes with the issuing of a Statement of Objections in Phase II: Before the issuing of a Statement of Objections, the Commission has to take a clearance decision as soon as the “serious doubts” are removed, in particular if the parties submit commitments. Thereafter, the commitments have to be sufficient to eliminate the significant impediment to effective competition identified in the Statement of Objections (provided that the Commission does not abandon the concerns following the parties’ reply to the statement of objections). The remedies can generally be more targeted in Phase II, given that more time is available, and, irrespective of the actual standard, the Commission may obviously drop concerns at any point during an on-going Phase II investigation if it does not consider them to be founded any longer.

**2. When crafting merger remedies, does your agency employ structural remedies? Do you employ behavioural remedies or hybrid remedies? How do you decide what remedy or combination of remedies best cures the competitive harm of concern? Is the approach different in horizontal and vertical mergers?**

According to the case law of the European Courts, the basic aim of commitments is to ensure competitive market structures. Therefore, commitments which 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 Merger Regulation's objective, because they prevent, durably, the competition concerns which would be raised by the merger as notified, and do normally not, moreover, require on-going monitoring measures.

Nevertheless, the possibility cannot automatically be ruled out that other types of commitments may also be capable of preventing the significant impediment of effective competition. The question of whether a remedy and, more specifically, which type of remedy is suitable to eliminate the competition concerns identified, has to be examined on a case-by-case basis.

A general distinction can be made between (i) divestitures, (ii) other structural remedies, such as granting access to key infrastructure or inputs on non-discriminatory terms, and (iii) commitments relating to the future behaviour of the merged entity. Divestiture commitments are the best way to eliminate competition concerns resulting from horizontal overlaps, and may also be the best means of resolving problems resulting from vertical or conglomerate concerns.

Other structural commitments may be suitable to resolve all types of concerns. However, divestitures are the benchmark for other types of remedies in terms of effectiveness and efficiency. The Commission therefore may accept other types of commitments, but only in circumstances where the other remedy proposed is at least equivalent in its effects to a divestiture.

As will be set out in more detail below, commitments relating to the future behaviour of the merged entity may be acceptable only exceptionally in very specific circumstances and, in any case, only if their workability is fully ensured by effective implementation and if they do not risk leading to distorting effects on competition.

**3. When seeking structural relief, under what circumstances do you require the divestiture of a stand-alone business? Do you ever require the divestiture of identified assets that are not a stand-alone business? Do you ever require the divestiture of intellectual property in lieu of the divestiture of a stand-alone business or a collection of physical assets? When do you use each type of divestiture remedy?**

The divested activities must consist of a viable business that, if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis and that is divested as a going concern. Normally such a divestment business should be an existing stand-alone business and must contain all the assets necessary for its operation and all the personnel currently employed.

However, the Commission, taking into account the principle of proportionality, may also consider the divestiture of businesses which have existing links, or are partially integrated with businesses retained by the parties and therefore need to be "carved out". In order to reduce the risks for the viability and competitiveness to a minimum in such circumstances, the Commission's preferred option is if the parties propose to carve out those parts of an existing business which do not necessarily have to be divested. In effect, an existing, stand-alone business is being divested in those circumstances although, by way of a "reverse carve-out", the parties may carve-out the limited parts which they may keep. In situations in which a carve-out is accepted, it may also be necessary to duplicate some of the shared assets in order to avoid a lack of viability of the business to be divested. Carve-outs may also raise certain risks during the interim period, until divestiture, for the selection of the assets to be carved-out and the personnel. The Commission therefore normally expects an active role of the Hold Separate Manager and Monitoring Trustee in this regard (see below).

A divestiture consisting of a combination of certain assets which did not form a uniform and viable business in the past may create risks as to the viability and competitiveness of the resulting business. This is in particular the case if assets from more than one party are involved. Such an approach may be accepted by the Commission only if the viability of the business is ensured notwithstanding the fact that the assets did not form a uniform business in the past. This may be the case if the individual assets can already be considered a viable and competitive business.

Similarly, only in exceptional cases a divestiture package including only brands and supporting production and/or distribution assets may be sufficient to create the conditions for effective competition. In such circumstances, the package consisting of brands and assets must be sufficient to allow the Commission to conclude that the resulting business will be immediately viable in the hands of a suitable purchaser.

Divestments of brands are acceptable if competition is mainly based on brands and if the resulting business will be immediately viable in hands of suitable purchaser. In case of doubts concerning the availability of a suitable purchaser, an up-front buyer or fix-it-first solution would be typically required. In such cases, the Commission prefers the transfer of a brand over an exclusive license to use the brand or a temporary licence for re-branding. A clear transfer avoid any on-going links between the parties and the purchaser of the brand, thereby facilitating competition between them, and makes sure that the purchaser will be active in the market on the basis of its own assets, without having to rely on the purchaser's future incentives to make a re-branding exercise work.

A recent example for how the Commission deals with the divestiture of brands is the case *Unilever/Sara Lee*.<sup>5</sup> The Commission's Phase II investigation showed that the merger would have lead to significant overlaps and a very strong leadership position of Unilever in a number of Member States for

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<sup>5</sup> Case COMP/M.5658 *Unilever/Sara Lee Body Care*.

deodorants by combining the parties' brands, most notably Sara Lee's Sanex brand with Unilever's brands Dove and Rexona. These brands were in fierce competition with each other pre-merger so that the merger would have removed an important competitive force. The Commission considered that the final commitments, consisting in the full divestiture of the Sanex brand (including contracts, key personnel, etc.) across all product categories and for the whole of the EEA provided a clean, workable and effective remedy to create a viable and effective competitor.

In this case, the parties made different proposals before which, however, were not considered as sufficiently effective to create a viable competitor. The first proposal would have required a complex re-branding exercise of two different brands, leading to a geographic split of the brands for the re-branding period and making it doubtful that a purchaser would invest sufficiently into the brand to make it an appropriate remedy. The second proposal would have allowed the parties to re-brand the Sanex products apart from the deodorants, leading to a split of the Sanex brand between different products and Member States for the re-branding period. The parties' re-branding exercise could thus have significantly harmed the Sanex' activities to be divested and would have involved significant uncertainties for the effectiveness of the remedy.

This is in line with the Commission's general policy, as set out in the Remedies Notice, to accept re-branding exercises only in exceptional cases in which the Commission can conclude with the required degree of certainty that the licence will be sufficient to re-establish an effective competitor after re-branding the products. The case also shows that it may be necessary to divest a brand not only for the countries and products for which competition concerns have been identified but also for neighbouring products and the entire European Union in order to ensure the viability of the brand and effective competition post-divestiture.

Apart from divestitures of stand alone businesses and brands, the Commission's practice allows for other types of structural remedies, although statistically these cases amount only to a minority of our remedy cases.

In some cases, a commitment relating to the dissolution of a joint venture or the divestiture of a minority share may be sufficient to remedy the competition concerns a notified transaction would lead to. In *MAN Ferrostaal/IPIC*, this type of solution was used to resolve a vertical problem of input foreclosure<sup>6</sup> in which the merged entity would combine a large market share in the downstream market with a minority stake at upstream level in a significant producer of a key input.

**4. What types of behavioural remedies does your agency use? In what circumstances have you used firewalls, fair dealing clauses, transparency requirements, anti-retaliation provisions or prohibitions on anticompetitive contracting practices?**

As set out before, divestitures or the removal of links with competitors are the Commission's preferred remedies. They are, however, not the only solutions the Commission may be prepared to accept. The benchmark for the acceptance of any other types of remedies is that they are as effective and efficient as divestitures.

The Commission distinguishes between other structural remedies, apart from divestitures, such as access remedies and remedies which are merely related to the future behaviour of the merged entity. Whereas the former ones are often used in practice, the latter ones are accepted only exceptionally. Below a short discussion of each type.

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<sup>6</sup> Case COMP/M.5406 *MAN Ferrostaal/IPIC*. See for another example of a commitment to divest a minority participation Case COMP/M.3653 *Siemens/VA Tech*.

The typology of access commitments is very wide and they can be described in general as ensuring effective access to infrastructure, networks, e.g. pay-TV platforms,<sup>7</sup> key technology or IP rights<sup>8</sup> or essential inputs. They may be helpful for lowering entry barriers with the effect that actual entry of new competitors is likely or to resolve foreclosure concerns (but only if competitors will actually use these commitments). These commitments may be acceptable if they have the same effect as a divestiture.

One essential pre-requisite is that such commitments can be monitored, either via market participants through arbitration clauses (self-enforcement of commitments) or via recourses to national regulators (e.g. telecoms or energy). The sensitive issues in this respect are that the access terms, in particular the access fees, can rarely be defined precisely in advance, but have to leave room for the particular situation of potential beneficiaries. In other instances, for example for remedies concerning access to technical interfaces,<sup>9</sup> the release of technical information and assistance is critical so that an effective monitoring mechanism is required in that regard.

Over the last couple of years the Commission has dealt with a number of airlines mergers that have been cleared on the basis of slot release remedies characterised by the release (and, eventually, transfer) of slots without compensation.<sup>10</sup> The legal standard for these remedies, confirmed by the General Court's *easyJet*<sup>11</sup> judgment is that they must lead to actual and sufficient entry of new competitors and such entry must be timely and likely. The market test of the remedies should confirm interest of competitors to enter the problematic routes. In the most recent cases, the Commission aimed at making those remedies more effective by introducing a shorter time-window and assimilating them to a transfer of slots by providing for a transfer of grandfathering rights if the slots are used regularly in a minimum period of IATA seasons).

Commitments relating to the future behaviour of the merged entity may be acceptable only exceptionally in very specific circumstances and will generally not be acceptable in order to eliminate competition concerns resulting from horizontal overlaps. In any case, those types of remedies can only exceptionally be accepted if their workability is fully ensured by effective implementation and if they do not risk leading to distorting effects on competition.

Therefore, the Commission's experience in this regard is limited. However, we have seen in practice that long term supply contracts can create links and interaction between competitors and promote information dissemination about the cost structures of the competitor. They also contribute to fix existing and possibly less-than-ideal market structures. For example, the use of price caps involves a heavy degree of intervention in the market – something that we regard as outside the mission of a competition authority. We have also found that firewalls are virtually impossible to monitor.

The type of cases for which the Commission may exceptionally consider remedies related to the future behaviour of the merged entity may also be explained by looking at two significant cases in the IT area which the Commission decided within the last year. These cases are *Cisco/Tandberg*, based on horizontal concerns, and *Intel/McAfee*,<sup>12</sup> where the Commission accepted remedies based on conglomerate

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<sup>7</sup> See for example Case M.2876 *NewsCorp/Telepiù*.

<sup>8</sup> See for example Case COMP/M.1715 *Alcan/Pechiney* or Case COMP/M.3998 *Axalto/Gemplus*.

<sup>9</sup> See for example Case COMP/M.3083 *GE/Instrumentarium* or Case COMP/M.2861 *Siemens/Drägerwerk/JV*.

<sup>10</sup> See for example Case COMP/M.5364 *Iberia/Vueling/Clickair*, Case COMP/M.5335 *Lufthansa/SN Airholding (Brussels Airlines)* or Case COMP/M.5440 *Lufthansa/Austrian Airlines*.

<sup>11</sup> Case T-177/04 *easyJet v Commission* [2006] ECR II-1913.

<sup>12</sup> Case COMP/M.5669 *Cisco/Tandberg* and Case COMP/M.5984 *Intel/McAfee*.

concerns. The remedies were significantly different in the two cases, although the competition concerns identified in both cases involved interoperability issues.

In *Cisco/Tandberg*,<sup>13</sup> the Commission identified horizontal competition concerns arising from the transaction in the market for videoconferencing solutions. In particular, the Commission considered that the merged entity could, based on its strengthened position in this market, could impose its own technology as a *de facto* standard for interoperability and thereby impede competitors from competing effectively as there was no industry standard available and raise barriers to entry further.

In order to address the Commission's concerns, Cisco committed, *inter alia*, to divest the rights attached to its proprietary Telepresence Interoperability Protocol to an independent industry body, ensuring that actual and potential competitors would have access to the protocol and could make their devices interoperable with the parties' devices. Within this framework all competitors will be able to participate in the future development of the protocol, making the process similar to an open standard-setting process. The Commission preferred this transfer of the IP rights to an independent body over the granting of a license as a simple licensing remedy would have kept the relevant technology under Cisco's control and Cisco could have decided on future developments of the protocol on its own.

In *Intel/McAfee*,<sup>14</sup> the Commission identified conglomerate concerns arising from the companies being active in neighbouring and complementary markets (Intel in CPUs and chipsets and McAfee in internet security software). The Commission considered, after a Phase I investigation, that the merger would, *inter alia*, likely lead to the introduction of technical tying between Intel CPUs and McAfee security products and to a lack of interoperability of other security vendors with Intel CPUs since Intel might withhold the information regarding CPUs to which security vendors needed to have access for the development of new solutions. This could result in the exclusion of rival IT security products from the marketplace given Intel's strong presence in the world markets for computer chips and chipsets.

The commitments submitted by Intel addressed those problems and provided that the competitors of McAfee will be able to continue to run on Intel CPUs and will have access to all necessary Intel technical information to use the functionalities of Intel's CPUs and chipsets in the same way as McAfee. The commitments were therefore designed to maintain interoperability between the merged entity's products and those of their competitors, thereby ensuring competition on an equal footing between the parties and their competitors.

The remedies in the Intel/McAfee case may partly be considered to relate to the future behaviour of the merged entity, while other parts of it are more in line with traditional access remedies. Given that the concerns identified were of conglomerate nature, the Commission concluded that the commitments were suitable to remove the competition concerns identified while preserving efficiencies brought about by the merger. The commitments also fulfilled the need for an effective monitoring mechanism as they provide for rather straight-forward obligations and include a trustee as a monitoring device. In the horizontal Cisco/Tandberg case, however, the Commission considered a fully structural remedy, including the transfer to an independent body of the intellectual property rights needed to ensure interoperability with other providers of videoconferencing solutions, as appropriate and justified. The comparison of the two cases underlines that the Commission may consider remedies relating to the future behaviour only in

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<sup>13</sup> See Case COMP/M.5669 *Cisco/Tandberg*.

<sup>14</sup> See Case COMP/M.5984 *Intel/McAfee*.

circumstances where the competition concerns themselves only arise from the future behaviour – as it may be the case in with respect of competition concerns arising in conglomerate structures.<sup>15</sup>

**5. Do you have experience protecting the to-be-divested assets or businesses prior to divestiture? Have you required that assets or businesses be held separate or otherwise preserved? Have you employed monitoring trustees?**

In our experience, the time period between the clearance decision and the transfer to a buyer is critical for the to-be-divested business. The parties would be in a position to withdraw assets, know-how or personnel from the divestment business or could simply neglect it. The competitive strength of the divestment business and its ability to remove the competition concerns could therefore decrease.

Accordingly, our system obliges the parties to preserve the business by ring-fencing it and not carrying out any acts which might have significant negative impacts on its value, management, or competitiveness. They also have to continue financing the divested business to allow ongoing development on the basis of the existing business plans and to retain key personnel by offering, if necessary, appropriate incentive schemes.

In general, and going further than the mere hold-separate issue, the supervision of the divestment process cannot be done by the Commission alone and trustees are therefore required. It is standard practice for the Commission to appoint a monitoring trustee which will be the “eyes and ears of the Commission” in order to hold-separate, but also oversee carve-outs, adopt interim preservation provisions, check the sale process and assess proposed purchasers. This trustee would also monitor behavioural aspects of the remedy, such as temporary supply agreements and will be the first point of call for third parties. The trustee is obliged to report to the Commission at regular intervals and can intervene in matters on our request.

Under the supervision of the Monitoring Trustee, the commitments normally provide for the appointment of a Hold Separate Manager who is an employee of the parties, ensuring the separation of the divestment business on a day-to-day basis. In the Commission's practice, the Hold Separate manager should be a senior manager selected from the list of key personnel that will remain at the divested business, and therefore he has an incentive to act in the interest of the divestment business. It is appointed immediately after the adoption of the Commission clearance decision and even before closing the main transaction.

Acting under the instructions of the Monitoring Trustee, the mandate of the HSM consists in ensuring the legal and physical separation of the assets of the business to be divested from the parties' retained businesses and the parties' influence, so that the divested business can operate on a stand-alone basis, is able to compete successfully on a lasting basis, and is independent of the divesting parties. The position of the Hold Separate Manager has been strengthened following the Commission's Remedies Study that showed that a close supervision is necessary in relation a practical problems arising during the interim period until the divestiture is completed. Those problems relate to, *e.g.*, the sharing of assets, like IT systems or IPRs or the monitoring of a necessary carve-out or the selection of "key-personnel".

**6. How do you ensure an expeditious and successful divesture? Do you require divestitures be finalized before a merger close? If not, how quickly do you require divestiture? What happens if the divestiture has not timely occurred? Do you use sales trustees? Do you insist on enhanced asset packages when sales are not timely? How do you ensure that a sale to a**

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<sup>15</sup> See paragraph 69 of the Remedies Notice and ECJ, judgment of 15 February 2005 in Case C-12/03 P Commission v Tetra Laval [2005] ECR I-987.



**proposed divestiture buyer and the terms of the divestiture will accomplish your remedial goals?**

There are a number of ways to ensure an expeditious and successful divestiture. The normal scenario is a sale of the divestment business within a fixed time-limit after the Commission's clearance condition subject to remedies. In this case the parties may close their transaction after having obtained the clearance decision but are required to undertake the divestment within a short period of time, failing which the clearance decision may ultimately be revoked and the transaction may need to be unwound.

Where the Commission does not have certainty that the parties will manage to divest within a short period of time to a suitable buyer, it may require that the parties propose an up-front buyer. Under this scenario, even after adoption of the clearance decision, the parties may only close their transaction where they have presented to the Commission a buyer of the divestment business and that buyer has been approved by the Commission.

A third possibility is a fix-it-first solution. This means that the parties already during the merger control procedure identify a buyer for the divestment business and enter into an agreement with it. The Commission will take the agreement with that buyer into account in its clearance decision and no further buyer approval will be required post clearance. Fix-it-first solutions are particularly appropriate where the effectiveness of a remedy (and therefore its acceptability by the Commission) will depend on the identity of the buyer. This could for example be the case where the divestment business consists of a bundle of assets contributed by both parties, i.e. where those assets did not previously constitute a stand-alone business.

Finally, our system also contemplates the possibility of enhanced asset packages ("crown jewels") when the sale of the divested business is not timely. If there is uncertainty as to the implementation of the divestiture due to third party rights or as to finding a suitable purchaser "crown jewel" commitments and the "up-front buyer" structure described above address the same concerns, and the parties may therefore choose between both structures.

As to the timing, the divestiture has to be completed within a fixed time period agreed between the parties and the Commission. This period is divided into (i) a period for entering into a final agreement and (ii) a further period for the closing of the transaction.

The period for entering into a binding agreement is further normally divided into a (i) first period in which the parties can look for a suitable purchaser and, if the parties do not succeed to divest the business, (ii) the second period in which the divestiture trustee obtains the mandate to divest the business at no minimum price. The Commission considers that short divestiture periods contribute largely to the success of the divestiture since, otherwise, the business to be divested will be exposed to an extended period of uncertainty. The Commission explained in the Remedies Notice that normally a period of around six months for the first divestiture period and an additional period of three months for the trustee divestiture period is appropriate.

In order to ensure that divestiture commitments will be effectively implemented, it is standard practice that the commitments provide for a divestiture trustee to be appointed if the parties do not succeed in finding a suitable purchaser within the first divestiture period. Then, in the subsequent trustee divestiture period, the parties have to transfer the task to the divestiture trustee who will be given an irrevocable and exclusive mandate to dispose of the business, under the supervision of the Commission, within a specific deadline at no minimum price to a suitable purchaser. The divestiture trustee to include in the sale and purchase agreement such terms and conditions as it considers appropriate for an expedient sale, in particular customary representations, warranties and indemnities. The sale of the business by the

divestiture trustee is in the same way subject to the prior approval of the Commission as the sale by the parties.

The Commission's standard commitments set out that the parties shall support and inform the divestiture trustee and co-operate with the trustee in the same way as this is foreseen for the monitoring trustee. For the divestiture, the parties have to grant to the divestiture trustee comprehensive powers of attorney, covering all stages of the divestiture, in order to fulfill its role.

**7. How do you ensure that parties comply with your remedy order? Do you include reporting requirements or inspection clauses in your orders? Do you have staff dedicated to enforcement of remedies?**

In our system the remedies have to be offered by the parties. However, the Commission ensures the enforceability of commitments by making the clearance of the merger subject to compliance with the commitments.

A distinction must be made between conditions and obligations. The requirement for achievement of the structural change of the market is a condition — for example, that a business is to be divested. The implementing steps which are necessary to achieve this condition (e.g. appointment of a trustee, etc) are generally obligations on the parties.

If a condition is breached, (e.g. the business is not divested in the time-frame foreseen in the commitments or afterwards), the clearance decision is no longer applicable and the Commission may, first, take interim measures appropriate to maintain conditions of effective competition pursuant. Second, it may order any appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures. In addition, the parties may also be subject to fines of up to 10% of the aggregated turnover of the undertakings concerned.

Where the undertakings concerned commit a breach of an obligation, the Commission may revoke its own clearance decisions. Here again, the parties may also be subject to fines of up to 10% of the aggregated turnover of the undertakings concerned. On top of this, the Commission can impose daily penalty payments until the parties comply with the obligation.

**8. Is your experience in enforcing remedies reflected in documents describing your best practices or in other guideline documents? If not, are you planning to issue guidance in the near future?**

Our practice in this field is reflected in the Remedies Notice, published on 22 October 2008.<sup>16</sup> This Remedies Notice sets out the general principles applicable to remedies acceptable to the Commission, the main types of commitments that may be accepted by the Commission in cases under the EU Merger Regulation, the specific requirements which proposals of commitments need to fulfill in both phases of the procedure, and the main requirements for the implementation of commitments.

The 2008 Remedies Notice replaces a prior one published in 2001 and takes into account the findings of the Commission's Merger Remedies Study<sup>17</sup> published in October 2005. We do not intend to amend the 2008 Remedies Notice for the time being.

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<sup>16</sup> See footnote 1.

<sup>17</sup> The study can be found at <http://ec.europa.eu/competition/mergers/legislation/remedies.htm>.

The Remedies Notice is supplemented by a Commission Model text for Divestiture Commitments and the Trustee Mandate that can be amended from time to time to reflect our practical experience.

**9. What role do third parties and the public have in commenting on proposed remedies? How have your courts assessed the agencies' remedies and efforts to enforce them?**

Under the EU Merger Regulation, remedy proposals by the parties which may be suitable to solve the competition concerns identified and which are submitted in time will normally be market-tested with customers and competitors. The importance of the market test has been confirmed by the General Court in the *General Electric* and *EDP/GDP/ENI* judgments. However, proposals that are manifestly insufficient to address the Commission's concerns can be rejected by the Commission without being market tested.

The market testing is carried out through a questionnaire together with a non-confidential version of the remedies proposal. Our assessment of replies is aware of a potential bias of competitors, e.g. as they may wish to enlarge the scope of the remedy.

Given the time constraints, the market test normally takes place immediately after the submission of the commitments by the parties. Therefore, it is necessary that the parties directly propose an appropriate remedy as, in particular in Phase I, after a market test, only limited modifications of the proposed remedies will be possible in order to address the problems indicated in the market test in clear-cut way. Normally, no further testing of such modifications is possible afterwards (particularly in Phase I procedures).

To date, the European Courts have analysed the Commission's practice in relation to remedies in 13 judgements.<sup>18</sup> This is a natural consequence of our system that provides that (i) the Commission has to publish a fully reasoned decision in every merger case notified to it; and that (ii) every third party with a "legitimate interest", and not only the parties to the transaction; can appeal a Commission decision.

Over the years, the European Courts have given useful guidance in areas such as, among others, proportionality of the remedies (*Cementbouw I* and *II*), allocation of responsibilities to the Commission (*General Electric*, *EDP/GDP(ENI)*), modification of remedies (*Philips*, *My Travel*), behavioural commitments (*Tetra Laval/Sidel*) and trustee-related matters (*Odile Jacob*).

Naturally, all the interpretation and findings of the European Courts are immediately incorporated into the Commission's daily practice.

**10. Feel free to comment on other issues that arise in relation to the assessment of merger remedies.**

The European Commission's remedies policy is based on a clear preference for structural remedies, in particular divestitures of viable businesses. However, where other types of remedies are as effective and efficient as a clear cut divestiture, the Commission will be ready to explore their feasibility and sometimes be in a position to accept alternative solutions. Remedies related to the future behaviour may, though, only in exceptional cases be acceptable.

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<sup>18</sup> Case T-290/94 *Kaysersberg v Commission* [1997] ECR II-2137, *Gencor*, Case T-342/00 *Petrolessence v Commission* [2003] ECR II-1161, *Philips*, Case T-158/00 *ARD v Commission* [2003] ECR II-3825, Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987 ("*Tetra Laval/Sidel*"), *EDP/GDP/ENI*, *General Electric*, Case T-282/02 *Cementbouw v Commission* [2006] ECR II-319 ("*Cementbouw I*"), *easyJet*, Case C-202/06 P *Cementbouw v Commission* [2007] ECR I-12129 ("*Cementbouw II*"), *My Travel*, Case T-237/05 – *Editions Odile Jacob SAS v. Commission* ("*Odile Jacob*").

## BULGARIA

The Bulgarian Commission on Protection of Competition (**CPC**) is the only authority with powers within national merger control. In the light of the accession to the EU, the applicable law – the Law on Protection of Competition (**LPC**) – has been fully harmonized, so in the area of merger control the specific rules, governing the subject, are in line with the similar rules applied by EC Member States.

As regard imposing remedies, CPC has limited experience. We believe such a fact reflects the usual situation with the transition economies where liberalization and privatization process provokes more antitrust action than a need to impose merger remedies. Another strong tendency was for foreign companies, often big international players, to enter Bulgarian markets through national acquisitions.

### 1. Remedies imposed by now

Providing examples of our remedies practice we would refer to CPC Decision No 116/2006 – *New Image Bulgaria EOOD / Boyana Film EAD, Sofia*, where clear behavioral remedies were imposed. In particular, CPC made it an obligation for New Image to grant access to shooting sites, where other producers need such facilities. An efficient monitoring has been guaranteed by imposing an obligation for the acquirer to submit on yearly basis sufficient information on the implementation of the respective remedies.

Another example shall be the obligations within a telecommunication case imposed with CPC Decision No 335/2004 - *BTC AD / RTK OOD / Bulfon AD*, where not only the competitive environment but the quality and access to services had been secured with typical requirements such as granting non-discriminatory access, avoidance of unjustified termination of contracts or worsening of the supply conditions, etc. Further, there was an obligation for a company (RTK OOD) to seize certain activities and where it decided to sell those, it was to find an independent purchaser.

Structural remedy has been accepted by the Commission with Decision No 63/2004 – *Rea Cement Limited, Cyprus / Zlatna Panega Cement, Bulgaria / Granitoid, Bulgaria*, where clearance has been granted subject to proposed divestiture at the level of cement production that eased the market structure.

### 2. Remedies guidance is being prepared

Further industry concentration is to be expected, especially following the world economic and financial crisis. Any future impetus for market concentration would bring complicated cases, where remedies most possibly shall be required. Although little experience in imposing remedies was so far gained, the authority is planning to introduce its first Remedies Guidance. The purpose of such a document would be to forestall some of the main issues related to the subject. We believe the provision of legal certainty could well combine with the need to explain the respective procedural steps, the scope of the remedy action and our criteria as to its proportionality and effectiveness.

### 3. Remedy proposals are accepted during Phase II

Bulgarian merger review system involves a 2-phase process. Although proposals for changes to the concentration could be submitted at Phase I (the so-called “preliminary investigation”), the provisions of

the LPC do not foresee any communication on the part of the Commission wherewith to express its competition concerns to the parties, allowing them to formulate appropriate and corresponding remedies proposals. That provides for any objective concerns to be investigated in Phase II - the so-called “in-depth investigation”. That’s why we would rather consider the I-st phase proposals to be a “modification” of a concentration and not necessarily directed at rendering the deal compatible with the competition rules.

It is envisaged in the law (LPC) that apart of Commission’s powers to impose remedies those could be proposed by the parties to the concentration. That shall reflect our view that remedies should be negotiated with the parties. Any remedies decision that is not accepted by the parties is prohibitive in nature and hence is not a satisfactory solution.

Before it is to become a part of Commission’s decision, the respective remedy or remedy package shall be market tested on preset conditions.

#### **4. Type of remedies accepted**

As to the type of remedies the Commission would seek, it is mainly the experience of the other competition authorities that make us rely more on structural remedies rather than on behavioral ones. Despite being fully committed to imposing remedies that shall address the identified competitive detriments, we would not see it as a provocation to the desired proportionality or effectiveness of the action that we strongly prefer structural remedies to behavioral ones.

An additional justification for favoring structural remedies derives from the applicable “dominance test” for clearing mergers. According to the LPC (art. 26) *the Commission shall authorize a concentration provided that it does not lead to the creation or strengthening of dominant position, as a result of which effective competition in the relevant market would be significantly impeded*. That is to say structural remedies are fast track measures that would ease the market structure. Imposing such remedies meets horizontal issues, i.e. high concentration level, or vertical and conglomerate concerns such as “market foreclosure”. At the same time, where appropriate, behavioral remedies such as access to key infrastructure or supply shall be insisted upon.

As to the asset(s) chosen for divestiture the Commission shall seek that those are both viable and sufficient to eliminate the respective competition concerns.

Commission’s rules envisage that following entering into force of a decision, wherewith concentration subject to modification or remedies is declared compatible with the competition rules, a compulsory monitoring process starts. CPC’s soon to be introduced Remedies Guidance will cover also the option of appointing a trustee with an obligation to report on companies’ compliance with any structural remedies that might be imposed.

Although we would proclaim a clear preference to structural solution, it is not an *idée fixe* for CPC as the authority readily imposes behavioral remedies as well. That should be indicative for our commitment for fast and effective action to be flexible, viable and adjusted to the potential competitive concerns identified.

## INDONESIA

### 1. Introduction<sup>1</sup>

Remedies are fundamental aspects of merger enforcement. The approach to remedies may determine the success of competition enforcement through defining best approach to control market structure and maintain fair competition in the relevant industries. The choice of structural or conduct remedies is debatable and quite tricky for most competition authorities. Some compare it to efficiency defense, while some debate the potential economic cost that may arise due to the selection of a given remedy. Therefore, merger remedy decisions are not easy.

### 2. The inauguration of mergers regime in Indonesia

More than 10 years ago the Indonesian legislature enacted Law No.5 Year 1999 Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (hereinafter briefly referred to as “Law No.5/1999”). Articles 28 and 29 of Law No.5/99 prohibited mergers and acquisitions which can have potentially anti-competition effects, and setting forth notification requirements. However, these Articles could not be implemented effectively until provided for in a Government Regulation.

On July 20, 2010 the Government of the Republic of Indonesia issued Government Regulation No. 57 Year 2010 Concerning Consolidation or Merger of Business Entities and the Acquisition of Company Shares Potentially Causing Monopolistic Practices and Unfair Business Competition (hereinafter briefly referred to as “GR 57/2010”). The GR No. 57/2010 has become a milestone in merger control in Indonesia, which has now enabled the merger prohibitions to be implemented.

### 3. The unique feature of Indonesian merger regime

The feature that distinguishes Indonesia’s merger control is its notification system, requiring to notify after a merger or acquisition becomes legally effective (post-merger notification), rather than before conducting a merger and acquisition (pre-merger notification). This is provided for in Article 29 of Law No.5/1999, explicitly setting forth that notification must be done within 30 business days following the date on which the merger and acquisition was conducted. Business actors failing to comply with the time frame are subject to rather significant fines, namely Rp.1 billion (USD 111,111) for each business day of the delay, up to the maximum fine of Rp.25 billion (USD 2.78 million).

A weaknesses of post-merger notification is that it can potentially hamper the achievement of merger control objectives. KPPU has undertaken certain endeavors in order to ensure that GR 57/2010 provides an opportunity for notification prior to conducting merger or acquisition (pre-merger notification). This has been accommodated in GR 57/2010 Part IV Concerning Consultation. The consultation referred to in Part IV means pre-merger notification on a voluntary basis, which is available to the parties conducting merger

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<sup>1</sup> This report is prepared by the Foreign Co-operation Division with valuable input from internal sources to contribute for series of the OECD Competition Committee Meeting in June 2011. Further information or clarification on stipulated issues may be obtained from Mr. Deswin Nur (Head of Foreign Co-operation Division) through his e-mail addresses, [deswin@kppu.go.id](mailto:deswin@kppu.go.id) or from our international team at [international@kppu.go.id](mailto:international@kppu.go.id).

or acquisition. By applying for a KPPU consideration pursuant to the Consultation mechanism, the related parties have an opportunity to understand KPPU's opinion on a merger or acquisition before it is implemented. By doing so, any potential anti-competition effects of the merger or acquisition concerned can be prevented, and the relevant parties conducting merger are able to obtain legal certainty in the merger and acquisition process.

#### **4. The concept of remedies does not explicitly exist in Indonesia's competition law**

Upon completing the M&A assessment, KPPU issues the Commission Opinion on the Merger or Acquisition concerned, both for assessment conducted through the Consultation as well as through the Notification mechanisms. The Commission's opinion can be in the form of the following three alternatives:

- There is no allegation of monopolistic practices or unfair business competition as a result of the merger concerned;
- There is an allegation of monopolistic practices or unfair business competition as a result of the merger concerned; or
- There is no allegation of monopolistic practices or unfair business competition as a result of the merger concerned, provided of the parties follow the advice/guidance set out in the opinion (this is only possible under the Consultation mechanism and does not apply for Notification).

KPPU's opinion is published on KPPU's website, enabling the public to understand KPPU's considerations in assessing the competition effects of a merger or acquisition.

There are no avenues for appeal in relation to the remedies identified by the KPPU's in the Consultation procedure. Based on the Merger Guidelines, non-compliance with KPPU's Opinion is an interim assessment which is subject to the formal legal procedure up to the issuance of a Decision. It is only against such a Decision that business actors have an avenue to dispute the KPPU's views by appealing to the Court in accordance with the provisions of applicable laws and regulations.

The Consultation mechanism has more flexibility in providing opportunity for the Commission to provide non-binding advices or opinions on the possibility of improvements (eg. remedies) if the merger is to be implemented. However, of the outcome of a Consultation does not remove the Commission's authority for post mergers assessment.

#### **5. What type of sanctions exist in relation to mergers?**

Articles 47 and 48 of the law stipulate that the M&A violations can result in the cancellation of the merger or acquisition, as well as financial sanction of Rp. 1 billion (USD 111,111) up to the maximum fine of Rp. 25 billion (USD 2.78 million). Criminal sanction also may be imposed by the Court during the appeal process. The sanction will vary from Rp. 25 billion (USD 111,111) up to Rp 100 billion (11.1 million) or imprisonment for up to six months, despite which, until today, there have been no imprisonment sentences applied by the Court for any competition violation.

As noted above, business actors fail to notify the M&A, could be imposed with additional fines from Rp.1 billion (USD 111,111) for each business day of the delay, up to the maximum fine of Rp.25 billion (USD 2.78 million).

Third parties or public are not expected to comment the proposed sanctions as it is within the full authority of the Commission. However, the Commission's opinion on consulted and notified mergers are

made public through the Commission's official website ([www.kppu.go.id](http://www.kppu.go.id)) for everyone to follow the progress of any mergers that may interest them. To date, there have been 11 (eleven) mergers are notified and 2 (two) mergers consulted upon. No notified mergers have been denied by the Commission because none have been found to affect competition in the relevant market.

## **6. Active M&A monitoring system**

The Commission will conduct frequent monitoring activities and co-operate with relevant agencies (eg. the Ministry of Finance) to identify mergers that meet the requirements but which have not been notified within 30 (thirty) working days. In the case of qualified foreign mergers where the parties have failed to notify within 30 (thirty) working days, the Commission will apply the penalty to that part of the relevant business group that is located in Indonesia. The Commission will use its authority and (if necessary) work with other related agencies to ensure the imposed fines are submitted.

Because M&A violations are treated as other competition violations, the collection of fines is conducted by the litigation staff of the Execution Division of the Commission. The Commission does not have authority to collect the fine or confiscate the business's assets if parties fail to pay the fines without first obtaining a Court order. The number of staff who are available to seek such Court orders is limited (no more than five staffs).

## **7. Conclusion**

The authority to undertake mergers assessment has been long awaited by the Commission (since 1999) and the power was only made available last year after the enactment of GR. 57/2010. That regulation puts in place a post notification mechanism and the possibility to conduct consultation before a merger is complete. Within nearly a year, the Commission has recorded 11 (eleven) Notifications and 2 (two) Consultations on mergers.

Mergers in Indonesian competition law are considered just as other competition violation (under abuse of dominant chapter) with no explicit possibility of providing remedies. Sanctions applied on mergers are limited to the cancellation of mergers and financial penalties. Non-binding remedies may be applied if the parties submit the planned merger to consultation with the Commission.

We understand that this approach may quite different from other international practices. Therefore, to maintain market stability, the Commission always puts more effort in encouraging businesses to conduct Consultation prior to their merger implementation. This should minimize potential loss (risk) which may be suffered by the business if the mergers are cancelled by the Commission after the merger has been completed when it is proved to amount to a monopolistic practice or unfair business competition.





## LITHUANIA

- 1. What is your process for considering possible remedies for mergers that present competitive problems? Are parties responsible for proposing remedies, and are they required to follow particular procedures or time lines in order to do so? If your merger review system involves a 2-phase process, are there different procedures and standards for reviewing proposed remedies in the 2 phases?**

Article 14(1)(2) of the Law on Competition of the Republic of Lithuania (Law on Competition) entitles Competition Council (CC) to clear mergers by imposing “*conditions and obligations <...> in order to prevent the creation or strengthening of a dominant position or the significant impediment of competition*”.

The Law on Competition provides for a two-phase procedure. Phase 1 and Phase 2 can last up to one and three months respectively. In case of commitments, the examination period may be extended by one month at the request of the notifying parties. The CC, however, encourages parties to a notifiable merger that may raise competition concerns to contact the CC at an early stage in order to discuss these concerns and craft possible solutions.

The remedies, both structural and behavioral, may be proposed by the notifying parties or offered by the CC itself. There are, however, no rules published as to the timelines or a particular procedure to be followed when proposing remedies. The key requirement is that the proposed remedies address the competition concerns identified by the CC.

- 2. When crafting merger remedies, does your agency employ structural remedies? Do you employ behavioral remedies or hybrid remedies? How do you decide what remedy or combination of remedies best cures the competitive harm of concern? Is the approach different in horizontal and vertical mergers?**

The CC has employed both structural and behavioral remedies to address the competition concerns that have arisen during the assessment of merger notifications.

The most common structural remedy imposed by the CC is the divestment of an undertaking or a part of an undertaking constituting a stand-alone ongoing business.

The behavioral remedies include requirement of price transparency and arm’s length dealing with related undertakings, a prohibition to apply discriminatory pricing and to impose exclusive purchasing obligations, as well as requirement to guarantee the right to terminate a contractual relationship unilaterally at any time subject to a three months notice period. Behavioral remedies have been imposed both independently and as a package with the structural ones.

As to the difference in approach towards choosing a remedy in horizontal and vertical merger cases, it should be noted that experience of the CC in vertical merger cases is rather scarce. Therefore no conclusive approach could be described.

**3. When seeking structural relief, under what circumstances do you require the divestiture of a stand-alone business? Do you ever require the divestiture of intellectual property in lieu of the divestiture of a stand-alone business or a collection of physical assets? When do you use each type of divestiture remedy?**

The CC considers the divestiture of a stand-alone business to be the preferred type of a structural remedy due to its viability and potential to exercise competitive constraint on the post-merger undertaking. Hybrid remedies are, however, often imposed to ensure the viability of the divested business.

The CC has, however, also imposed a divestment of a non-stand alone business in 2000 *Vitoma / Antrimeta et al II*<sup>1</sup> case, where the notifying party, active on the market for procurement and processing of scrap metal, proposed to sell some of its physical assets that did not constitute a stand-alone business. Such divestiture had resulted in a significant reduction of *Vitoma's* productive capacity and, consequently, in the reduction of its market share.

Divestiture of intellectual property has so far never been imposed as an independent remedy in lieu of the divestiture of a stand-alone business or a collection of physical assets. The transfer of intellectual property rights has only been an explicit part of a stand-alone business divestiture remedies in e.g. *Carlsberg AS / Orkla* case,<sup>2</sup> where the parties were obliged to sell a brewery, and *Elion Ettevöttes / MicroLink AS* case,<sup>3</sup> where the parties were obliged to divest a retail broadband service provider.

**4. What types of behavioral remedies does your agency use? In what circumstances have you used firewalls, fair dealing clauses, transparency requirement, anti-retaliation provisions or prohibition on anticompetitive contracting practices?**

During the last 12 years since the coming into force of the current Law on Competition the CC has employed a variety of behavioral remedies ranging from the obligation not to discriminate (primarily used in the earlier cases) to access obligations and account separation (imposed more recently). Below are some example cases that best describe the wide range of behavioral remedies recently imposed by the CC.

In *Rautakirja / Lietuvos spauda*<sup>4</sup> the Finnish company Rautakirja Oy acquired control of UAB Lietuvos spauda Vilniaus agentūra (“Lietuvos spauda”), a former State enterprise operating on the wholesale and retail markets for distribution of publications (newspapers and magazines). Rautakirja Oy was active on the same markets through its joint venture UAB Impress Teva („Impress Teva“).

The concern in the present case was the creation of a dominant position at the wholesale level of the market for distribution of publications, where the combined share of the merging firms would have reached 45-50% and in some regions the merged entity would have become the only distributor. While the overlap of the parties’ retail operations and their overall market share on this level was found to be insignificant, it was concluded that the vertical integration would allow the merged firm to cross-subsidise its operations and gain a competitive advantage against even the most efficient competitors. The merger was cleared subject to commitments including the obligation on the acquiring company to retain two separate channels of distribution at the retail level, not to engage in a preferential treatment of its retail operations and not to include exclusive distribution or exclusive purchase provisions in contracts with publishers and retailers. In

<sup>1</sup> Competition Council Decision No. 101, September 18, 2000.

<sup>2</sup> Competition Council Decision No. 123, November 9, 2000.

<sup>3</sup> Competition Council Decision No. 1S-122, October 27, 2005.

<sup>4</sup> Competition Council Decision No. 1S-121, October 27, 2005.

addition, Rautakirja Oy was required to allow all publishers access to its wholesale distribution system on non-discriminatory terms. The commitments also included the right for publishers to terminate their contractual relationships with the merged entity at any time subject to a three months notice period.

A year after the above-described case Rautakirja Oy notified its intended acquisition of a full control of Impress Teva.<sup>5</sup> Even though some of the remedies imposed were similar to the ones employed in the earlier case, the CC has emphasized the transparency requirement as to how the commission for the distribution services should be determined. This was aimed at ensuring transparency in the system of commission and precluding instances of discrimination of publishers or publishing houses.

In *Rokiškio sūris / Panevėžio pienas*<sup>6</sup> the merger in question affected the market of milk procurement and dairy products. One of the largest producers of milk products, AB Rokiškio sūris, intended to acquire a 35.3% shareholding in AB Panevėžio pienas that was solely controlled by AB Pieno žvaigždės, another major producer of milk products. The concentration would have changed the level of control from sole to joint. After the merger, the combined market share of the merging parties would have been 60% in the milk procurement market and 61% in the dairy product market with one major third-party competitor remaining in both markets. The concern was that creation of relations between three leading competitors might lead to fixing of prices and market sharing. The merger was, nevertheless, authorised subject to a commitment by AB Rokiškio sūris to refrain from voting in the general meeting of shareholders of AB Panevėžio pienas on issues of distribution of profits, establishment of reserves and disposition of permanent assets.

In *TeliaSonera / Omnitel*<sup>7</sup> the merger concerned the increase of the shareholding of up to 90% in UAB Omnitel, the leading mobile telephone network operator in Lithuania, by AB TeliaSonera. At the time, AB TeliaSonera already had 60% shareholding in AB Lietuvos telekomas, the operator of the largest fixed-line telephone network, and 55% in UAB Omnitel. The CC was concerned that AB TeliaSonera would be able to ensure a full co-ordination between AB Lietuvos telekomas and UAB Omnitel that would allow the achievement of economies of scale and the investment in research and development, as well as horizontal and vertical integration of existing and future networks on the basis of technology and simultaneous restructure of management systems. It was thought that such co-ordination could lead to a reduction of competition on the relevant markets. The merger was allowed subject to commitments of the parties to refrain from reorganising or merging UAB Omnitel with AB Lietuvos Telekomas as well as to ensure that no business (customer contracts) will be transferred from AB Lietuvos Telekomas to UAB Omnitel without prior clearance by the CC.

The behavioral remedies imposed by the CC have not been limited in time in the earlier cases, however, this practice is changing and where appropriate the behavioral remedies have fixed time frames, e.g. in *Rautakirja Oy/ Impress Teva* the term for behavioral remedies was limited to 2 years with a possibility to extend if the market participants were to complain.

**5. Do you have experience protecting the to-be-divested assets or businesses prior to divestiture? Have you required that assets or businesses be held separate or otherwise preserved? Have you employed monitoring trustees?**

In cases where remedies include a divestment of assets or business, in addition to this structural remedy the CC includes ancillary measures to protect against the risk that a divestiture remedy may

<sup>5</sup> Competition Council Decision No. 1S-190, December 29, 2007.

<sup>6</sup> Competition Council Decision No. 1S-29, April 3, 2003.

<sup>7</sup> Competition Council Decision No. 1S-140, December 11, 2003.

ultimately fail due to depreciation of the value of assets or business. The measures include an obligation on the acquiring party to maintain viability of the business to be sold, including maintaining the reputation of the business, trademarks and other acquired rights.

Moreover, the time limit for the sale of business is considered to be confidential in order not to undermine the value of the assets. This time limit can also be postponed to ensure that the viability of the assets is preserved.

The CC has in three cases appointed a monitoring trustee to ensure the effectiveness of the remedy and the compliance of the parties with such a remedy (*Rautakirja Oy / Lietuvos Spauda, Rautakirja Oy / Impress Teva, Carlsberg AS/ Orkla*). In *Rautakirja Oy / Impress Teva* the monitoring trustee was also entitled to mediate the disputes as to the proper implementation of the imposed remedies.

**6. How do you ensure an expeditious and successful divestiture? Do you require divestitures be finalized before a merger closes? If not, how quickly do you require divestiture? What happens if the divestiture has not timely occurred? Do you use sales trustees? Do you insist on enhanced asset packages when sales are not timely? How do you ensure that a sale to a proposed divestiture buyer and the terms of the divestiture will accomplish your remedial goals?**

Given the limited four (plus one) month time frame for adopting a decision in merger assessment cases, the divestitures do not have to be finalized before a merger. The CC, however, sets a term for a divestiture, which is normally kept confidential in order to ensure the value of the assets is not undermined.

Since the practice of the appointment of any kind of trustee is limited, there has only been one instance where the merging parties appointed a specific sales trustee – *Carlsberg AS/ Orkla* case. Therefore, at this stage the CC would not be in a position to describe any trends or rules of the appointment of such a trustee.

There are no statutory provisions on how purchasers of divested assets should be approved. In practice, the obligation of the merging parties to get prior approval of the prospective buyer by the CC is clearly stated in every conditional clearance decision that establishes structural remedies.

**7. How do you ensure that parties comply with your remedy order? Do you include reporting requirements or inspection clauses in your orders? Do you have staff dedicated to enforcement of remedies?**

Pursuant to Article 41(1) of the Law on Competition the notifying parties may be fined up to 10% of the annual income in the preceding financial year for failure to comply with the imposed merger remedies. Article 41(4) of the Law on Competition also provides the CC with the option of imposing a periodical penalty of up to 5% of the average daily turnover in the preceding business year of the undertakings concerned for each day of continuation of infringement.

In addition to the statutory provisions ensuring compliance, the CC merger decisions with remedies also provide for a reporting requirement allowing the CC to ensure effective and timely implementation of the imposed remedies.

The only case where the parties failed to comply with the imposed remedies was *Rautakirja Oy / Impress Teva*, where the parties failed to appoint a monitoring trustee which resulted in a monetary fine.

In is noteworthy, that given the very small number of the members within the merger assessment division, there are no staff members specifically dedicated to enforcement of remedies.

**8. Is your experience in enforcing remedies reflected in documents describing your best practices or in other guidelines documents? If not, are you planning to issue guidance in the near future?**

There are currently no guidelines or other type of explanatory document on the enforcement of remedies by the CC. Taking into account that no remedies have been imposed during the last two and a half years and the limited resources of the CC there are no plans to issue guidance on the matter in the near future.

**9. What role do third parties and the public have in commenting on the proposed remedies? How have your courts assessed the agencies' remedies and effort to enforce them?**

There are no specific rules on market testing of remedies, but general procedural provisions ensure that third parties are able to present their views on the matter prior to adoption of the final commitment decision. As a general requirement, pursuant to Article 13(1) of the Law on Competition all notified mergers must be publicly announced in the *Official Gazette* with details as to the nature of the merger and the parties involved. Within two weeks of this publication, any person whose interests could be affected by the concentration may submit their written objections. Such third parties must then be informed of the envisaged decision before it is adopted and are entitled to submit their comments. Moreover, they are granted access to the file (except for commercial secrets of other persons) and may request participation and the right to be heard at the procedural meeting of the CC/

Third parties additionally have formal rights to be directly involved in the merger review process even where they are not directly approached by the CC. In cases of mergers raising competition concerns, the officers of the CC are entitled to, and normally do, contact major competitors and customers of the merging firms in order to get their views on the effects of the transaction in question on the markets concerned. Usually this is done by sending questionnaires, but other forms of contact, such as telephone calls or interviews, may sometimes be used.

The importance of third party involvement was particularly clear in *Rautakirja Oy / Lietuvos Spauda* and *Rautakirja Oy / Impress Teva* case, where the CC organised official meeting with the publishers, retailers and direct competitors of the parties. A large part of the publishers expressed support towards the notified merger subject to the proposed remedies. The major newspapers as well as confederation of business employers have also supported the imposed remedies.



## ROMANIA

This paper will first briefly describe the treatment of remedies under Romanian Merger Control legislation and then the focus will be on different types of remedies accepted by Romanian Competition Council (hereinafter referred to as *RCC*) in merger cases.

### 1. Introduction: background considerations on merger control in Romania

Romanian merger control is regulated by Law No. 21/1996 (the Competition Law). The merger control rules contained in the Competition Law are given detail and expanded upon through secondary legislation adopted by the Competition Council. The Competition Law has recently been amended and completed by the Emergency Government Ordinance 75/2010 which entered into force on 5<sup>th</sup> of August, 2010. An important change concerns the adoption of the SIEC test in the merger control system, to replace the previously used market dominance assessment test.

Therefore, the current clearance test is whether the relevant transaction would raise significant impediments to effective competition on the Romanian market or on a substantial part of it, in particular through the creation or strengthening of a dominant position.

### 2. Procedural aspects of the assessment, acceptance and implementation of remedies

The specific provisions for merger remedies in Romania are provided by the Guidelines on commitments acceptable in merger cases of December 9, 2010, which are similar to the European Commission notice on remedies acceptable under the Merger Control Regulation (the 2008 Remedies Notice).

As a basic principle, it is up to the merging parties to propose remedies if the concentration turns out to pose competition problems. *RCC* can accept commitments in either phase of the review procedure. In phase one, the proposals must be submitted to the *RCC* before the date that notification became effective or within two weeks of the effective date. Furthermore, it is up to the notifying parties to convince the *RCC* that the proposed remedies will solve the competition problems and that the remedies can be implemented in a timely manner. At this stage, the *RCC* will only go as far as trying to inform the notifying parties of the competition problems that have been identified.

Once the proposed remedies have been submitted, it is the practice of the *RCC* to carry out a market test amongst other market players in order to test the effectiveness and the feasibility of the proposals.

If the proposals are acceptable, the *RCC* issues a decision on the notified transaction within maximum 45 days as of the effective day. It may issue either a so called non-opposition decision whereby the transaction is authorized or a decision launching the phase two.

Non-opposition decisions may be issued if (i) there are no serious doubts regarding the compatibility of the concentration with a normal competition environment, or if (ii) serious doubts regarding compatibility with normal competition have been removed by commitments proposed by the parties concerned and accepted by the *RCC*.



The phase I may also conclude within 30 days of the effective day, with the issuance of a letter stating that the respective transaction does not fall within the competence of the RCC.

If in phase one, proposals are not acceptable, then the second phase of the review process begins. The remedies proposed in this phase must be submitted to the RCC within 30 days of the date that the investigation was launched. In exceptional circumstances the parties may request a 15-day extension of the 30-day period to find an acceptable remedies solution.

If the RCC opens phase two proceedings it must decide within 5 months as of the effective day whether (i) to clear the transaction unconditionally, (ii) to clear the transaction conditionally, establishing the obligations and/or conditions aimed to ensure the observance by the involved parties of the commitments assumed in order to ensure the compatibility of concentration with a normal competitive environment. or (iii) to prohibit the transaction. Phase II proceedings may not be extended beyond this five-month period.

This procedure avoids that the competition authority actively "regulates" the structure of the market by proposing remedies to the parties and it is a safeguard against the application of overly strict remedies. There is, however, an important distinction between Phase I and Phase II remedies that deserves to be highlighted. The commitments accepted by the RCC in the Phase I must be such that they eliminate 'serious doubts' as to the concentration's compatibility with a normal competitive environment. That means that competition problems need to be so straightforward and remedies so clear-cut that it is not necessary to enter into an in-depth investigation.

If the RCC accepts the remedies and the parties go ahead and implement the concentration in breach of these remedies, the RCC has the power to impose fines of up to 10% of the total turnover of the financial year prior to the sanctioning and/or daily penalty payments.

In case an economic concentration was implemented in contradiction to a condition or obligation imposed through the non-opposition decision or the conditional clearance decision, the compatibility decision is no longer applicable. In such circumstances, RCC may take adequate interim measures aimed to restore or maintain the conditions of effective competition. Where, however, a condition imposed through the conditional clearance decision is breached, it may order any appropriate measure to ensure that the undertakings concerned dissolve the merger or take any other measure appropriate so as to restore the situation prevailing prior to the implementation of the concentration.

## **2.1 *Enforceability of commitments***

Whilst commitments have to be offered by the parties, the RCC will ensure the enforceability of the commitments by making the clearance of the merger subject to conditions and obligations.

In the clearance decision, the RCC sets forth a timeline within which the respective commitments must be implemented. The implementation normally takes place after the decision. Parties may meanwhile proceed to implement the respective transaction.

RCC acknowledges at the same time that important additional tools to ensure that divestiture remedies are implemented are up-front buyer or crown jewel provisions. However, yet the RCC did not make use of these tools in its practice.

The RCC's clearance decisions cover the ancillary restraints that are directly linked and necessary to the transaction such as non-competition, non-solicitation or confidentiality clauses provided that they are limited in scope and time. It falls upon the parties' however to self-assess whether any restrictions included

in the transaction documents are ancillary or not pursuant to the RCC's Guidelines on ancillary restraints which mirror those under the EC Notice on Ancillary Restraints.

## 2.2 Supervision

The RCC does not have a special compliance unit for mergers. However, the conditions and obligations it set in specific mergers and the commitments are followed up by the sectoral unit responsible for the decision in question in terms of their implementation and effectiveness.

Pursuant to the refined *RCC's Guidelines on commitments acceptable in merger cases*, a trustee may be as well appointed by the undertakings concerned with the prior approval of RCC to oversee compliance with commitments/remedies. The representative shall be remunerated by the undertakings concerned and shall safeguard, in good faith, on behalf of the RCC that the remedies are implemented. However, in its practice, the RCC has not yet used trustees to ensure implementation of merger remedies.

## 3. Merger enforcement

Most mergers analyzed insofar by the RCC occurred horizontally, between competitors who aimed to consolidate their position, and usually those mergers involved small to medium companies.

As the data provided in table below shows, since being established in 1997, the RCC has unconditionally cleared most transactions in the phase one. 3 negative decisions were issued, without being contested in the court.

Year	Total no. of decisions	No. of non-intervention decisions -Phase 1-	No. of non-opposition decisions -Phase 1-	No. of clearance decisions -Phase 2 -	No. of conditional clearance decisions -Phase 2 -	No. of negative decisions -Phase 2 -
1997	6	3	1	0	1	1
1998	43	8	34	1	0	0
1999	140	47	92	1	0	0
2000	193	7	180	2	3	1
2001	169	9	153	5	1	1
2002	157	14	138	5	0	0
2003	247	16	228	2	1	0
2004	165	45	118	2	0	0
2005	115	20	95	0	0	0
2006	106	24	82	0	0	0
2007	45	5	38	1	1	0
2008	76	14	60	2	0	0
2009	43	10	32	1	0	0
2010	40	5	35	0	0	0

It follows from the above statistics that the RCC issued 4 non-opposition decisions subject to commitments provided by the parties to the merger within the phase one proceeding, 1 clearance decision subject to commitments in phase two and 7 conditional clearance decisions subject to the imposition of structural and/or behavioural conditions and obligations.

## 4. Examples of commitments accepted by RCC in its practice

Since the adoption of *the new Guidelines on commitments in merger cases* in December 2010, no mergers have yet required commitments from the parties to the merger. Therefore, all the examples which follow have been assessed under the old guidelines entitled *Guidelines regarding corrective accepted measures in cases of conditioned approval of economic concentrations* and under the dominance test as the

clearance test for mergers as provided for in the Competition Law before the entry into force of EGO no. 75/2010. That said, while the process for obtaining remedies under the new guidelines is slightly different it is unlikely that the scope or terms of remedies will be very different from those obtained previously.

The following two examples try to illustrate the clear-cut approach the RCC has taken in divestiture cases.

In *OMV/Petrom (Decision no.299 [2004])*, Romanian Competition Council reviewed in the framework of the privatization process the acquisition by OMV of the sole control over a previously state owned company in the oil market. As part of the analysis, RCC acknowledged that the acquirer held a minority participation in a third company. Furthermore, the analysis revealed that a real overlap existed between the activities of the target undertaking and this third company on two affected markets, i.e, the Romanian market of distribution and selling petrol products. In order to be granted the clearance of the transaction in phase one of the merger, the acquirer committed itself to divest the minority stake it previously held in the rival's target company. The RCC was able to accept such a severing of the structural link of the acquirer with a competitor since the acquirer committed as well not to use its minority shareholding to influence the market behaviour of the operator in which it held the stake or not to use its voting rights until divestiture is implemented.

In another case, *Azomures/Chimpex, Decision 113 [2005]*, the Romanian Competition Council cleared a merger in phase two in the sector of harbour operating services with remedy including divestiture of a controlling stake in a viable stand-alone business. SC Azomures SA Tg.Mures, manufacturer of fertilisers proposed acquiring 74.372% of the share capital of Chimpex SA Constanta, company which performs harbour operating services for fertilisers. The relevant market was defined as the market of Romanian harbour operating services. The Competition Council found out that, besides SC Chimpex SA which is the main provider of harbour operating services for fertilisers, the balance of the market of harbour operating services is held by SC SOCEP SA via its facilities rented from SC Transocep Terminal SA. As Azomures SA was holding the common control over Transocep Terminal SA, there was a possibility for Azomures SA to interfere with the competitive behaviour of SOCEP SA, the only competitor of Chimpex as far as the operation services regarding fertilisers were concerned. After acquiring majority of stock in Chimpex, Azomures would have been able, to a considerable degree, to behave independently toward its customers and competitors, a fact which might have led to a significant restriction, prevention or distortion of competition on the relevant market. In order to be granted the clearance, Azomures submitted to the Romanian Competition Council, commitment proposals in order to make the operation compatible with a normal competitive environment. Thus, Azomures took upon itself to give up the joint control in SC Transocep Terminal SA, by selling the 20% participation held in this undertaking.

RCC acknowledges at the same time that under certain circumstances, structural commitments may be used in combination with non-structural commitments in order to ensure that the desired effect of the structural commitment is achieved or because the structural commitment alone is not enough to restore the competitive situation.

For example, in the acquisition of the sole control by Kronospan Holding GmbH, a subsidiary of Kronospan Group (hereinafter referred to as Kronospan) over certain assets of the Constantia Industries AG Austria Group (*Kronospan Holding GmbH Germany/Constantia Industries AG Austria, Decision no. 31/2007*), the acquirer's structural commitment submitted in the phase two of the economic concentration not to acquire directly or indirectly, either wholly or in part one of the three original Target plants namely FunderMax GmbH which would remain with the seller Constantia, for a period running

since the date of the authorization decision, similar to that undertaken by the acquirer in front of the European Commission<sup>1</sup> was supplemented by behavioural commitments of the acquirer.

More specifically, RCC obliged Kronospan to keep in function another Target plant namely Falco Rt Hungary as a separate business within the Kronospan Group with separate distribution channels of Falco Rt products in Romania and to preserve the trademark of Falco Rt. products sold in Romania for a two-year period from the clearance of the economic concentration to facilitate the very likely entry in the market of a potential competitor together with a two-year price reporting obligations period of the raw and coated particle board performed by Kronospan at the Romanian production site.

This package of commitments made possible the conditional clearance of this merger by RCC. The unconditional clearance of the merger would have put the merged entity into a position that enabled it to consolidate its dominant position in two of the three relevant markets identified, respectively the Romanian market of raw particle board and coated particle board that could have led to a significant restriction of competition on the respective markets.

At the end of the monitoring period of the fulfillment of the obligations and conditions imposed on Kronospan Holding GmbH Germania for the 2 year period based on the conditional clearance obtained, RCC concluded that the behavioural commitments assumed by the parties to the concentration helped to foster a competitive structure of the market by facilitating other forces which will restore competition. More exactly, Kronospan had duly fulfilled its obligations by the time the anticipated entry in 2008, of Egger, already an important competitor of Kronospan in Romania due to its import activities on the market of raw particle board and coated particle board produced its positive effects in terms of increased consumer choice. The structural commitment consisting in the prohibition regarding the acquisition of FunderMax GmbH Austria by any of the companies of Kronospan Group remains to be monitored by the RCC.

The presence of IP elements in a concentration is likely to influence the analysis performed by the RCC in terms of the commitments which the parties may propose with a view to rendering the concentration compatible with a normal competitive environment.

Inquiring into RCC's portfolio of merger cases, one may find that in *Bunge Romania/Agricover (Decision no. 19/2007)*, to alleviate the concerns regarding the strengthening of the buyer's market power, the concentration consisting in the acquisition of control by Bunge Romania over certain trademarks and assets pertaining to Agricover in the fat oil manufacturing sector was cleared in phase 1 of the procedure subject to the buyer's commitment to give up the acquisition of two specific trademarks together with the amendment of the non-competition clause (removal of any reference to those two trademarks). In this way, it was reserved for the acquired company the right to manufacture and market, without any limitation from the buyer's side, the trademarks at stake.

Even if a divestiture of the IP rights is the preferable remedy as it eliminates a lasting relationship between the merged entity and its competitors, exclusive licensing arrangements may be sometimes an alternative to divestiture. This was the case in *Orkla/Royal Brinkers (Decision no. 78 [2006])*, a concentration consisting in the acquisition of the majority stock and sole control of Orkla, part of the Orkla Group over Royal Brinkers Romania SRL and Royal Brinkers Distribution SRL where RCC issued a non-opposition decision subject to a commitment undertaken by Orkla to grant an exclusive time-limited license for three brands, the so called re-branding commitment.

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<sup>1</sup> In this foreign-to-foreign transaction, Romanian Competition Council had exclusive jurisdiction over that part of the proposed concentration performed on the Romanian territory because the framework agreement that triggered the notification obligation had occurred before the date of Romania's accession to EU.

The RCC found out that both Orkla and Royal Brinkers Romania SRL are active on the market of the packed yellow fats and that both undertakings manufacture only margarine. So, in this case a more detailed analysis on a narrower market (packed margarine market) was necessary. It resulted that the proposed merger did give rise to competition concerns on the low price segment of the packed margarine, because, on this segment, Orkla would have the possibility to behave independently from the main competitors, which could lead to the restriction, distortion or obstruction of the competition. To remove the RCC's concerns in this respect, Orkla committed to enter into a three year licensing agreement for three specific trademarks.

In order to ensure the effectiveness of the commitment i.e. a viable transfer of activity, the terms of the licensing agreement and the licensee were subject to the prior approval by the RCC before the signing of the agreement. Thus, RCC expressly required that the licensee had to be an undertaking independent of Orkla, Brinkers or the respective groups, had to have financial resources and proven experience in its field of activity as to maintain and develop the margarine marketing. In addition, Orkla committed to renegotiate with the sellers the duration of the non-competition clause from 5 years to 2 years. The amendment to the sales contract decreasing the non-competition clause period had to be also approved by the RCC and fulfilled within a specific period from the clearance decision. The decrease of the black-out period imposed to the sellers by Orkla was considered necessary by RCC so to enable Royal Brinkers to re-enter this market by means of the imports from other countries where Brinkers Group had production facilities.

At the end of the 3 year exclusive license for the three brands, RCC noted that the period was enough for the licensee to put into place a re-branding strategy, i.e. to ensure that customers will transfer from the licensed brands to its own new brands. Actually, the exclusive license proved to have been sufficiently long so that re-branding would have effects similar to a brand divestiture.

The change in the market structure resulting from a proposed concentration can cause existing contractual arrangements to be inimical to effective competition due to their foreclosure effects. This issue arose in *Kandia-Excelent SA/Kraft Group (Decision no.10/2007)*, consisting in a proposal of purchase by Kandia - Excelent SA ("Kandia"), from companies belonging to Kraft Group, of two trademarks of sugar confectionery products ("Silvana" and "Sugus") and of related rights (such as recipes, stocks, raw materials, advertising materials), as well as of assets for the manufacturing of sugar confectionery.

More specifically, RCC noted that post-concentration, the distribution of the products concerned by the transaction would be carried out only through Kandia's exclusive distribution network made of 36 single-branded distributors enjoying exclusivity in their respective territories. Another concern of the RCC was that the respective exclusive distribution agreements would foreclose downstream the access of Kandia's competitors to Kandia's distributors.

In this context, Kandia submitted to the RCC an offer of commitments consisting in eliminating its distributors' single branding obligations included in the distribution agreements. In such circumstances, RCC cleared the merger in the phase I of the concentration control procedure as it considered the termination of the existing exclusive distribution agreement as appropriate to eliminate the competition concerns.

The clearance Decision covered as well the restrictions ancillary to the concentration i.e. supply of products, transfer of know-how and the non-competition obligation for a period of three years from the closing of the transaction.

## 5. Conclusions

To conclude, the limited number of interventions of RCC in merger cases was justified by the threat to competition in all the cases. The threats to competition were (partially) unnecessary ancillary restraints associated with some mergers, changes in the market structure causing competition to potentially deteriorate or the likelihood of collusion post-merger.

That means that RCC assesses each remedies proposal on its merits and selects, on a case-by-case basis the appropriate and proportionate remedy depending on the theory of competitive harm identified.

It appears from the above examples that the divestiture commitments have been used by RCC in particular for removing the links between the parties and competitors in cases where it was found that these links contributed to the competition concerns raised by the merger whereas the behavioural conditions imposed have been focused in particular on those particular forms of remedies that have structural effects on the markets similar to those of divestments such as exclusive licensing agreements, the termination of existing exclusive distribution agreements, separation of distribution networks and so forth.

Although most of the RCC' merger cases where remedies were applied have been horizontal in nature, RCC considers that a structural remedy will often be the most appropriate solution in either horizontal or vertical mergers giving rise to competition concerns given that in either case a structural change to a market occurs.



## RUSSIAN FEDERATION

After analysis of transactions, other actions, and investigation of competition conditions in the relevant product market the Competition Authority has a right to provide Parties to the transactions with the Instruction that includes remedies to the transaction. Parties to the transaction are not responsible for proposing the remedies.

In accordance with Part 2 of Article 33 of the Law on Protection of Competition, basing on the results of consideration of an application, the Competition Authority may decide to prolong the period for consideration of an application in the following cases:

- in case of need to additionally consider an application, as well as to receive additional information for making a decision;
- in case of need to determine certain remedies, after fulfillment of which by an applicant and (or) other persons participating in the transaction, the Competition Authority can decide to satisfy an application, as well as necessity to determine the terms for fulfillment of these remedies that can not exceed nine months (applicable while considering mergers, accessions, establishment of commercial organizations). These remedies are essential for making decisions on prolonging consideration of an application. After fulfillment of indicated remedies, an applicant submits to the Competition Authority documents confirming their fulfillment. In case of confirmation of the fulfillment of remedies within the prescribed terms, the Competition Authority takes a decision on the application satisfaction or, if otherwise, the decision on rejecting the application;
- in case if a transaction or other action declared in the application, are subject to prior approval in accordance with the Federal Law № 57-FZ of April 29, 2008 "On Procedures for Foreign Investments in the Business Entities of Strategic Importance for National Defense and State Security" prior to the date of the decision in respect of such transaction or other action in accordance with the Federal Law.

Furthermore, the Competition Authority may cancel, amend or supplement the Instruction issuing a written Instruction to the applicant if it recognizes the applicant's objections to the validity of issued Instructions as motivated.

The FAS Russia imposes both structural and behavioral remedies. The decision to use a specific type of remedy is made by the Competition Authority at its own discretion. There are no special procedures under the regulatory legal acts of the Russian Federation for determining the type of remedies. There is no differentiating and structuring of remedies established under certain regulation in Russia. However, the list of the types of the Instructions and, consequently, their substantive content, are indicated in Article 23 of the Law on Protection of Competition (the Powers of the Competition Authority).

The FAS Russia imposes behavioral remedies mainly. The remedy of selling the assets is included in the Instruction of the Competition Authority only in case if there is no other possibility to eliminate the risk of competition restriction in the product market (inter alia as a result of a dominant position).



Moreover, the FAS Russia demands to sell business if combination of certain business activities by persons included in one an the same group of persons is prohibited by the law.

Thus, structural remedies were imposed under control over observance of the energy power legislation that prohibits combination of generation and transmission of power energy. The Moscow Regional office of the FAS Russia while considering an application of the OJSC “Oboronenergo” for acquisition of 100% minus 1 of voting stock of the OJSC “28 Electricity Network”, came to conclusion that as a result of this transaction the OJSC “Oboronenergo” would combine within one group of persons the activity on the energy power transmission and activity on purchase and sale of energy power due to ownership of voting stock of energy sale and power supply entities.

Establishment of the OJSC “Oboronenergo” group of persons and combination by its persons of the activity on energy power transmission and energy power sale might have negative impact on competition in the energy supply market within the borders of the electricity networks length of the OJSC “Oboronenergo”.

Finally, the Moscow Regional Office of the FAS Russia made a decision to issue an Instruction that do not allow to the OJSC “Oboronenergo” to carry on actions leading to restriction of competition, and ensuring actions leading to development of competition in the energy supply market within the borders of the OJSC “Oboronenergo” electricity networks length, in particular to withdraw the OJSC “Oboronenergosbyt” (a seller of electric power on wholesale and retail electric power markets) from the OJSC “Oboronenergo” group of persons.

The FAS Russia imposes quite an extensive list of behavioral remedies as follows:

- remedies to ensure non-discriminatory access to production capacities, etc.;
- remedies to ensure non-discriminatory conditions while concluding contracts (inter alia, delivery contracts);
- remedies to ensure performance of all short- and (or) long- term contracts, effective on the date of the transaction;
- remedies not to take up actions aimed at reduction and conversion of production capacities without prior approval of the Competition Authority;
- remedies to submit to the Competition Authority information on general indicators of business activity, price increase, etc on the regular basis;
- remedies to submit duly verified copies of documents that evidence the fulfillment of the Instruction;
- remedies to send a duly verified Instruction of the Competition Authority to other economic entities that belong to the same group of persons;
- remedies of preliminary agreement with the Competition Authority of the standard contracts with consumers;
- remedies to inform on shares (stocks) acquisition;

- remedies to inform consumers on termination, increase, decrease in the delivery volume, and increase in price of products sale;
- - remedies not to allow groundless refusal or avoidance of contract conclusion.

In case of imposing structural remedies, the FAS Russia sets the terms for their fulfillment. The failure to fulfill the remedies set forth in the FAS Russia Instruction leads to the administrative liability.

The following case is quite illustrative in this respect. As a result of consideration of the LLC “Operator Svyazi” application on acquisition of 10% of the CJSC “Multiregion” voting stock, the FAS Russia in the Instruction required to sell the participatory shares of the LLC “Antenna-Garant” to persons not belonging to the LLC “Operator Svyazi” group of persons or to sell or transfer for use the production capital funds of the CJSC “Comstar-Regiony” for provision of cablecasting telecommunication services to a person (persons) that does not belong to the LLC “Operator Svyazi” group of persons. The term for the remedies to be fulfilled was 18 months from the moment of issuing the Instruction. Alongside with that, the LLC “Operator Svyazi” was alerted about administrative liability in accordance with Part 2.3 of Article 19.5 of the Code on Administrative Violations of the Russian Federation (failure of timely fulfillment of the imposed remedy issued by the Competition Authority when carrying on the duties of state control over business concentration).

The requirements for economic entities to inform on fulfillment of remedies are provided for in the Instruction of the FAS Russia.

The Regional Office of the FAS Russia in Nijny Novgorod, for instance, decided to provide the LLC “Farmcomplekt” and the OJSC “NAS” with the Instruction to secure fulfillment of the following remedies:

On the 28th of each month during 2011 the LLC “Farmcomplekt” is to submit to the Regional Office the following information:

- information on the purchased medicine included into the list of essential drugs with indication of the producer prices;
- information on the wholesale prices set by the LLC “Farmcomplekt” for the medicine included into the list of essential drugs;
- on the 28th of each month during 2011 the OJSC “NAS” is to submit to the Regional Office information on retail prices for the drugs included into the list of essential drugs.

There is another illustrative example. The FAS Russia required submission of information on the date and reasons for the closure by a financial organization of each its division (subsidiary) or other internal structural unit (supplementary office) with indication of its name and location (address).

The control over fulfillment of the imposed Instructions is exercised by the Competition Authority.

According to Part 3 of Article 33 of the Federal Law on Protection of Competition, in case if the Competition Authority needs to extend the application consideration, as well as to receive additional information for making a decision, it publishes information on a transaction in question or other action, declared in the application, on the official FAS Russia’ Internet web site. Interested parties are entitled to submit to the Competition Authority information on the impact of this transaction or other actions on competition.



## SOUTH AFRICA

### 1. Introduction

The Competition Act in South Africa has now been in existence for just over 10 years and from the start merger regulation was part of the Competition law regime. The Competition Act 89 of 1998 (Section 12) provides that the authorities (Competition Commission, Competition Tribunal or Competition Appeal Court) must either approve, approve subject to conditions or prohibit a merger which has been notified to it. This provision clearly provides the authorities with the power to impose remedies to potentially problematic mergers.

In reaching a conclusion whether a merger should be approved, approved subject to conditions or prohibited the Commission is required to firstly consider whether the merger is likely to “*substantially prevent or lessen competition.*” The authorities are also obliged to consider whether the merger can or cannot be justified on substantial public interest grounds by assessing the effect of the merger on the following factors:

- a particular sector or region;
- employment;
- the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
- the ability of national industries to compete in international markets.

The Competition authorities therefore consider both competition and specific public interest factors in analysing mergers and often impose conditions to mergers in order to address concerns arising from either of these. This report will initially deal with remedies imposed on competition issues and thereafter briefly deal with the authorities’ approach to remedies to substantial public interest factors.

### 2. The process of finding a suitable remedy

South African legislation has a compulsory notification regime. The Competition Commission attempts to identify problematic mergers early in an investigation. Remedies are considered if the merger raises concerns which may result in a prohibition if workable remedies are not identified.

The Commission advises parties to problematic mergers early in the process, usually because such mergers inevitably require further information. The Commission also discuss potential remedies with the parties before it takes its final decision.

Parties may challenge the Commission’s remedies at the Competition Tribunal if they disagree with the Commission’s theory of harm or appropriateness of the remedies. Where parties accept the Commission’s theory of harm they are usually constructive in proposing suitable remedies. The Commission may also engage with third parties that are affected by the merger in constructing remedies, for example in vertical mergers with customers or suppliers affected by foreclosure concerns.

### **3. What constitutes acceptable remedies?**

#### ***3.1 Structural remedies or behavioural remedies***

Behavioural and structural remedies may have advantages or shortcomings depending on the circumstances of a case. The Commission's approach is to identify the remedy which is most appropriate in addressing the anti-competitive harm. In instances where behavioural conditions are sufficient to address the concern, the Commission will not insist on a structural remedy. We do recognise however, that structural remedies take away the need for monitoring compliance.

In 2002 the Competition Tribunal approved a merger between *Astral Foods Limited* ("Astral") and *National Chick Limited* ("Natchix") subject to both structural and behavioural conditions.

Astral was a dominant supplier of poultry feed, as well as grandparent and parent broiler stock. Natchix was also a supplier of poultry feed and was dominant in the supplier of day old chicks.

The merger would have entrenched dominance in the poultry feed market and potentially foreclosed competitors from access to day old chicks. The conditions on the merger were:

- The divestiture of Natchix poultry feed business, and;
- Compelling the merged entity to continue supply competitors with day old chicks for a period of 5 years.

During 2010 the Commission conducted an impact assessment of the impact of the merger in 2010, by inter alia interviewing other market participants in this market. The assessment concluded that while the poultry feed market remained competitive, foreclosure re-emerged as a concern on expiry of the supply condition.

### **4. Types of structural remedies**

#### ***4.1 Divestitures***

The Commission attempts to ensure that divested entities are viable stand-alone not dependant on the merged entity. This means that all assets and personnel that are required for the operation of the business be included in the transaction.

What should constitute assets to be divested is dependent on the circumstances of each case. While the divestiture of a brand may not be necessary in intermediate input markets, technology (e.g. patents) and know-how which may be possessed by specific employees could be amongst assets/resources that should be included in intermediate inputs market divestitures.

On the other hand, where products are sold directly to end consumers there may be a need to divest not just the physical assets but also brands. In the merger between *Unilever PLC/Unilever N.V. and Sara Lee Corporation* the Tribunal ordered the divestiture of the Status deodorant brand in addition to various other assets.

#### ***4.2 Firewalls and barring appointment of board members in competitors***

In situations where the merger is likely to facilitate co-ordination as a result of information exchange between firms in the same line of business due to cross-shareholding, the Commission has required the

parties or one of the parties to refrain from appointing board representatives to the board of a competitor wherein such firm has minority shareholding.

In the *Akzo Nobel N.V. (Akzo) and Imperial Chemical Industries PLC (ICI)* merger the Commission found that an indirect structural link was established between Plascon and Dulux, two prominent decorative coatings brands, through their shared interest in International Paint Joint Venture. Akzo was in this joint venture with the then Barloworld Coatings, a supplier of Plascon branded decorative coatings and ICI, the target firm, controlled Dulux.

In order to allay the competition concerns of a co-ordinated nature the merging parties tendered and the Commission accepted as a condition that the: *“The acquiring firm must ensure, for so long as it owns a controlling interest in both ICI/Dulux and International Paint, that no person may serve as a director or executive, or attend board meetings, of both International Paint and ICI/Dulux simultaneously.”*

## **5. Types of behavioural remedies**

During 2010 six mergers were subject to behavioural remedies, three relating to supply conditions and three to access and interoperability conditions.

### **5.1 Supply conditions**

Supply conditions are imposed in vertical mergers where foreclosure concerns arise. The duration of supply conditions depends on the level of innovation in the market. In the *MTO Boskor* merger which involved a dominant upstream forestry company acquiring a major downstream sawmilling company, the Commission required the forestry company to supply for a period of 10 years a significant percentage of saw logs to the open market. The terms and conditions of the sale of saw logs had to be on the same terms and conditions as the forestry company sells to the target sawmill.

### **5.2 Access and interoperability conditions**

The Commission during the course of 2010 issued 3 decisions with remedies relating to access and interoperability. In the *Softline & Netcash* merger, the merging parties were found dominant in the market for accounting software and the market for payment infrastructure. The transaction would have potentially resulted in a competing payment infrastructure firm being foreclosed from access to the accounting software of the acquiring firm. The Commission therefore imposed a remedy on the parties to ensure proper access and interoperability to the accounting software of the acquiring firm is provided to the competitors of the target. The other two transactions related to the banking payment system in ensuring competing firms were able to continue to access and compete with the merged entity.

## **6. Process in implementing divestiture conditions**

The Commission follows closely international best practice in devising effective divestiture conditions. A trustee, appointed by the merging parties and approved by the Commission, monitors the divestiture process, ensures that the divested entity is not “run down” and reports progress to the Commission.

The Commission generally does not require divestiture to occur before the merger is implemented. The divestitures are generally required to be implemented between 6 and 18 months from date of approval.

In the event the parties are not able to divest within the prescribed time period, the Commission may order the trustee to dispose of the assets at no minimum value. None of the divestitures ordered by the Commission to date has had to take such a step. A divestiture may only be concluded when the

Commission is satisfied that the proposed purchasers is sufficiently independent of the parties and will be able to compete effectively in the market. In *Mercanto Investments (Pty) Ltd and Johnnic Holdings Ltd* the merger was approved subject to the condition that a business be divested within 12 months. The merging parties proposed that this condition could be fulfilled by unbundling the divested business to its shareholders. This view was rejected by the Commission on the ground that the shareholders were not independent of the merging parties.

## **7. Public interest remedies**

The most common remedy or condition based on public interest ground is limiting the number of job losses occurring as a result of a merger.

This type of remedy is increasingly being advocated by trade unions and government officials in our processes, this is due to high unemployment rates in South Africa and job creation and retrenchments being the priority public policy issue.

During October 2010, the Competition Tribunal has found in a merger involving two major insurance companies *Metropolitan & Momentum* that the proposed job losses (1000 employees) was not justified to be in the public's interest. This is because, the parties could not prove that there was a rational process followed to arrive at the determination of the number of jobs to be lost and the number of jobs proposed to be shed as a result of the merger. Furthermore, the Tribunal ruled that the public interest in preventing employment loss is balanced by an equally weighty public interest justifying the job losses and the parties were not able to justify to the Tribunal that it was in the public's interest to retrench 1000 employees. The benefits of retrenchment would only accrue to the shareholders which is a private interest.

Therefore the Competition Tribunal found that the job losses to occur as a result of the merger were significant and not in the public's interest and in order to remedy the significant effect on employment the Tribunal ordered that a moratorium be placed on the retrenchment of all employees (except senior management) for a period of two years.

## **8. Conclusion**

The Competition authorities have used structural, behavioural and a combination of the two remedies in matters where competition concerns have arisen. The Commission requires the appointment of a trustee and obliges parties to provide monitoring reports on a regular basis to the Commission. Often the facts of the particular merger determine the most relevant effective remedy.

In addition to the competition concerns potentially remedied the authorities often impose remedies to transactions in instances where a merger cannot be justified to be in the public interest where for example the merger will result in significant job losses and where affected employees are unlikely to regain alternative employment in the short term.

## CHINESE TAIPEI

### 1. General points

Pursuant to Article 12 of the Fair Trade Act, the Fair Trade Commission (the Commission) may not prohibit any of the mergers filed if the overall economic benefit of the merger outweighs the disadvantages resulting from competition restraint. The Commission's standard for merger review depends on whether the overall economic benefit of the merger outweighs the disadvantages resulting from its restraint on competition. Thus, the net effect between the economic benefit and the disadvantages in terms of the competition restraint resulting from the merger is the basis of the substantive test. If there is no suspicion of obvious competition restraint in the merger filing, then the overall economic benefits of the merger can be considered to outweigh the disadvantages resulting from competition restraint. On the other hand, the Commission is also empowered to attach conditions or require undertakings in its decision to the notified merger if it is satisfied that the measure taken can produce enough economic benefits to outweigh the disadvantages resulting from competition restraint.

If the merger fails to perform the undertakings required by the Commission, the Commission may act in line with Article 13 of the Fair Trade Act to prohibit the merger, and if so, it may prescribe a period for such enterprise(s) to split, to dispose of all or a part of its shares, to transfer a part of its operations, to remove certain persons from position, or to make any other necessary disposition. In the case of such enterprise(s) violating the aforesaid disposition made by the Commission, the Commission may order the dissolution of such enterprise(s), or the suspension or termination of its operations.

The Fair Trade Act does not require that merging parties have the obligation to propose remedies. However, in order to eliminate the suspicion of competition restraint in the merger filing and ensure the realization of the overall economic benefit of the merger, the merging parties automatically provide proposed remedies to the Commission. In fact, to ensure that the merging parties could comply with the Commission's remedy order, the Commission has required undertakings in its decision to require the merger applicant to periodically provide related documents and information to the Commission within a specified period of time.

### 2. Types of merger remedies and application criteria

Among the merger cases that the Commission has reviewed, conditions attached to non-prohibition decisions are not uncommon. The Commission's practice regarding the treatment of merger remedies includes structural and behavioral remedies. However, the Commission does not set forth the guidelines or best practices with regard to the merger remedies, but makes its decisions on a case-by-case basis.

The Commission usually imposes behavioral remedies on parties to a merger when it attaches conditions or requires undertakings in its decisions. It was not until the recent cable TV merger cases that the Commission made its decisions to impose structural remedies. The Commission imposed such remedies to prevent the merging parties from undertaking practices to restrict competition or impede fair competition, and also took into consideration the regulations of the Cable Radio and Television Act. Currently, all the structural remedies imposed by the Commission require that the merging parties put limits on the shareholdings or appointment of directors and supervisors.



### **3. Contents of remedies**

The Commission has never imposed the divestiture remedy in merger control. All the structural remedies have been to dispose of all or a part of the shares or remove certain persons from positions of directors and supervisors. In practice, there are four main types of behavioral remedies as follows: (1) the merging parties shall not employ their market position after the merger to conduct a boycott; (2) the merging parties shall not employ their market position after the merger to engage in unfair transactions with any trading counterparts or enter into agreements that may lead to competition restraint; (3) the merging parties shall not abuse their market position after the merger to improperly determine prices, or engage in restraints on competition or impede fair competition; and (4) the merging parties have the obligation to co-operate with the Commission's supervision following the merger.

The Commission has mostly used behavioral remedies in the past. However, in the case regarding Holiday Entertainment Co. & Cashbox Partyworld Co., the Commission considered that the purpose behind the merger control was to prevent enterprises from forming a monopoly or acquiring monopolistic power through a merger and causing a substantial lessening of competition. Therefore, "merger remedies" adopted to accomplish the aforesaid purpose of merger control must be able to "restore competition" effectively, and not be involved in controlling prices or quantities after the merger. This is the first time for the Commission to raise the concept of structural remedies in this case. Even though the Commission has not yet used the structural remedies as the primary consideration in merger control, such a concept indicates that the Commission has significantly changed the choices of merger remedies.

### **4. Supervision of remedies**

The competition authorities of most countries tend to impose structural instead of behavioral remedies chiefly because structural remedies are more clear and easier to supervise. On the other hand, behavioral remedies are subject to the disadvantages of requiring ongoing supervision, enforcement and compliance activities. As Chinese Taipei is a small economy, it is easier to choose behavioral remedies to promote market competition than structural remedies. In order to supervise the enforcement of the behavioral remedies, the Commission has required undertakings in its decision to require the merging parties to submit reports and related documents in a number of recent cases, such as the merger of Wangzhong Broadband Media Co., Ltd. with 11 cable TV system operators, the extraterritorial merger between US-based Microsoft Corporation and US-based Yahoo! Inc, and so on.

### **5. The roles of third parties and the public in commenting on proposed remedies**

During the process of reviewing merger cases, the Commission always solicits the opinions of all sectors by posting public announcements on its website and sometimes and, depending on the cases, by holding consultation meetings or sending official letters to obtain the opinions from other government entities, industrial sectors and academicians to serve as reference for the decision as to whether the conditions attached are necessary and what type of conditions should be attached. At the same time, the Commission also requests opinions from regulatory agencies to serve as reference to evaluate both the overall economic benefit of the merger and the disadvantages resulting from the competition restraint.

### **6. Case examples**

#### **6.1 *Case 1: Cable TV merger – Wangzhong Broadband Media Co., Ltd. & 11 cable TV system operators***

In 2010, Wangzhong Broadband Media Co., Ltd., through acquiring 100% of the shares of Anshun Development Co., Ltd. (Anshun) and Bokang Development Co., Ltd. (Bokang), intended to have direct

control of the financial affairs, business operations and the appointment or discharge of personnel of Anshun and Bokang as well as their subsidiaries (including Jilong and 10 other cable TV system operators). Wangzhong Broadband Media Co., Ltd. filed a pre-merger notification in accordance with the Fair Trade Act.

Since the total number of cable TV operators' subscribers controlled by the merging parties did not exceed one-third of the total number of subscribers nationwide, and the total number of program contents provided by the merging parties did not exceed one quarter of the number of available channels, the Commission was of the view that this merger would not cause significant disadvantages resulting from competition restraint. In addition, this merger could improve the overall economic benefit that will promote the development of the digitalization of cable TV, boost the development of the video media industry, promote the development and competition of the digital convergence industry and help with the provision of various selections to the consumers.

However, this case might give rise to concerns that the merging parties might engage in restricting competition in the cable radio and television system service market, the satellite radio and television program market, as well as the online shopping and mail order markets. In order to ensure that the overall economic benefit of the merger outweighs the disadvantages resulting from competition restraint, the Commission imposed undertakings on merging parties in its decisions and requested that the merging parties perform undertakings. The structural and behavioral remedies as well as supervisory measures employed by the Commission included:

- Without the consent of the Commission, the board of directors, supervisors or managers of merging parties and their subsidiaries shall not serve as directors, supervisors or managers of Eastern Media International, CTI Television Incorporation, Netwave Cable TV Co., Ltd., Hsin Yeong An Cable TV Co., Ltd., and Powerful Cable TV Co., Ltd; while the board of directors, supervisors or managers of Eastern Media International, CTI Television Incorporation, Netwave Cable TV Co., Ltd., Hsin Yeong An Cable TV Co., Ltd., and Powerful Cable TV Co. also shall not serve as directors, supervisors or managers in any of the merging parties and their subsidiaries.
- Without the consent of the Commission, the board of directors, supervisors or managers of the merging enterprises and their subsidiaries shall not serve as directors, supervisors or managers of any other cable TV systems operators and their subsidiaries.
- Without the consent of the Commission, the merging parties and their subsidiaries shall not produce or represent other analog satellite radio and television programs, except the existing analog satellite radio and television programs they produce or represent.
- Without the consent of the Commission, the merging parties and their subsidiaries shall not produce or represent any TV shopping programs.
- The applicant and its subsidiaries are required to make every effort to ensure the transfer of such shares to the original shareholders first or buy the shares back in other ways to maintain the shareholding structure simplification when their shareholders decide to transfer their shares in the future.
- Without justification, the merging parties and their subsidiaries shall not refuse to license the satellite radio and television programs produced or represented by them to other cable television systems operators, live satellite radio and television services operators, multimedia contents

transmission services providers or other competing cable or wireless transmission channel service providers, or engage in other discriminative conduct.

- Without justification, the merging enterprises and their subsidiaries shall not offer different trading terms and conditions pertaining to the price or otherwise to license the satellite radio and television programs produced or represented by them to other cable television system operators, live satellite radio and television services operators, multimedia contents transmission services providers or other competing cable or wireless transmission channel service providers.
- When co-operating with advertising or TV shopping businesses to broadcast product advertisement or TV shopping programs on designated advertising channels, if without justification, the merging parties and their subsidiaries shall not refuse to trade, undertake discriminative treatment, or collaborate with other enterprises to jointly boycott the advertising or TV shopping businesses.
- The merging parties and their subsidiaries shall perform the following tasks that are beneficial to the overall economic interest from the day after implementing a merger:
  - Make active efforts to complete the digitalization of cable TV and two-way construction of the cable television system network to increase program options for consumers.
  - Make active efforts to accomplish the target of the penetration of digital cable TV stated in the “Digital Convergence Policy Initiative” passed by the Cabinet on July 8, 2010 to help promote the development of digital convergence.
  - Make active efforts to acquire the authorization from satellite radio and television program providers to broadcast satellite programs through Internet Protocol TV (IPTV) and then authorize IPTV operators to run such programs in a fair and reasonable manner.
  - Make active efforts to improve the quality of high-definition digital content and channels, promote the development of cultural and creative industries, create a high-definition program area in various cable TV systems, and encourage domestic channel operators to speed up their production of digital programs.
  - Make active efforts to provide diverse digital content services, protect the right of access to digital media for low-income families, and offer preferential fees for low-income subscribers to digital programs.
  - Make active efforts to allow designated advertising channels to be shared by several advertising or TV shopping businesses for broadcasting product advertisement or TV shopping advertising programs.
- The applicant shall submit the following information to the Commission by July 1 of each year within five years from the day after implementing a merger:
  - The names of the satellite radio and television programs produced, represented, or sold by the merging parties and their subsidiaries along with the agency contracts.
  - Information on price quotations, contract amounts and contracts for broadcasting product advertisement or TV shopping advertising programs through the designated advertising

channels provided by the merging parties and their subsidiaries to advertising or TV shopping businesses.

- A report on the outcomes in improvement of the overall economic benefit (including but not limited to the tasks prescribed in Point 9.)
- The applicant shall submit information regarding all changes to the board of directors, supervisors, managers and company charters to the Commission within five years from the day after implementing a merger.

## **6.2 Case 2: Extraterritorial merger –US-based Microsoft Corporation (hereinafter Microsoft) & US-based Yahoo! Inc. (hereinafter Yahoo)**

The two corporations proposed to merge outside of the territory of Chinese Taipei. Yahoo authorized Microsoft to use part of its core search technology. Microsoft consolidated the search engines and keyword-based advertising platforms of both companies and became the exclusive provider of these services for Yahoo. After the said consolidation, Yahoo stopped operating the above-mentioned businesses and instead became responsible for the promotion and management of “Premium Direct Advertisers” (PDAs). Such a merger constituted the merger type set forth in Subparagraph 4 of Paragraph 1 of Article 6 of the Fair Trade Act. In addition, the sales of the subsidiaries of both corporations in Chinese Taipei exceeded NTD 4.5 billion for the preceding fiscal year and Yahoo’s subsidiary Yahoo! Taiwan Holdings Limited (Hong Kong), Taiwan Branch (hereinafter Yahoo Taiwan) had more than 65% of the market share in the keyword-based advertising market in 2008. Therefore, the extraterritorial merger of Microsoft and Yahoo had a direct, substantial and reasonably foreseeable impact on the relevant market in Chinese Taipei and thus fell under the jurisdiction of the Commission. At the same time, as Yahoo Taiwan already had more than a 25% market share in the internet advertising and keyword-based advertising service markets, this reached the threshold for pre-merger notification filing as required by Subparagraph 2 of Paragraph 1 of Article 11 of the Fair Trade Act and also did not fall into the exceptions provided in Article 11-1 of the same Act. Therefore, the subsidiaries of both corporations in Chinese Taipei (i.e., Microsoft Taiwan and Yahoo Taiwan) filed a merger with the Commission according to the Fair Trade Act.

Before the merger, Microsoft had not provided the keyword-based advertising platform service in Chinese Taipei, thus competition between the two firms had not existed. After the merger, Microsoft consolidated the technologies of both firms and became the provider of the keyword-based advertising platform service, whereas Yahoo stopped providing such a service. Based on the distribution mechanism for the revenue from keyword-based advertising sales as well as each firm’s interests, both firms were to make separate endeavors to increase income from keyword-based advertising businesses. Each firm operated its portals and, although Microsoft was responsible for providing the search technology, Yahoo retained the right to edit the contents of the web pages. After investigation, the Commission made a decision that a merger of Microsoft and Yahoo did not give rise to a significant concern about causing competition restraints and the overall economic benefit of the merger outweighed the disadvantages resulting from competition restraints. Therefore, the Commission did not prohibit the merger.

However, in order to prevent the applicant from employing market power through such a merger and engaging in competition restraint or unfair competition in the search service and keyword-based advertising service markets, the Commission imposed undertakings on merging parties in its decisions in accordance with Paragraph 2 of Article 12 and requested that merging parties should perform undertakings. Those behavioral remedies included:

- The applicant shall not employ its market position after the merger to improperly restrict any keyword-based advertising trading counterparts from trading with any particular enterprises;

- The applicant shall not employ its market position after the merger to engage in other unfair transactions with any trading counterparts or enter into agreements concerning trading conditions that may lead to competition restraint;
- The applicant shall not employ its market position after the merger to improperly determine, maintain or alter prices, or impede other enterprises' fair competition or other actions abusing its dominant market position;
- The applicant is required, within three years from the day after the receipt of this merger decision, to provide the Commission with the following information before the end of December each year: the operating scale of the keyword-based advertising, the numbers of employees and researchers in Chinese Taipei, and the industrial structure such as the market share, and so on.

### 6.3 *Case 3: KTV merger –Holiday Entertainment Co. & Cashbox Partyworld Co.*

The merger which Holiday Entertainment Co. planned with Cashbox Partyworld Co. falls under the type of merger set forth in Articles 6 (1)(i) and 11(1)(i) of the Fair Trade Act. As the overall economic benefits of such a merger would not outweigh the disadvantages resulting from the competition restraint caused by the merger, the Commission decided to prohibit the merger in accordance with Article 12(1) of the Fair Trade Act.

Holiday Entertainment Co. and Cashbox Partyworld Co. are the two largest enterprises in the audiovisual and singing service market. Before the merger occurs, the merging parties are the chief competitors of each other and will acquire a monopolistic position after their merger. The Commission found that the merger would not only eliminate competitive pressure between merging parties, but also the rest of the competitors have a market share of less than 1%. Therefore, the other competitors in the market are unable to exert competitive pressure on the merging parties in the short term.

The merger will not only eliminate the effective competition state which has already existed in the audiovisual and singing service market, but will also make it possible to eliminate the benefits of competition brought about by the original circumstances of resistance towards price negotiation among the upstream counterparts and the merging parties. There is a lack of effective competition in the market and no effective mechanism to ensure that the merging parties could improve the economic benefits to a certain degree effectively. Therefore, the overall economic benefits of such a merger obviously do not outweigh the disadvantages resulting from the competition restraint caused by the merger.

In spite of the remedies the merging parties proposed, the Commission still decided to prohibit the merger for the following reasons:

- Although the merging parties submitted their commitments that they would not raise prices within five years and would absorb all raw material cost increases as its feedback to consumers, the Commission was of the view that the commitment to “no price raise” could only prevent consumers' benefits from suffering loss, but might not cause consumers to attain even more benefits. On the one hand, if a market situation changes after the approval of the merger, the merging parties' operating costs will be reduced but consumers will be unable to request that the merging parties lower prices or service remuneration to repay themselves; on the other hand, there will be a lack of an effective market competition mechanism to supervise the merging parties' continuous engagement in innovation or improvement of service quality. Besides, if the merger were not approved, it would be possible for consumers to obtain better services or similar services at lower prices in a more competitive market.

- The merging parties committed to “maintain dual brands as Cashbox and Holiday after the merger and maintain the operation of their businesses in the existing operating places.” The Commission considered that such dual brand operation was merely the internal operating strategy of the merging parties and could not increase external competition to actually raise the degree of competition in the audiovisual and singing service market. The commitment could perhaps ensure that consumers would still have the same number of choices, but it cannot improve the quantities and quality of services, and consumption convenience provided by the services for consumers. Moreover, the merging parties stated that there were still the provisos such as natural disasters, price fluctuations, downturns in the overall economy, house property owners unwilling to renew their leases, and so forth. In other words, the merging parties might be unable to fulfill the commitment because of certain uncontrollable factors. On the other hand, the commitment might obstruct elimination of inefficient operating places and thus conflict with the objective of the merger to integrate resources and save manpower costs.
- The Commission also asserted that “merger remedies” must be able to “restore competition” effectively for substantial injuries caused by competition, and not be involved in controlling prices or quantities after the merger. Such control measures would be inconsistent with the determination mechanism for the free market that is encouraged by the competition law. Even if the aforesaid commitments proposed by the merging parties are indeed carried out, the performance of these commitments will not be able to restore the level of competition to the previous position when the merger had not occurred. On the contrary, under the circumstance of there being a lack of effective market competition, this merger forced the competition authority to intervene in the prices or quantities of the enterprises’ services or products. Therefore, it is difficult for the Commission to believe that implementing these commitments is sufficient to resolve the anti-competition concerns caused by the merger.



## BIAC

BIAC welcomes the opportunity to provide its views to the OECD Competition Committee on the issue of merger remedies.

### 1. Introduction

A significant percentage of mergers involve firms whose primary customers are business entities rather than individuals. In a merger creating anticompetitive effects, the two merging parties stand to benefit from supracompetitive pricing and unjust enrichment. The harm, however, can extend to immediate purchasers, to downstream (indirect) customers, and, in the case of a merger resulting in unilateral power, to competitors. A failure to impose effective remedies can often result in direct harm to the business community at several levels. Thus, the business community shares an interest with competition authorities in ensuring effective merger enforcement through the imposition of remedies.

BIAC recognizes the significant efforts undertaken by competition authorities to provide guidance and transparency into their analysis of effective merger remedies. Much has been done since BIAC previously presented its views to the Competition Committee on this issue.<sup>1</sup> Authorities in many jurisdictions have given the issue of merger remedies significant attention. For example, the U.S. Department of Justice's Antitrust Division ("DOJ") issued its first policy guide to merger remedies in 2004<sup>2</sup> and published its revised guidance very recently.<sup>3</sup> The Canadian Competition Bureau published its merger remedy policy in 2006.<sup>4</sup> The European Commission ("EC") conducted a well-publicized study on remedies (2005) and released a revised remedies notice that drew heavily on the results of its earlier study (2008).<sup>5</sup> The UK's Competition Commission also published its own study on the effectiveness of merger remedies in 2008 and then released its new guidelines later that year.<sup>6</sup> At the same time, emerging economies continue to introduce competition regimes that frequently include merger control and remedial provisions.

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<sup>1</sup> Summary of Discussion Points, Presented by BIAC to the OECD (Oct. 17, 2003).

<sup>2</sup> U.S. Dep't of Justice Antitrust Div., Antitrust Division Policy Guide to Merger Remedies (Oct. 2004), available at <http://www.justice.gov/atr/public/guidelines/205108.pdf> (hereafter "2004 DOJ Merger Remedies Policy").

<sup>3</sup> U.S. Dep't of Justice Antitrust Div., Antitrust Division Policy Guide to Merger Remedies (June 2011), available at <http://www.justice.gov/atr/public/guidelines/272350.pdf> (hereafter "2011 DOJ Merger Remedies Policy").

<sup>4</sup> Canadian Competition Bureau, Information Bulletin on Merger Remedies in Canada, (Sept. 26, 2006), available at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Mergers\\_Remedies\\_PDF\\_EN1.pdf/\\$FILE/Mergers\\_Remedies\\_PDF\\_EN1.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Mergers_Remedies_PDF_EN1.pdf/$FILE/Mergers_Remedies_PDF_EN1.pdf).

<sup>5</sup> Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) 802/2004, 2008 O.J. (C 267) 1, (hereinafter "EC Notice on Merger Remedies").

<sup>6</sup> Competition Commission, Merger Remedies: Competition Commission Guidelines, (Nov. 2008), available at [http://www.competition-commission.org.uk/rep\\_pub/rules\\_and\\_guide/pdf/CC8.pdf](http://www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/CC8.pdf) (hereinafter "UK Merger Remedies Guidelines").



As an initial observation, competition agencies – particularly the U.S. DOJ and the Canadian Competition Bureau – have increasingly moved away from the imposition of remedies premised on static assumptions. These agencies have in recent years taken a more flexible case-by-case approach to merger remedies and that is, in BIAC’s view, the better course. Competition agencies’ shift away from some of the sweeping generalizations found in existing and former policy statements brings into question the continued utility of static assumptions to the business community. Therefore, the Committee’s consideration of merger remedy policy is especially appropriate at this time.

## 2. The imposition of merger remedies should serve an important but limited purpose

In 2002, then-DOJ Deputy Assistant Attorney General (and future FTC Chairman) Deborah Majoras argued for merger remedies having a narrow purpose in the following terms:

*The goal [of merger review] is not to review the market and decide how it would best operate. Rather, the goal is to effectively remedy the violation for the benefit of consumers, maintaining competition at premerger levels. Once the violation is remedied, competition will decide how the market performs, including choosing the winners and losers.*<sup>7</sup>

More recently, Assistant Attorney General Varney echoed this view when she explained that the DOJ’s job is simply to prevent the anticompetitive harms that a merger presents. “That is a limited role: whatever we might want a particular industry to look like, a merger does not provide us an open invitation to remake an industry or a firm’s business model to make it more consumer friendly.”<sup>8</sup>

In Canada, the Supreme Court has taken a similar view on the purpose of remedies in the mergers context:

*The evil to which the drafters of the Competition Act addressed themselves is substantial lessening of competition. . . . It hardly needs arguing that the appropriate remedy for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger.*<sup>9</sup>

Global competition authorities have correctly embraced a policy of limited government interference with market forces.<sup>10</sup> In Canada, then-Competition Bureau Deputy Director André Lafond (whose remarks related to the regulation of industry generally, and not merely via merger enforcement) asserted that “markets are best allowed to regulate business behaviour. In other words, the less role that regulators and

<sup>7</sup> Deborah Platt Majoras, Antitrust Remedies in the United States: Adhering to Sound Principles in a Multi-Faceted Scheme, Address Before the Canadian Bar Association National Law Section 2002 Annual Fall Conference on Competition Law 6 (Oct. 4, 2002), available at <http://www.justice.gov/atr/public/speeches/200354.pdf>.

<sup>8</sup> Christine A. Varney, The Ticketmaster/Live Nation Merger Review and Consent Decree in Perspective, Remarks as Prepared for South by Southwest 1-2 (Mar. 18, 2010), available at <http://www.justice.gov/atr/public/speeches/263320.pdf>.

<sup>9</sup> Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748 at ¶ 85. Indeed, according to the Supreme Court “presumably *some* lessening of competition following a merger is tolerated, because the Act proscribes only a *substantial* lessening of competition.” *Id.* at ¶ 83 (emphasis in original).

<sup>10</sup> Richard G. Parker & David A. Balto, *The Evolving Approach to Merger Remedies*, ANTITRUST REPORT (May 2000), also available at <http://www.ftc.gov/speeches/other/remedies.shtml> (“The FTC is not a market regulator. Apart from enforcing the prohibitions that are contained in the antitrust laws, our job is not to regulate or prescribe the market behavior of firms. That is a function of the competitive process.”).

the Competition Bureau have in the market, the better.”<sup>11</sup> In Europe, Hungary, for example, has explicitly established that its Competition Council “may not undertake the general role of a market regulator even if it would lead to more desirable circumstances for competition.”<sup>12</sup> The EC fully supported the principle that competition authorities should not use merger review to engage in industrial planning in its comments to the previous OECD roundtable on the issue. More precisely, the French concentration guidelines specify that remedies should not be used to protect specific competitors rather than competition, or for protectionist purposes.<sup>13</sup>

Merger remedies should be closely tied to the specific competitive harms likely to emerge from the transaction. They should be crafted to protect against the lessening of competition, and no more. Remedies that are too broad – that is, those that impose too many restrictions on the merged firm’s business conduct or those that require the divestiture of more assets than are necessary to create a viable new competitor in the marketplace – should be avoided. Such remedies risk eliminating the efficiencies created by a merger, preventing the parties from achieving economies of scale, and reducing the value of the assets acquired, without benefiting the marketplace or the parties’ customers. Put differently, merger remedies should be proportionate to the anticompetitive harm. If the risk of harm is uncertain or the scope of harm is limited, competition authorities should adjust their remedial demands to ensure that the remedy proposed is, in the words of the EC, “proportionate to the competition problem.”<sup>14</sup>

It is imperative, therefore, that remedies imposed by antitrust enforcement authorities protect competition – as a foremost concern – but do so in a manner that limits the costs of the remedy to the parties involved so as to preserve, to the greatest extent possible, the efficiencies that otherwise would derive from the transaction and not to unduly damage the value of the transaction to the respective parties.

BIAC reiterates its belief that flexibility in evaluating remedy proposals and in determining the conditions of those remedies should be a priority for enforcement agencies.<sup>15</sup> Inflexible rules of policies in favour of a certain form of relief (*e.g.*, divestiture) or implementation of relief (*e.g.*, up-front buyer) should not be adhered to automatically but only after carefully weighing up the need for such remedies in each particular case. Agencies should assess which form of relief best preserves competition given the specific facts of each particular case.

Adherence to certain “guiding principles” can be useful, such as accepting only those remedies that resolve the competitive problem or crafting remedies that are clear and straightforward. Such guiding principles can serve as a useful starting point for the evaluation of remedies, but should not serve as an

<sup>11</sup> André Lafond, *The Roles and Responsibilities of the Industry Regulator versus the Competition Bureau as Regulated Industries Become Competitive*, Address to the Conference Board Regulatory Reform Program Meeting (Feb. 19, 1999), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00864.html>.

<sup>12</sup> Written Submission from Hungary, OECD Policy Roundtable on Merger Remedies, [DAF/COMP\(2004\)21](#), ¶ 1.3 (Dec. 2004).

<sup>13</sup> Autorité de la Concurrence, *Lignes directrices de l’Autorité de la concurrence relatives au contrôle des concentrations*, (Dec. 2009), ¶ 526, available at [http://www.autoritedelaconcurrence.fr/doc/ld\\_concentrations\\_dec09.pdf](http://www.autoritedelaconcurrence.fr/doc/ld_concentrations_dec09.pdf) (hereinafter “French Concentration Guidelines”).

<sup>14</sup> EC Notice on Merger Remedies, *supra* note 5, ¶ 85.

<sup>15</sup> Summary of Discussion Points, Presented by John M. Taladay of BIAC to the OECD (Oct. 17, 2003) at 2; *see also* Summary of Discussion Points, Presented by John M. Taladay and the BIAC to the OECD Global Forum on Competition: “Cross-Border Merger Control: Challenges for Developing and Emerging Economies,” (Feb. 17, 2011); Summary of Discussion Points, Presented by Ilene Knable Gotts and the BIAC to the OECD Working Party No. 3 Roundtable on Cross Border Merger Remedies (Feb 15, 2005).

ending point. The same incentives that caused competition agencies in recent years to discard rigid market-share based structural presumptions for substantive merger analysis in favour of economically-grounded, dynamic factual assessment should cause agencies to re-evaluate the presumptions underlying rote, inflexible application of remedy provisions. In short, rigid adherence to remedy presumptions should be avoided.

Over-reliance on remedy presumptions – for instance the requirement of structural remedies in all horizontal merger cases – will prevent competition authorities from carefully considering the unique facts about the parties and market dynamics that relate to the specific merger under review. Moreover, it will needlessly require merging parties (and, perhaps competitors who complain about the anticompetitive aspects of the merger) that present a unique but effective fix to “swim upstream” against agency policy. Where parties or other interested actors present a competition agency with a remedy, and compelling reasons why that remedy resolves competition concerns, the burden should not be on those parties to explain why an inflexible presumption is inapplicable.

### 3. Behavioural remedies

#### 3.1 *Behavioural remedies should receive the same flexible, case-by-case consideration as do structural remedies in order to ensure the best remedial outcomes*

Behavioural remedies can be effective in helping to preserve competition, whether or not implemented in conjunction with or in support of structural relief. For example, the divestiture of certain assets to an independent business may not sufficiently create viable new competition to replace the acquired firm’s competitive presence, if the divestiture buyer lacks necessary inputs to compete effectively. In these cases, behavioural relief such as requiring the merged company to enter into a supply agreement with the divestiture buyer or guaranteeing non-discriminatory access to important competitive inputs may well be the most appropriate way to preserve competition while retaining the procompetitive aspects of the merger. The EC recently imposed such behavioural conditions in its *Intel/McAfee* decision.<sup>16</sup>

Merging parties and the customers they serve may, in fact, prefer the imposition of reasonable obligations on the conduct of the merged entity to the compelled divestiture of additional assets, because the latter may reduce the productive value of the assets being acquired and may prevent the post-merger company from achieving efficiencies that can be passed along to the customers. Therefore, presumptions against the imposition of conduct remedies should be reconsidered and perhaps superseded with a formal recognition that the imposition of conduct remedies will be evaluated under a flexible approach that considers each merger on its own merits. The revised EC remedies notice states that the question of “which type of remedy is suitable to eliminate the competition concerns identified has to be examined on a case-by-case basis;”<sup>17</sup> however, this nuanced approach may be overshadowed by the EC’s expressed clear preference for structural relief (“Divestiture commitments are the best way to eliminate competition concerns resulting from horizontal overlaps”).<sup>18</sup> Such a generalized statement of enforcement does not reflect the kind of case-by-case analysis that is appropriate in evaluating complex markets. Perhaps in

<sup>16</sup> Case No COMP/M.5984, *Intel/McAfee*, C(2011) 529 final, available at [http://ec.europa.eu/competition/mergers/cases/decisions/m5984\\_20110126\\_20212\\_1685278\\_EN.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m5984_20110126_20212_1685278_EN.pdf).

<sup>17</sup> EC Notice on Merger Remedies, *supra*, note 5, ¶ 16.

<sup>18</sup> *Id.* ¶ 17.

recognition of this, the DOJ replaced the strong preference for structural relief found in its 2004 guidelines with a more flexible approach.<sup>19</sup>

This is especially true given numerous jurisdictions' acceptance of behavioural remedies, particularly where structural remedies are not viable or where behavioural remedies can be tailored to the identified competitive harm. Finland's *Valio/Aito Maito* case<sup>20</sup> (2000) and the UK's *Dräger/Air-Shields* case<sup>21</sup> (2004) illustrate circumstances where structural relief was considered impractical and therefore behavioural remedies were imposed. More recently, the UK determined that "a package of behavioural remedies . . . has a high probability of being effective in addressing the adverse effects of the merger" proposed between Macquarie UK Ventures and National Grid Wireless Group.<sup>22</sup>

### 3.2 *Behavioural remedies must be clear and straightforward*

While behavioural remedies may be appropriate in certain circumstances, they should still be subject to the guiding principle favouring clear, straightforward remedies. The DOJ policy states:

*[A] remedy is not effective if it cannot be enforced. Remedial provisions that are too vague to be enforced or that could be construed when enforced, or that can easily be misconstrued or evaded, fall short of their intended purpose and may leave the competitive harm unchecked.*<sup>23</sup>

Provisions that do not clearly define what conduct is required or prohibited can present compliance challenges, not only to the merging parties themselves but also to other stakeholders such as customers, suppliers, or licensees. An example can be found in the DOJ's *Ticketmaster/Live Nation* final judgment.<sup>24</sup> The parties agreed to a settlement containing extensive behavioural remedies, including the following:

*Nothing in this Section prevents Defendants from bundling their services and products in any combination or from exercising their own business judgment in whether and how to pursue, develop, expand, or compete for any ticketing, venue, promotions, artist management, or any other business, so long as Defendants do so in a manner that is not inconsistent with the provisions of this Section.*<sup>25</sup>

It is unclear how easily Ticketmaster will be able to comply with this provision. The law in the United States on bundling is hardly settled. Given the uncertainty in this area, a behavioural provision that permits

<sup>19</sup> Compare 2004 DOJ Merger Remedies Policy, *supra* note 2, § III.A. ("structural remedies are preferred to conduct remedies in merger cases") with 2011 DOJ Merger Remedies Policy, *supra* note 3, § II ("Effective merger remedies typically include structural or conduct provisions. Each can be used to preserve competition in the appropriate factual circumstances.").

<sup>20</sup> Press Release, Finnish Competition Authority, Conditional Approval of Acquisition of Osuuskuunta Maito-Pirkka, Kainuun Osuusmeijeri and Aito Maito by Valio (June 20, 2000), available at <http://www.kilpailuvirasto.fi/cgi-bin/english.cgi?luku=news-archive&sivu=news/n-2000-06-20>.

<sup>21</sup> Dräger Medical AG & Co KGaA and Hillenbrand Industries, Inc. (May 2004), available at [http://www.competition-commission.org.uk/rep\\_pub/reports/2004/fulltext/489.pdf](http://www.competition-commission.org.uk/rep_pub/reports/2004/fulltext/489.pdf).

<sup>22</sup> Macquarie UK Broadcast Ventures Ltd./National Grid Wireless Group 12 (Mar. 11, 2008), available at [http://www.competition-commission.org.uk/rep\\_pub/reports/2008/fulltext/537.pdf](http://www.competition-commission.org.uk/rep_pub/reports/2008/fulltext/537.pdf).

<sup>23</sup> 2011 DOJ Merger Remedies Policy, *supra* note 3, § II.B.

<sup>24</sup> United States v. Ticketmaster Entertainment Inc., *et al*, Case No. 1-10-cv-00139 (D.D.C. July 30, 2010) (Final Judgment), available at <http://www.justice.gov/atr/cases/f260900/260909.pdf>.

<sup>25</sup> *Id.* § IX, at 19.

bundled services without any guidance – save for the direction that such bundled services not be “inconsistent with the provisions of this Section” – seems at cross purposes with a remedies principle favouring clear and understandable policies. Behavioural remedies can be supported by ensuring control of the implementation backed by appropriate sanctions in the case they are not achieved. For instance, the remedies imposed by the French Competition Authority on the occasion of the merger of Banque Populaire and Caisse d'Epargne with respect to the separate management of their branches in La Réunion provided for monitoring, and the potential divestiture of a designated part of the business if the remedy did not prove efficient.<sup>26</sup>

Non-solicitation provisions also provide examples of behavioural remedies that can suffer from imprecise drafting. In the DOJ's *Bemis/Alcan* settlement,<sup>27</sup> for instance, the parties divested certain assets, including Alcan customer contracts, to a third party buyer. The settlement obligated the merged party to refrain from soliciting business for flexible packaging products that were subject to any of these customer contracts that were unexpired for one year. “Solicit” was not a defined term in the Final Judgment. Most likely, the DOJ included this provision in order to allow the buyer of the divested assets sufficient time to become a viable competitor to the post-merger Bemis. However, more careful drafting could have reduced any confusion as to whether, for example, Bemis was permitted to respond to a former Alcan customer's request for proposal during the one-year period.

### **3.3 Behavioural remedies should avoid imposing conditions on the merging parties that appear unlikely to preserve competition**

Behavioural remedies should not be used where the restraint involves a speculative violation of competition laws that are otherwise enforceable by the agencies. Remedies that threaten to stifle business conduct that is potentially procompetitive (*e.g.*, bundling) should be imposed cautiously and only after the agency's careful consideration of the relevant market dynamics.

Most importantly, behavioural remedies should not be imposed to address non-competition concerns as such remedies undermine the credibility of the competition review and call into question the bona fides of the reviewing authority and its commitment to consumer welfare. For example, China recently held-up Nokia's acquisition of Motorola's network equipment assets – after eight other jurisdictions had cleared the deal months before – until Motorola settled IP litigation with Huawei, a Chinese competitor with the largest share of the Chinese market.<sup>28</sup> Similarly, South Africa frequently imposes employment conditions that are unrelated to competition concerns in its remedies.<sup>29</sup>

Behavioural remedies that implicate non-compete or non-bid provisions should generally be disfavoured. These provisions can reduce customer choice, product output, and decrease the incentives of the merged company to innovate because its access to certain customers is blocked. Competition agencies

<sup>26</sup> Banque Populaire/Caisse d'Epargne, Decision 09-DCC-16, (June 22, 2009), available at <http://www.autoritedelaconurrence.fr/pdf/avis/09DCC16decisionversionpublication.pdf>.

<sup>27</sup> United States v. Bemis Co., Inc., Case No. 1:10-cv-00295 (D.D.C. July 13, 2010) (Final Judgment), available at <http://www.justice.gov/atr/cases/f260600/260625.pdf>.

<sup>28</sup> Sherry Mazzocchi, *China Delays \$1.2B Nokia Siemens-Motorola Deal*, LAW360, Mar. 9, 2011, available at <http://www.law360.com/competition/articles/230943/china-delays-1-2b-nokia-siemens-motorola-deal>; Pete Brush, *Chinese Regulators OK \$975M Nokia-Motorola Deal*, LAW360, Apr. 21, 2011, available at <http://www.law360.com/corporatefinance/articles/240533/chinese-regulators-ok-975m-nokia-motorola-deal>.

<sup>29</sup> See, *e.g.*, Harmony Gold Mining Co. Ltd. & Pamodzi Gold Free State (Pty) Ltd, Case No: 71/LM/Oct09, available at <http://www.comptrib.co.za/assets/Uploads/Case-Documents/71LMOct09.pdf>.



may argue that such provisions are necessary to incentivize the buyer of divested assets to invest in the development of those assets without having to overcome an entrenched incumbent.<sup>30</sup> So long as the buyer of divested assets has fair and non-discriminatory access to critical inputs needed for competition (*e.g.*, personnel, facilities, branding/trademarks, “hard” IP, customer lists), it should have the ability and incentive to viably compete against the merged company. Restrictions on the merged company’s ability to compete for certain customers for the life of the settlement – possibly 10 or 20 years – are overbroad. Market forces should be trusted to determine whether the incumbent or the new entrant gains customer loyalty.

#### **4. Guidance documents or “best practices” manuals should reflect current, actual agency practice to the extent possible**

Merger remedy guidance documents should reflect the actual enforcement practice of the competition agencies that issue them. This statement seems self-evident, however in reality it is easy for static analytical frameworks found in guidance materials to diverge from actual agency practice.<sup>31</sup>

It is not feasible to revise guidance documents with every deviation from written policy. Such a task might well require revisions that mirror a jurisdiction’s political cycle, or even more frequent revisions that account for each novel merger that the competition agencies encounter. But, for guidance documents to be truly useful for the business community, they should not contain outdated generalizations and presumptions that no longer provide business with insight into the agencies’ thinking. In particular, although some agencies continue to suggest that they will not often be amenable to behavioural remedies, in a number of very significant recent mergers such remedies have been relied upon. It would be preferable for merger remedies guidance documents to more accurately reflect this willingness to rely on behavioural remedies in appropriate cases. For example, BIAC commends the UK Competition Commission’s merger remedies guidelines released in 2008, which were “updated and extended to take account of the CC’s experience of inquiries in recent years” and which also took into account “the principles outlined by the International Competition Network (ICN).”<sup>32</sup> BIAC also commends the DOJ on the recent revision of its remedy guidelines, which now reflect the “changes in the merger landscape and the lessons the division has learned from the remedies it has entered into since the issuance of the original guide in 2004, ensuring that it accurately details the division’s merger remedy practices.”<sup>33</sup>

The DOJ’s recent policy revision is timely and appropriate, as during the past two years it very visibly backed away from its former policy favouring structural remedies and disfavouring behavioural remedies. Numerous high-profile matters, both horizontal and vertical, were cleared on the condition that the merging parties agree to be bound by hybrid structural and behavioural remedies. Significant conduct remedies were included in DOJ final judgments approving the *Comcast/NBC* joint venture<sup>34</sup> (fair dealing,

<sup>30</sup> See, *e.g.*, *United States v. Election Systems and Software, Inc.*, Case No. 1:10-cv-00380 (D.D.C. Mar. 8, 2010) (Competitive Impact Statement), available at <http://www.justice.gov/atr/cases/f256200/256273.pdf>.

<sup>31</sup> For example, the U.S. competition agencies revised their joint horizontal merger guidelines last year because the agencies’ actual merger review practice was no longer reflected accurately by the 1992 Merger Guidelines. See, Press Release, U.S. Dept. of Justice Antitrust Div., Department of Justice and Federal Trade Commission Issue Revised Horizontal Merger Guidelines, Aug. 19, 2010, available at [http://www.justice.gov/atr/public/press\\_releases/2010/261642.pdf](http://www.justice.gov/atr/public/press_releases/2010/261642.pdf).

<sup>32</sup> UK Merger Remedies Guidelines, *supra* note 6, ¶ 1.2.

<sup>33</sup> Press Release, U.S. Dept. of Justice Antitrust Div., Antitrust Division Issues Updated Merger Remedies Guide, June 17, 2011, available at [http://www.justice.gov/atr/public/press\\_releases/2011/272365.pdf](http://www.justice.gov/atr/public/press_releases/2011/272365.pdf).

<sup>34</sup> *United States v. Comcast Corp.*, Case No. 1:11-cv-00106 (D.D.C. Feb. 20, 2011) (Stipulation and Order), available at <http://www.justice.gov/atr/cases/f267700/267705.pdf>.

non-retaliation), the *Ticketmaster/Live Nation* merger<sup>35</sup> (non-retaliation, “permissible bundling”), the *Google/ITA* merger<sup>36</sup> (“fair” commercial agreements with downstream competitors), the *Bemis/Alcan* merger<sup>37</sup> (firewalls, non-solicitation), as well as firewall provisions being included by the FTC in the vertical beverage mergers between Coca-Cola<sup>38</sup> and PepsiCo<sup>39</sup> and their respective bottlers.

The Canadian Competition Bureau also has embraced behavioural remedies in a number of recent high-profile mergers cases. The Bureau adopted the behavioural remedies that were also adopted by the DOJ in the *Ticketmaster/Live Nation*<sup>40</sup> and Coca-Cola bottling mergers.<sup>41</sup> The Bureau also agreed to significant behavioural remedies in connection with its clearance of the *Suncor/Petro-Canada* merger, including minimum requirements to sell terminal storage and distribution capacity and to supply certain quantities of gasoline to independent marketers.<sup>42</sup>

Despite the common practice of employing behavioural remedies in appropriate cases, as illustrated by the cases set out above, current agency guidance in some jurisdictions such as Canada expressly disfavors conduct remedies and calls them seldom acceptable or appropriate only in limited circumstances.<sup>43</sup> The business community would benefit from guidance formally acknowledging that agencies will consider imposing behavioural remedies on a case-by-case basis without a presumption disfavoring such remedies. While the French concentration guidelines clearly give priority to structural remedies in the form of divestitures and sets conditions to the alternative use of behavioural remedies,<sup>44</sup> the Autorité's recent practice shows more flexibility.

<sup>35</sup> *Ticketmaster*, *supra* note 24. Ticketmaster also agreed to be bound by quasi-behavioral obligations. A notable example is that Ticketmaster is required to build a website for AEG, the buyer of divested ticketing software, that has a “look and feel” to AEG’s satisfaction in order to assist the branding and marketing of AEG’s ticketing services.

<sup>36</sup> *United States v. Google Inc. & ITA Software, Inc.*, Case No. 1:11-cv-00688 (D.D.C. Apr. 8, 2011) ([Proposed] Final Judgment), available at <http://www.justice.gov/atr/cases/f269600/269632.pdf>.

<sup>37</sup> *Bemis*, *supra* note 27.

<sup>38</sup> *In the Matter of The Coca-Cola Company*, FTC File No. 101 0107 (Nov. 3, 2010) (Decision and Order), available at <http://www.ftc.gov/os/caselist/1010107/101105cocacolado.pdf>.

<sup>39</sup> *In the Matter of PepsiCo, Inc.*, FTC File No. 091 0133 (Feb. 26, 2010) (Decision and Order), available at <http://www.ftc.gov/os/caselist/0910133/100226pepsicodo.pdf>.

<sup>40</sup> The Commissioner of Competition and Ticket Master Entertainment Inc. and Live Nation Inc., Case No. CT-2010-001 (Jan. 15, 2010), available at [http://www.ct-tc.gc.ca/CMFiles/CT-2010-01\\_Consent%20Agreement\\_1\\_38\\_1-25-2010\\_9824.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-2010-01_Consent%20Agreement_1_38_1-25-2010_9824.pdf).

<sup>41</sup> The Commissioner of Competition v. The Coca-Cola Co., Case No. CT-2010-009 (Sept. 27, 2010), available at [http://www.ct-tc.gc.ca/CMFiles/CT-2010-009\\_Registered%20Consent%20Agreement\\_2\\_45\\_9-27-2010\\_5925.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-2010-009_Registered%20Consent%20Agreement_2_45_9-27-2010_5925.pdf).

<sup>42</sup> The Commissioner of Competition v. Suncor Energy Inc. and Petro Canada, Case No. CT-2009-011 (Aug. 13, 2010), available at, [http://www.ct-tc.gc.ca/CMFiles/CT-2009-011\\_Updated%20Version%20of%20the%20Registered%20Consent%20Agreement\\_004\\_61\\_8-13-2009\\_2587.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-2009-011_Updated%20Version%20of%20the%20Registered%20Consent%20Agreement_004_61_8-13-2009_2587.pdf).

<sup>43</sup> Indeed, one study in Canada indicated, at the time the Competition Bureau Remedies Bulletin was being introduced, that the Bulletin “if anything has described a set of criteria [for when behavioral remedies are appropriate] that is even more restrictive than previous experience would suggest.” See Richard Annan, *Merger Remedies in Canada*, Address Before the Canadian Bar Association Annual Competition Law Conference (Nov. 4, 2005), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02134.html>.

<sup>44</sup> French Concentration Guidelines, *supra* note 13, ¶ 528.

Those countries or jurisdictions with multiple enforcers of antitrust laws, which sometimes includes sectoral regulators, should seek to harmonize their approach to merger remedies in order to implement uniform treatment of parties and promote due process. For example, in the U.S., the DOJ and FTC do not have a joint approach to merger remedies. Similarly, there has been no formal guidance issued by the EC and its member states seeking to ensure a consistent approach to merger remedies.

The FTC's and DOJ's separate merger remedies guidelines reflect purported (though dwindling) differences in the agencies' respective approaches to enforcement. Both U.S. agencies contemplate accepting an upfront buyer, though traditionally the FTC has been reputed to favour them more strongly, as its remedies policy "usually requires" them where the parties seek to divest less than an autonomous, ongoing business.<sup>45</sup>

It appears that the FTC has shown an increasing willingness to enter consent decrees requiring divestiture without naming a buyer up-front. Recently, the FTC accepted consent decrees in *Universal Health Services/Psychiatric Solutions*<sup>46</sup> (in-patient psychiatric services), *Simon Property/Prime Outlets*<sup>47</sup> (retail outlet centres), *Air Products/Airgas*<sup>48</sup> (industrial chemicals), and *Tops Markets/Penn Traffic*<sup>49</sup> (supermarkets) without identifying a buyer up-front. The DOJ's *Ticketmaster/Live Nation* settlement, in contrast, did require an up-front buyer before accepting a final judgment.<sup>50</sup>

## 5. Conclusion

Narrowly-tailored remedies can achieve the correct balance between preventing a merger's anticompetitive harms and preserving the procompetitive benefits of that merger. The best way to achieve this balance is to evaluate which types of remedies are appropriate in a flexible manner. The business community believes that competition authorities should largely abandon outdated presumptions about the types of remedies that are usually favoured, as there is no "one size fits all" merger remedy policy. Specifically, agencies' stated preference for structural remedies should be reassessed given that such relief can, in some cases, be overbroad and damage the transaction value to the parties. Fortunately, there is evidence of an encouraging trend toward a more adaptable approach emerging from competition authorities.

<sup>45</sup> Compare U.S. Fed. Trade Comm'n, Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies, 11, available at <http://www.ftc.gov/bc/bestpractices/bestpractices030401.shtm> with 2011 DOJ Merger Remedies Policy, *supra* note 3, § IV.A.2.a.

<sup>46</sup> *In the Matter of Alan B. Miller, Universal Health Services, Inc., and Psychiatric Solutions, Inc.*, FTC File No. 101 0142 (Decision and Order), available at <http://www.ftc.gov/os/caselist/1010142/110422uhsdo.pdf>.

<sup>47</sup> *In the Matter of Simon Property Group, Inc.*, FTC File No. 101 0061 (Jan. 13, 2011) (Decision and Order), available at <http://www.ftc.gov/os/caselist/1010061/110121simondo.pdf>.

<sup>48</sup> *In the Matter of Air Products and Chemicals, Inc.*, FTC File No. 101 0093 (Oct. 20, 2010) (Decision and Order [Redacted Public Version]), available at <http://www.ftc.gov/os/caselist/1010093/101022airproductsdo.pdf>.

<sup>49</sup> *In the Matter of Tops Markets LLC, Morgan Stanley Capital Partners V U.S. Holdco LLC, and The Penn Traffic Company*, File No. 101-0074 (Aug. 4, 2010) (Decision and Order), available at <http://www.ftc.gov/os/caselist/1010074/100804topspenndo.pdf>. The acceptance of a settlement without an up-front buyer in the supermarket industry is especially noteworthy. The FTC's Remedy Statement notes the retail grocery industry is particularly amenable to an up-front buyer requirement, because of the high risk that to-be-divested assets can deteriorate while waiting for an appropriate buyer to be named.

<sup>50</sup> *Ticketmaster*, *supra* note 24.



The presumption, in particular, that structural remedies are necessary to remedy anticompetitive harms in all horizontal merger cases deserves reconsideration, particularly in cases where the risk of harm is uncertain or the scope of harm is limited. The use of a single “hammer” for every type of “nail” does a disservice to the ability of agencies to use judgment to ensure that the scope of the remedy is proportionate to the potential harm. Mergers – even anticompetitive mergers that necessitate a remedy – can have precompetitive benefits that should be equally regarded and preserved to the greatest extent possible.

## SUMMARY OF DISCUSSION

### 1. Introduction

The Chair opened the roundtable on merger remedies by welcoming the delegations present, in particular the delegations from China, India and Pakistan, who have been invited to participate in this meeting as *ad hoc* observers. The Chair explained that the purpose of the roundtable was to review the approaches of various jurisdictions to merger remedies and to go over the developments in this area since the OECD last addressed the issue in 2003 and 2005.

To start the roundtable, the Chair invited the United States Department of Justice (US DoJ) to introduce its recently updated Policy Guide to Merger Remedies.

The delegation from the United States (US) began by describing the background for the update of the DoJ's remedies guide, which was partially prompted by the OECD's current focus on remedies. The DoJ remedies guide is principally intended to provide guidance to DoJ staff when evaluating proposed remedies for mergers. However, in the interest of transparency, it is also published for use by businesses and practitioners. The update focused on aligning the pre-existing guidance to the current practice, in which the emphasis is on the appropriateness of a given remedy rather than on its strict categorization as behavioural or structural.

The outcome of the merger remedies guide review was influenced by the DoJ's merger activity since its last review in 2004, which has increasingly involved complex vertical and international transactions. In reviewing mergers – whether horizontal or vertical - the DoJ's guiding principles are that the remedy must effectively preserve competition in the relevant market(s); focus on preserving competition, not protecting individual competitors; and be based on careful application of legal and economic principles to the particular facts of specific cases. In horizontal mergers, the DoJ generally pursues structural remedies. In vertical mergers, the DoJ considers tailored behavioural remedies and, in some cases, structural remedies. In mergers with both horizontal and vertical dimensions, the DoJ may require a combination of structural and behavioural provisions. The overriding goal in defining a suitable remedy is that it must be effective in dealing with the relevant competition concerns.

To clarify, the delegation explained that from the DoJ's perspective structural remedies include the sale of a physical asset as well as the licensing of intellectual property rights. Behavioural remedies, on the other hand, either prohibit or require certain behaviours after the completion of the merger. Increasingly, the DoJ imposes a combination of structural and behavioural remedies, as seen for example in the Ticketmaster/Live Nation merger (2010). With respect to structural remedies, the primary consideration is that any divestiture must include all assets necessary to compete effectively with the merged business. Taking this into account, the DoJ generally insists on the sale of an existing business entity that already has demonstrated its ability to compete in the relevant market.

Conduct remedies can be used to address a raft of different issues. Because of their forward-looking nature, it is crucial that they are carefully drafted to eliminate any scope for conflict over, or ambiguity in, their interpretation. There are many types of conduct remedies, each of them suitable for different sets of facts and circumstances. For example, firewalls inside the newly-merged company can be imposed to prevent the flow of information from one line of a business to another. Although sometimes difficult to

implement, firewalls can be very effective as long as the authority maintains the power to verify their efficacy. Non-discrimination provisions, whereby the merged entity is prohibited from discriminating against its competitors, are also common and have been used in the Google/ITA (2011) and Comcast/NBC (2011) consent decrees, among others. Other behavioural commitments employed include non-retaliation provisions, transparency provisions and contracting limitations.

When reviewing mergers in regulated industries, such as transportation or telecommunications, the DoJ works closely with the relevant regulators to ensure that each of their respective decisions are coherent and complementary. The Comcast/NBC merger is a good example of this type of co-operation between the DoJ and the Federal Communications Commission. Similarly, when dealing with international mergers, the DoJ is equally mindful of the potential extraterritorial effects its remedies may have and the consequent need for co-ordination with other authorities in crafting optimal remedies.

Once a remedy is defined, it must be properly implemented. With structural remedies, the merging parties sometimes divest the problematic assets before filing for merger clearance. In other cases, the parties may propose a post-consummation sale to a specified upfront buyer of a specific package of divestiture assets. In most merger cases, after the DoJ has identified a competitive problem with a transaction, the parties or a selling trustee will shop a specific asset package in an effort to find a buyer post-consummation. In some instances, if parties fail to find a buyer for the asset package they put together, they may be required to include in the package an asset of large value to them, a so-called "crown jewel". The carrying out of a divestiture is also closely watched. Often, the parties are required to operate the assets separately until they can be divested. In some cases, a trustee will be appointed with the responsibility for day-to-day management of the assets to be divested. The DoJ also may appoint a trustee to monitor the sale or to carry it out altogether. The newly established Office of General Counsel within the DoJ oversees the monitoring of consent decrees, which is an essential task in ensuring that imposed remedies are complied with.

In all cases of divestiture, the DoJ retains the right to approve the buyer of the assets. In order to obtain approval, three conditions must be met. First, the divestiture to the proposed purchaser must not cause competitive harm. Second, the buyer must have the incentives and ability to use the assets to compete effectively in the relevant market(s). Third, the buyer must have sufficient business acumen, experience and financial capability to compete effectively in the relevant market(s) over the long term.

To summarize, the US emphasized that rather than alter the substance of the DoJ approach to remedies, the revision updated the remedies guide to make it consistent with DoJ practices. The updated guide focuses on the effectiveness of remedies, rather than on whether they are structural, behavioural or a combination of both.

The Chair invited the Israeli delegation to present their draft guidelines on remedies in merger cases.

The delegation from Israel began by noting that its presentation would focus on several issues that came up in the debate surrounding the drafting of the Israeli competition authority's own remedies guidelines.

First, the discussions focused on the issue of mechanism design and the problem of costs. When devising a framework for merger remedies, the goal is the prevention of significant harm to competition. There are different tools to achieve this goal, each with its own costs for the authority, for the merging parties and for the marketplace. An effective remedies framework should strive to minimize these costs; however, the balancing of costs, in particular to different actors, is not a straightforward exercise.

Second, where the merger review standard is the significant lessening of competition, should remedies aim at restoring pre-merger competition or should they aim at preventing substantial harm? This was a heavily discussed question, and the authority tried to look at approaches in other jurisdictions around the world. In this context, divestiture of assets can be a particularly challenging remedy. There were cases in Israel where parties claimed that they needed six years to complete the required divestments. The authority agreed to such long terms so as to minimize the harm that could result from an immediate sale, notably significantly reduced prices for the assets. However, this time-lag resulted in many problems and allowed parties to make arguments that the market characteristics had changed by the time divestiture was to take place and thus that it should no longer be required. One potential solution to this issue is the use of a trustee.

The Israeli delegation then mentioned two cases relevant to this discussion. The first was the Bezeq/YES merger (2006) in the telecommunications sector in which the authority objected to the merger, requiring a divestiture which the parties were not willing to accept. The appeal tribunal overruled the authority, crafting a complex behavioural remedy; however, when the authority hired a telecoms expert to monitor its implementation, it turned out that the remedy was impossible to monitor. On appeal, the Supreme Court rejected the behavioural remedy and insisted on the divestiture originally favoured by the competition authority. The second case was the Terraflex/Kafrit merger (2008) in which the authority ordered divestiture of intellectual property assets. To the authority's surprise, the acquiring party appealed the divestiture order, arguing that the competition authority should have prohibited the merger. The appeal tribunal confirmed the authority's decision, holding that the imposition of the least harmful remedy was correct. The case was appealed in the Supreme Court.

## **2. Types of remedies (structural, behavioural/conduct and hybrid)**

The Chair thanked the Israeli delegation and asked the Austrian delegation to report on the review the Austrian authority carried out in 2010 of the remedies it imposed, most of which were of behavioural nature.

The delegation from Austria outlined the two main objectives of the review, which were, first, to determine whether the remedies imposed were being complied with and, second, to evaluate their effectiveness. The review identified that since the establishment of the Austrian competition authority in 2002, about 135 remedies - predominantly behavioural in nature - were imposed in approximately 55 cases. The review showed that most of the remedies have been complied with but also revealed rare instances of non-compliance. So far there has been one case of non-compliance brought to the Austrian Cartel Court with a resulting fine of 200 000 EUR, and more cases are likely to follow. The review also led to increased awareness in the business community as to the need for strict compliance and, as such, it was very productive.

Concerning the second objective of the review, the Austrian delegation reported that the evaluation of the remedies' effectiveness was still on-going. The review found that most of the remedies imposed were behavioural in nature, which is somewhat surprising in contrast to other jurisdictions which impose mostly structural remedies. There is no clear explanation for this fact. While in some cases behavioural remedies may have simply been more appropriate, in others, they may have been a necessity since, due to Austria's relatively small size, the assets that would have been subject to a structural remedy were located outside the jurisdiction.

The Chair shortly commented that the US DoJ findings in the Ticketmaster/Live Nation merger could be of interest to the Austrian delegation. The remedies in that case were a combination of structural and behavioural measures. Anecdotal evidence suggests that the prices for tickets have decreased by 25% and

that a major competitor has emerged on the basis of the divested assets. This case shows that the effectiveness of remedies is more important than whether they are behavioural or structural.

The Chair then turned to the delegation of New Zealand to describe the approach by its authority, which mainly imposes structural remedies.

The delegation of New Zealand described that in merger cases, the New Zealand Commerce Commission can accept only structural remedies. The inability to impose behavioural remedies, however, has not been problematic as the Commerce Commission favours structural over behavioural remedies, given the difficulty in formulating, monitoring and enforcing behavioural remedies.

The Chair thanked the New Zealand delegation and invited the Greek delegation to discuss its experience with remedies in vertical cases.

The delegation from Greece noted that since the entry into force of merger control in Greece, the competition authority has blocked only one merger. Initially, the remedies imposed were mainly of a behavioural nature, but in the last several years, it has imposed a growing number of structural remedies, including divestitures. This was the case, for example, in the milk (VIVARTIA/MEVGAL) and gas (ELPE/BP) cases described in the Greek written contribution.

With respect to vertical mergers, the VIVARTIA/MEVGAL merger (2011) is a good example illustrating the benefits of combining structural and behavioural remedies. In this case, besides requiring a divestiture, the Greek authority imposed behavioural remedies on both upstream and downstream markets. On the downstream level, the merged entity was prohibited from entering into exclusive contracts for a period of five years following the merger. On the upstream level, the merged entity was required to sell milk to competitors for five years on a cost basis using objective transparent criteria. The Greek delegation explained that, apart from being challenging from a competition point of view, the case was also very political. Ultimately, the resolution and the remedies imposed were deemed a success in removing competition concerns both upstream and downstream, while preserving the benefits from the merger.

The Chair thanked the Greek delegation and turned to Chile, whose submission mentioned forward-looking structural remedies, and asked it to explain what would be the characteristics of such measures.

The delegation from Chile explained that Chile's competition authority distinguishes between two types of structural remedies - divestiture and so-called forward-looking structural remedies - which either complement a divestiture or aim to otherwise resolve competitive concerns raised by a merger. An example of a forward-looking structural remedy can be found in a TV cable merger in 2004 in which besides from ordering divestiture of all assets in certain markets, the Competition Tribunal prohibited the merged entity from participating in these markets in the future. Another example is an obligation to ensure that a certain part of the business remains in a publicly traded corporation subject to securities rules. The last example of a forward-looking remedy, which has been imposed in several mergers in the supermarket and radio industries, is an obligation to notify any further merger or acquisition the merged entity is involved in. The Chilean delegation explained that this is an important remedy since merger notifications are voluntary in Chile. Notifications enable the Competition Tribunal to review any subsequent merger that would lead to an increased level of concentration in the market.

The Chair thanked the Chilean delegation and invited the Finnish delegation to comment on the issue raised in its written contribution that remedies should be tailored to the industry in which they are imposed.

The delegation from Finland explained that its written submission does not intend to suggest that remedies should be dictated by the nature of the relevant industry, but merely that the latter needs to be taken into account in determining a suitable remedy. In the experience of the Finnish competition

authority, there are certain sectors, such as telecommunications, where remedies were imposed more frequently than in others. Since telecommunications is a very heavily regulated industry, it is necessary to take this into account and ensure that the remedies imposed do not create a conflict with existing regulations. As to the types of remedies imposed in this sector, the Finnish delegation mentioned that, in general, structural remedies were used to resolve concerns in horizontal mergers while behavioural remedies are more suited to vertical mergers.

The Chair then asked the Italian delegation to share its experience with remedies in the banking sector, in which the Italian competition authority has considered a number of specific factors.

The delegation from Italy described that in the past few years the Italian competition authority reviewed a high number of mergers with remedies in the banking sector. As these mergers were part of a sector-consolidation process rather than the consequence of the financial crisis, they generally produced efficiencies. Some of them, however, did give rise to competition concerns, which were resolved through structural remedies (such as divestitures of branches in cases of a horizontal overlap or divestiture of shares in joint ventures). Given the specific nature of the Italian banking sector where there is a high degree of inter-locking directorates and management overlap, the competition authority also imposed complementary behavioural remedies in a number of cases to address concerns arising from these issues. These involved restrictions on the exercise of voting rights or commitments not to serve simultaneously on the boards of competing banks. In conclusion, the Italian delegation stressed that these behavioural remedies were imposed only to complement structural remedies, which also remain the preferred remedy option in this sector.

The Chair thanked the Italian delegation and asked the Australian delegation to expand on the National Australia Bank's acquisition of AXA Asia/Pacific Holding discussed in its written submission.

The delegation from Australia began by emphasizing that the Australian Competition and Consumer Commission (ACCC) also strongly prefers structural remedies over behavioural remedies for the reasons already mentioned by the other delegations.

As to the National Australia Bank (NAB)/AXA Asia Pacific Holdings (AXA) merger (2010), this was a merger in the wealth management sector, which involved a particularly complex assessment due to the intricate nature of the products' distribution. Investors, who are the clients, have access to a network of investment advisers who in turn have access to investment platforms on which banks and other institutions offer their investment products. Access to the investment platform is key to competition. Through the merger, NAB, a dominant player in the market, was seeking to acquire a smaller player, AXA, which was very competitive in developing its investment platform and had plans for further innovation and expansion of its offering.

The ACCC opposed the merger, which NAB subsequently proposed to resolve by divesting AXA's platform in development. However, subsequent negotiations and public consultation showed that what initially appeared to be a structural remedy was in fact a quasi-behavioural remedy, because NAB was proposing to divest only a project in development without any products or distribution network of investment advisers. The success of such a remedy, which would require significant monitoring, was very uncertain as it depended on the actions of various different third party players ranging from investment advisers to the platform developers.

As a result, the ACCC decided not to accept the remedy thus maintaining its decision to oppose the merger. This decision was considerably controversial as it was made at a late stage in the negotiation process, which had gone into great detail in describing the potential remedy, thus giving rise to expectations by the parties that the remedy would be accepted. Looking at the transaction in retrospect, an

earlier decision to reject the remedy would have benefited all those involved; however, given the complexity of the remedy proposed an in-depth inquiry was clearly needed.

The Chair thanked the Australian delegation and invited delegations to comment on the general concept of structural versus behavioural remedies.

BIAC took the floor and stressed the importance of this roundtable. Merger remedies have a significant impact on companies' investments, and a great degree of uncertainty as to what kind of remedies might be imposed may dissuade investments that would otherwise increase consumer welfare. BIAC invited competition authorities to take this into account when evaluating the effectiveness and costs of envisaged remedies. As to the appropriateness of structural versus behavioural remedies, BIAC noted that little attention so far had been given in the discussion to the main disadvantage of structural remedies, i.e. the costs to both the merging parties and consumers. According to BIAC four issues deserve more attention and further study. First, structural remedies often eliminate or reduce the scope for both static and dynamic efficiencies. Second, frequently the competitive harm resulting from a merger is either more limited than what was presumed, or even non-existent, making the imposed remedy disproportionate. Third, even if there is competitive harm as a result of the merger, it is often transitory in nature and it does not involve entry, repositioning, or shifting consumer demand, while the effects of a structural remedy are long-lasting. Finally, structural remedies can create downstream disruptions, impacting customer relationships, which is a reason why customers may sometimes prefer behavioural remedies.

With these considerations in mind, BIAC argued that a near presumption in favour of structural remedies for horizontal mergers would not be appropriate. Structural remedies should, as a matter of practice, only be considered as a last resort. While behavioural remedies have their own challenges, as mentioned by other delegations, they can avoid some of the mentioned disadvantages of structural remedies. BIAC thus cautioned against any presumption, where horizontal mergers are always treated with structural remedies and vertical mergers with behavioural remedies, and urged competition agencies to look at the effectiveness and costs of any contemplated remedies to all actors. To do so, what is often needed is better factual and economic analysis and closer attention to the outcomes of the proposed remedy. In this respect BIAC welcomed the changes in the US remedies guidelines, which go a long way in this direction and favour effective and cost efficient remedies specific to each transaction.

In reaction to BIAC's intervention the delegation from Brazil mentioned the Braskem/Quattor merger (2011), which was resolved with behavioural remedies even though the transaction led to a monopoly within the Brazilian market. In this case, behavioural remedies were considered more appropriate in view of the adverse effects that a structural remedy might have had on a vast number of actors in the market. Moreover, they allowed the authority to exercise oversight over the new entity and gave it the tools to prosecute more easily in case of abuse of the newly acquired market power. Such a remedy thus gave the authority better tools to deal with any competition harm following the merger.

The Chair thanked BIAC and the Brazilian delegation and gave the floor to the German delegation to offer its comments.

The delegation from Germany commented that the present discussion shows a positive move towards effectiveness as the principal criterion when considering remedies. German law prohibits any measure amounting to permanent control of a company, which helps the authority focus on defining the most effective remedy within these constraints. Long-lasting or permanent control of a company's behaviour requires a level of regulatory oversight for which competition authorities are neither equipped nor assigned to provide.

Before moving to the discussion of individual remedies, the Chair turned to the delegation of Israel to make final comments on the differences between structural and behavioural remedies.

The delegation from Israel offered several comments on the issues raised during the discussion. First, when considering the costs of a remedy, the costs to the competition authority must be weighed against the costs to the merging parties. Equally, the authority should consider cost savings achieved by the parties but not passed on to the consumers. Second, efficiencies must be, of course, taken into account when deciding on an optimal remedy and may well tip the balance towards a behavioural remedy, although on the basis of cost considerations only, a structural remedy might be preferable. Third, behavioural remedies are not always sufficiently effective. For example, in the case of a vertical merger involving 100% ownership, a non-discrimination clause would not be effective to guarantee equal pricing. Last, behavioural remedies require monitoring, which turns the competition authority into a quasi-regulator, a role for which it is ill-equipped. This is particularly problematic in regulated industries where two government agencies would have parallel powers which require co-ordination.

### **3. Hold separate arrangements and up-front buyers**

The Chair thanked all the delegations for their contributions on the general differences between behavioural and structural remedies and turned the discussion to the specific issues of individual remedies. The Chair asked the Canadian delegation to comments on the issue of “hold separate” arrangements and up-front buyers.

The delegation from Canada explained that the purpose of a hold separate agreement is to ensure the preservation and viability of the assets to be divested throughout the divestiture period by keeping them separate from the merged entity. The Canadian Competition Bureau (Bureau) may consider the use of a hold separate arrangement in two instances: either pending the divestiture of assets following a consensual resolution agreement or in litigated proceedings in the period before the issuance of a decision. The Bureau typically requires that an experienced manager, independent of the acquirer, manage the separate business. Moreover, the merged entity may be required to provide the financial support necessary to ensure the viability of the held separate business. The Bureau recently completed a study of merger remedies imposed between 1995-2005. This study, which is available on its website,<sup>1</sup> has shown that certain hold separate arrangements imposed during the study period lacked sufficient requirements to ensure the viability of the separate assets. In some of these cases, the separate assets were found to have deteriorated as a result of a prolonged initial sale period, lack of an independent manager or lack of funding. These results reinforce the Bureau’s requirements relating to hold separate arrangements as set out in its 2006 Remedies Bulletin and its continuing determination to impose all appropriate requirements in a hold separate arrangement.

The Chair thanked the Canadian delegation and asked the United Kingdom delegation to describe its experience with up-front buyer remedies.

The United Kingdom (UK) explained that, in the UK, mergers are assessed in a first phase by the Office of Fair Trading (OFT), which submits cases that cannot be resolved in this first phase for an in-depth phase two investigation by the Competition Commission. Procedurally, if the OFT approves the merger with a remedy in phase one (by accepting a so-called “undertaking in lieu of reference”) and the parties subsequently fail to carry it out (for example, they fail to find a buyer), the OFT cannot refer the case to the Competition Commission (CC). Consequently, the OFT will often require up-front buyers before accepting the undertakings so as to retain the ability to make a reference to the CC.

<sup>1</sup> <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03392.html>.



For this reason, the OFT often requires that the transaction is not only signed but also completed before the merger is approved. The benefit of completing an up-front sale in phase one is that the initial sale period is relatively short, which reduces the risk of deterioration of assets mentioned earlier by the Canadian delegation. Also, the OFT can do market testing on the divestment package and on the identity of the buyer prior to approving the merger. Last but not least, resolving a case with an up-front buyer remedy in phase one saves both the authorities (and therefore taxpayers) and the merging parties the significant burden of a phase two investigation.

If undertakings in lieu remedying problematic mergers cannot be obtained in phase one, the case is referred for a phase two investigation to the CC. If a divestiture is found to be the most appropriate remedy, then the main concern in a phase two investigation is to incentivize the merging parties to carry it out. There are three main types of incentives to do that. First, obtaining a contractually committed suitable purchaser or completing a divestiture can be made a condition precedent to the transaction the parties want to carry out (i.e. an up-front buyer). An example is the Hamsard/Academy Music Holdings (2007) where buyers were required to be contractually committed to acquiring two concert venues prior to allowing the proposed merger to proceed. A second type of incentives is the “crown jewel” approach, whereby parties unwilling or unable to divest the required divestment package are threatened with a larger divestiture package as an alternative. EWS Railway Holdings/Marcroft Engineering (2006) is an example of this approach. The last type of incentives is the CC having the ability to appoint a divestiture trustee to sell the divestiture package at no minimum price. The divestiture trustee is usually to be appointed if the parties have not made the divestment within a specified period. Stonegate Farmers/Dean Foods Group (2007) is an example of this approach.

The Chair thanked the UK delegation and turned to the Slovakian delegation to describe its experience with an up-front buyer remedy in the Tesco-Carrefour merger

The delegation from the Slovak Republic began by explaining the facts of the case, which was a large transnational merger between two leading retail chain operators, Tesco and Carrefour in 2006. The Slovakian Competition Authority assessed the part of the merger that affected the Slovakian market, where Tesco and Carrefour were the only operators of large supermarkets. The other retail chain operators in the Slovakian market focused mainly on smaller supermarkets and discount stores. The merger raised significant competition concerns, in response to which Tesco offered to divest three of its supermarkets. However, none of the proposed buyers showed any interest in buying the assets, partly because of the close proximity of supermarkets that would remain in Tesco’s hands and partly because some of the buyers had a different business strategy which focused on local stores and smaller supermarkets. Faced with this situation, the competition authority requested an up-front buyer solution, which Tesco rejected and the merger was therefore blocked. Interestingly, Tesco did not challenge the decision, perhaps because in the meantime it lost interest in the acquisition of Carrefour supermarkets because of the relative saturation in this market segment in Slovakia.

Following the Slovakian intervention, the Chair invited the Swiss delegation to share its experience with supermarket mergers.

The delegation from Switzerland noted that its experience in the Coop/Carrefour merger (2008) was very similar to that of Slovakia. The retail market in Switzerland is very concentrated, with Migros controlling 40% of the market followed by Coop with 35%. Carrefour was a relatively small player who wished to exit the market and sell its stores to Coop. To resolve the significant competition concerns this transaction raised, Coop was obliged to divest large amount of retail surface in the problematic regions. However, finding a buyer for the whole package proved impossible due to various factors: first, the leases on the retail surface areas were too high for most of the smaller competitors; second, the locations were not particularly attractive; last, the fact that the retail market was already very concentrated led to serious

doubts as to the possibility of viably running the divested operations against the competition of Migros and Coop. The authority then approached German discount store operators Aldi and Lidl, which were about to enter the Swiss market, about buying the package. However, their business strategies did not match the assets to be divested, in terms of locations and desired dimensions. In the end, it was not possible to find a buyer for the whole package. This example shows the limits of structural remedies in concentrated markets in small economies: where there are no buyers for the whole divestiture package, the structural remedy is bound to fail.

The Chair turned to the Mexican delegation to offer its view on divestiture as a remedy.

The delegation from Mexico explained that the Mexican competition authority can ensure compliance with remedies either through an *ex post* reversal of a merger approval in case of non-compliance or through the imposition of a fine of up to 10% of sales. The delegation then explained the different factors identified by the Mexican Competition Authority as contributing to a successful divestiture.. First, the scope of remedies must be clearly defined. Second, the divestiture plan must contain a minimum number of elements to secure an expeditious and successful divestiture. Third, the divestiture package should include not only physical assets but all the elements that make it a viable business (such as inventory, key personnel, intellectual property rights and so on). Fourth, prospective buyers must be approved by the competition authority to ensure they have sufficient market knowledge and financial strength to successfully run the divested assets. Fifth, initial sales periods should be reasonably short in order to prevent deterioration of the divested assets. Sixth, the divested assets should be placed under the administration of a specialized trustee that promotes the divestiture. Finally, the terms of the remedies must be kept confidential until the conclusion of the divestiture process. To the Chair's question, the Mexican delegation responded that there has never been a case where a merger approval would be revoked due to non-compliance with divestiture order, partly due to the success of the above-mentioned factors and partly due to the difficulty of reversing an already consummated merger.

#### **4. Use of monitoring trustees**

The Chair then invited the Spanish delegation to discuss its submission, which highlighted four important factors in selecting an effective trustee.

The delegation from Spain noted that the Spanish competition authority allows parties to proceed with a divestment within a specified timeframe. If the divestment has not been completed by the parties within that timeframe, the authority appoints a trustee. When appointing a trustee, the authority takes into account a number of factors:

- First, the authority attempts to ensure the independence of the sales trustee by analysing the links between the potential trustee and the parties. Often, complete independence is not possible since many trustees are investment banks and consulting firms. However, the authority strives to make sure that the trustee's staff has no positive or negative interests in the divestiture of the assets.
- Second, the trustee should have no conflict of interest related to the divestiture (for example, it cannot be linked to a competitor and must not accept work with the company for a set period after the trusteeship concludes).
- Third, trustees should have extensive experience in identifying potential buyers and negotiating transactions involving similar assets. Potential trustees must present a detailed plan of action with fixed timetables and mechanisms for carrying out the transaction.

- Finally, the trustee's retribution must be enough to assure an independent and successful mandate.

The Chair then asked the Irish delegation to discuss the two examples in its submission of the role of trustees in implementing both structural and behavioural remedies.

The delegation from Ireland began describing the merger of two free morning newspapers, each owned by paid-for-newspapers, to form the Metro/Herald (2009). Besides the issue of the JV being able to operate independently of its parent companies, the Irish competition authority had behavioural concerns that the joint company would become a forum for information sharing either between the parent companies or between a parent and the Metro-Herald. An independent trustee was appointed to monitor compliance with the commitments not to share commercially-sensitive information and to allow the Metro-Herald to function independently of its shareholders. The trustee must report back to the authority annually. The question of how long these annual reports should continue was left open.

The second example concerned the merger of two closely competing radio-stations. The parties had to find an up-front buyer and were given three months to implement the divestiture before a divestment trustee would be appointed. This proved to be sufficient incentive for the parties to complete the divestiture in the initial three-month period. The delegation referred to the UK contribution which also underscored the need to provide strong incentives to companies to implement their commitments.

The Chair noted that the Korean submission discussed the costs of appointing a monitoring trustee as well as some alternatives to trustees such as the establishment of a watchdog committee or consultative bodies. The Chair asked the Korean delegation to elaborate.

The delegation from Korea explained that in some cases the Korean Fair Trade Commission (KFTC) opted to impose behavioural rather than structural remedies because of the economic conditions or regulatory framework of the industry in question. Since on-going monitoring places a burden on the competition authority, the KFTC ordered the establishment of a monitoring committee made up of stakeholders directly affected by the merger, such as customers, counter-parties and competitors of the merging firms. This type of solution is not suitable for horizontal mergers since after the merger such a committee could provide a channel for competitors to form a cartel in a market with an already reduced number of players.

One example was the merger of Posco with Hankook Core in 2007. Posco provided 92% of the domestic market for electrical steel sheets used in the components manufactured by Hankook Core. The KFTC ordered the merging parties to create a monitoring committee made up of competitors and independent trade supervisors, and required that committee to provide the KFTC with half-yearly reports. In this and other instances of application of monitoring committees, the merging parties never failed to implement and comply with the remedy. At the same time, the delegation was quick to note that estimating the effectiveness of these committees is difficult. What is clear is that the burden is placed on the authority when behavioural remedies are imposed. For that reason, the KFTC has recently revised its guidelines to state a preference for structural remedies whenever possible.

## **5. Procedural issues**

The Chair then turned the discussion to procedural issues. The written submission from Germany discussed the role of third parties such as customers and competitors in ensuring that a proposed remedy is effective in meeting the competition authority's concerns. She then asked the German delegation to discuss the role of third parties in determining appropriate remedies.

The delegation from Germany stressed the importance of input from third parties not only in understanding the market but also in designing effective remedies. They can elucidate what assets are truly essential to continue a viable business and bring to light hidden risks, such as property ownership or the duration of lease contracts and permits needed to operate. However, the German delegation noted the potential problems with relying on third parties. Specifically, competitors have adverse interests and might push the authority to require a divestiture of an attractive piece of the business that they could then purchase. Suppliers might not be completely forthcoming for fear of losing business. Customers are often more neutral, but sometimes they have less knowledge of the industry. Next, the German delegation spoke of the process of incorporating third party input. The first step is to identify customers, suppliers and competitors who could provide relevant information. Establishing good communication channels early on helps to obtain information quickly later on, during the remedy phase, when time limits are really tight. The Federal Cartel Office regularly market tests the proposed remedies.

The Chair turned to Portugal to explain how the review clause, which allows the authority to go back and alter commitments, has operated in practice.

The delegation from Portugal explained that changes to remedies can occur through a review clause or via an amendment to the decision. A review clause is used when the authority foresees the possibility that changes (for example, changes to deadlines or frequency of reporting) will be necessary when implementing remedies. This channel allows for a high degree of discretion and does not require third party consultation. The Portuguese competition authority may also alter the remedies imposed via an amendment decision. As opposed to operating through a review clause, amending a decision grants the authority very little discretion. Third parties opposing the decision must be consulted and the burden falls to notifying parties to justify that circumstances have changed to such a degree as to require an amendment. Due to these difficulties and the deadlines set for the implementation of remedies, amendments are likely to be rare.

The Chair then brought up the question of time allocated to the merging parties for implementing the imposed remedies. She asked the Turkish delegation to elaborate on its submission discussing the advantages and disadvantages of granting merging parties a longer time period than those imposed by other authorities.

The delegation from Turkey explained that in the past, the Turkish competition authority generally granted a two years period to complete the divestiture, given that the clearance decision did not require the closing to be finalized. In recent years, however, the authority has shortened this delay to one year, given the clear anticompetitive risks involved the longer the asset to be divested remains controlled by the merged entity. In the interim, for example, the firm could depreciate the asset before sale. In practice, the authority has seen that formal obligations can take as little as three months to implement, thus most likely a six-month timeline for divestiture would be sufficient.

The Chair turned to the Lithuanian delegation to discuss its experience with third parties' involvement in shaping appropriate remedies.

The delegation from Lithuania explained that only general procedures exist to ensure that third parties are able to comment prior to the adoption of a final conditional decision. Every notified merger must be published both in an official gazette and on the competition authority's website - after which publication, the interested or affected parties have two weeks to present their views. In practice, most mergers that the authority encounters tend not to give rise to anticompetitive concerns. Even when they do, third parties rarely use their rights to participate in the proceedings since most are small and unrepresented by counsel. Those that might have something meaningful to contribute might fear damaging business relationships given the small size of the business community.

The delegation cited the two rare examples of active third party participation, both of which involved the Finnish publishing company, Rautakirja. In the first merger, the authority held an official meeting with publishers, retailers and competitors of the merging firms. Many of which supported the remedies package. In the second merger, the authority surveyed third parties and a long list of remedies emerged from discussions with competitors and customers. Making the process more clear for third party participation could help in obtaining desired increased predictability.

## **6. International co-operation in the design and implementation of merger remedies**

The Chair then asked the delegation from the European Union (EU) to begin a discussion on international co-operation.

The EU started with describing the increase in international and multi-jurisdictional mergers in the last year and a half, because of both globalization and the proliferation of merger control regimes. From 2009-2010, as much as 25% of merger remedies were adopted on the basis of international co-operation or discussion. In these situations, the parties have a strong incentive to help authorities to co-operate with one another in order to align remedies across jurisdictions, since they would bear the heavy costs associated with conflicting future remedies. The delegation cited some recent examples of successful multi-jurisdictional co-operation in the Thomson-Reuters merger (2008), the Pfizer-Wyeth merger (2009), the Panasonic-Sanyo merger (2009) and the Cisco-Tandberg (2010) merger.

There is also co-operation between EU member states. The European Commission and the national competition authorities in the EU have jointly developed best practice principles for mergers that do not meet EC notification requirements but are reviewed by individual EU member states. When these principles were released for public consultation, there was a strong desire from parties for similar, or at least non-conflicting, remedies across national authorities.

Co-operation is always useful, even when the relevant geographic market is not global, given that remedies in one jurisdiction can have an impact on other jurisdictions. The EU cited the example of the pharmaceutical industry, which though it is comprised of 27 national markets is largely interconnected. A divestiture of a brand in one market or a plant from which other jurisdictions are supplied is likely to affect the competitive assessment by other authorities. Co-operation can assist in avoiding conflicting remedies and affecting other jurisdictions more than is necessary.

The EU delegation also stressed that co-operation should begin early in the assessment stage so that agencies have a common understanding of the competitive harm, and it should extend to the implementation of such remedies. A notifying system for key decision-making moments would help to align these procedures. The EU suggested an early warning mechanism between authorities to discuss parallel proceedings with the parties, particularly in cases where remedies are likely to be required. Regular calls between authorities with the assistance of waivers granted by the parties will allow the authorities to design common or interconnected remedies. Regular joint discussions with the parties and third party contributors could also be useful in achieving non-conflicting results. However, even with effective co-operation, it is impossible to say exactly which elements of the remedy should be the same. The appropriate remedy will always depend on the relevant market structure. In the case of a global market, a single remedies package may be apt. In such a situation, the authorities must agree on the appropriate scope of the divestiture.

When markets are not global but interconnected, co-ordination may be necessary to ensure that supply relationships are guaranteed even after a divestiture in order to make the remedy effective. For example, the remedy in the Pfizer-Wyeth merger (2009) called for a European divestment. However, to be effective, certain products needed to be transferred in and out of the US to make the European plant self-sustainable.

Non-divestiture remedies also require co-ordination. In Cisco-Tandberg (2010), the European Commission and the DoJ worked together on an interoperability remedy.

With respect to implementation, co-operation is helpful both in determining implementation provisions and the implementation itself. While deadlines need not be the same, there are benefits to aligning implementation timelines. In some cases, common trustees can be used, which would of course save costs for the parties. At the end of the remedy process, the divested asset must be successfully acquired by a purchaser. Therefore, agencies should also be able to agree on an appropriate purchaser. The EU delegation noted that agencies apply different approaches to the implementation of remedies to fit the procedural and substantial requirements of each jurisdiction. Therefore, authorities must employ flexibility and communication to reconcile these approaches, while at the same time ensuring that parties remain able to implement them.

The Chair then asked the Japanese delegation to share its experience with multi-jurisdictional filings in the case of Agilent Technologies acquisition of Varian.

The delegation from Japan explained that Agilent and Varian both manufacture and distribute analytical instruments all over the world, including in Japan through their respective Japanese affiliates. Since the US Federal Trade Commission (US FTC) and the European Commission (EC) found that the proposed transaction raised anticompetitive concerns in certain markets, the parties proposed to divest one of the product lines owned by Agilent and two owned by Varian. The US FTC and the EC conditionally approved the transaction subject to compliance with these remedies. The parties then proposed similar remedies to the Japan Fair Trade Commission (JFTC), which made a two-fold evaluation of the effectiveness of the divestitures in addressing the competitive concerns. First, the JFTC found that after the proposed transaction there would be no increases in market share. Second, the purchasers of those product lines had Japanese affiliates with distribution channels in place. Thus, the JFTC determined that they would develop into strong competitors in the Japanese market. The JFTC therefore approved the transaction with the remedies proposed by the parties in 2010.

The Chair turned to the French delegation to describe its experience with the Marine Harvest-Pan Fish merger, which was also a multi-jurisdictional merger case.

The delegation from France said that the merger, from 2006, was an interesting example of parallel investigations conducted in the UK and in France. Pan Fish, a Norwegian company, was acquiring a Dutch competitor in the market for raising Atlantic salmon. The transaction was first approved in the US and Spain but was held for further investigation in the UK and in France. The French and British authorities were often in contact, with the French authority referring to multiple aspects of the UK report when issuing its decision. In the end, the UK competition authority decided that the transaction would not be problematic in its market. Conversely, the French authority found that the merged entity would be able to profitably reduce the quantity of salmon produced in Scotland. It found that French consumers were less likely to substitute the product for salmon from another region. In addition, with the help of the UK authority, the French authority learned that production capacity in Scotland was low and that production costs were high. With respect to remedies, Pan Fish proposed to divest certain assets in Scotland. Despite the simple divestiture plan, it took more than two years to complete the remedy.

The Chair then opened up the floor for general questions and comments.

The US delegation noted that each authority's approach and mentality on applying remedies seemed remarkably similar. Differences seemed more attributable to varying experiences than to different philosophies, marking a change from 10 or 20 years ago. A second point revolved around the importance of communication and co-ordination in designing remedies so as not to harm competition in another

jurisdiction. Finally, the US commented that the new DoJ guidelines are consistent with what both the DoJ and US FTC have been doing in practice for some time. The guidelines put forth a very pragmatic approach that examines the theories of competitive harm in each case without relying on a one-size-fits-all model.

The Chair then concluded the discussion and thanked all the delegations for their contributions.

## COMPTE RENDU DE LA DISCUSSION

### 1. Introduction

La Présidente ouvre la table ronde sur les mesures correctives dans les affaires de concentration en souhaitant la bienvenue aux délégués présents, en particulier aux délégués de la Chine, de l'Inde et du Pakistan, qui ont été invités à assister à cette réunion en qualité d'observateurs ad hoc. La Présidente explique que la séance a pour objet de faire le point sur les approches adoptées par différents pays en matière de mesures correctives dans les affaires de concentration et d'examiner les évolutions dans ce domaine depuis la dernière fois que l'OCDE a abordé la question en 2003 et 2005.

Pour lancer les débats, la Présidente invite le ministère de la Justice des États-Unis à présenter son Guide des mesures correctives dans les affaires de concentration récemment mis à jour.

La délégation des États-Unis décrit d'abord le contexte dans lequel le guide des mesures correctives du ministère a été actualisé, en partie sous l'impulsion de l'intérêt que l'OCDE porte actuellement aux mesures correctives. Ce guide vise essentiellement à donner des conseils au personnel du ministère chargé d'évaluer les mesures correctives préconisées dans les affaires de concentration, mais, par souci de transparence, il est également publié à l'intention des entreprises et des praticiens. L'actualisation concerne surtout la mise en adéquation des lignes directrices préexistantes avec la pratique actuelle, laquelle accorde une plus grande importance à la pertinence d'une mesure corrective donnée qu'à sa qualification stricte de mesure comportementale ou structurelle.

Les opérations de fusion traitées par le ministère américain de la Justice depuis son dernier examen en 2004, qui comptent de plus en plus d'opérations verticales et internationales complexes, ont influencé le résultat de la révision du guide des mesures correctives dans les affaires de concentration. L'examen des fusions – qu'elles soient transversales ou verticales – doit être guidé par les principes directeurs du ministère américain de la Justice selon lesquels la mesure corrective doit protéger efficacement la concurrence sur le(s) marché(s) concerné(s) ; viser avant tout à préserver la concurrence et non à protéger tel ou tel concurrent ; et reposer sur une application soignée des principes juridiques et économiques aux circonstances spécifiques au cas d'espèce. Dans les fusions horizontales, les mesures correctives mises en œuvre par le ministère américain de la Justice sont le plus souvent structurelles. Dans les fusions verticales, le ministère envisage des mesures comportementales adaptées et, dans certains cas, structurelles. Dans les fusions comportant des dimensions à la fois horizontales et verticales, le ministère peut exiger des mesures combinant des aspects structurels et comportementaux. Une mesure corrective appropriée doit avoir pour principal objectif de répondre efficacement aux problèmes de concurrence qui se posent.

La délégation précise que, pour le ministère américain de la Justice, les mesures correctives structurelles englobent la vente d'actifs physiques et l'octroi de licences de propriété intellectuelle. Pour leur part, les mesures correctives comportementales interdisent ou imposent certains comportements, une fois la concentration réalisée. Le ministère américain de la Justice combine de plus en plus des mesures correctives structurelles et comportementales, comme par exemple dans la fusion Ticketmaster-Live Nation (2010). S'agissant des mesures correctives structurelles, il est primordial que toute cession d'actifs permette de soutenir efficacement la concurrence avec la nouvelle entreprise. Dans cette optique, le ministère américain de la Justice préconise généralement la vente d'une entité existante qui a déjà prouvé qu'elle était compétitive sur le marché concerné.



Les mesures correctives comportementales peuvent servir à résoudre tout un ensemble de questions. Du fait de leur nature prospective, il est essentiel qu'elles soient rédigées avec soin de manière à lever toute contradiction ou ambiguïté sur leur interprétation. Il existe de nombreux types de mesures comportementales, chacun se prêtant à différents faits et circonstances. Par exemple, des cloisons étanches à l'intérieur de l'entreprise issue de la fusion peuvent être imposées pour empêcher que l'information ne circule d'une activité à l'autre. Bien que parfois difficiles à mettre en œuvre, ces cloisons étanches peuvent s'avérer très efficaces, pour autant que l'autorité conserve la faculté de contrôler leur efficacité. Il est également fréquent de recourir à des dispositions de non-discrimination qui interdisent à l'entité issue de la fusion toute discrimination à l'égard de ses concurrents, comme en contiennent les décisions de règlement amiable dans les affaires Google/ITA (2011) et Comcast/NBC (2011), pour ne citer qu'elles. Parmi les autres engagements comportementaux utilisés figurent des dispositions de non-représailles, des dispositions relatives à la transparence et des limitations relatives à la passation de contrats.

Lors de l'examen de fusions dans les secteurs réglementés, comme les transports ou les télécommunications, le ministère américain de la Justice travaille en étroite collaboration avec les organismes de réglementation concernés pour s'assurer de la cohérence et de la complémentarité de leurs décisions respectives. La fusion Comcast/NBC offre un bon exemple de ce type de coopération entre le ministère américain de la Justice et la Commission fédérale des communications. De la même façon, lorsqu'il traite de fusions internationales, le ministère américain de la Justice est tout aussi attentif aux possibles effets extraterritoriaux des mesures correctives et au besoin de co-ordination avec d'autres autorités qui en résulte, de manière à élaborer les meilleures mesures possibles.

Une fois définie, la mesure corrective doit être mise en œuvre de façon appropriée. Avec les mesures correctives structurelles, les parties à la fusion se défont parfois de leurs actifs problématiques avant d'introduire une procédure d'autorisation de fusion. Dans d'autres cas, elles peuvent proposer une vente a posteriori d'un ensemble donné d'actifs à un acheteur désigné à l'avance. Dans la plupart des affaires de fusion, dès lors que le ministère de la Justice a estimé qu'une transaction menaçait la concurrence, les parties ou un mandataire tenteront de trouver un acquéreur a posteriori d'un ensemble spécifique d'actifs. Dans certains cas, si les parties ne trouvent pas d'acquéreur pour l'ensemble des actifs cédés, elles peuvent être contraintes d'y inclure un actif de grande valeur pour elles, que l'on désigne communément sous le nom de « joyau de la couronne ». L'exécution de la cession d'actifs est également étroitement surveillée. Il est souvent demandé aux parties d'exploiter les actifs séparément jusqu'à ce qu'ils puissent être cédés. Dans certains cas, un mandataire sera nommé pour assurer la gestion quotidienne des actifs à céder. Le ministère de la Justice peut également désigner un mandataire chargé de surveiller la vente ou de la mener de bout en bout. Le Bureau du conseiller général, récemment créé au sein du ministère américain de la Justice, est chargé du suivi des décisions de règlement amiable, mission qui s'avère essentielle au respect des mesures correctives appliquées.

Dans tous les cas de cession d'actifs, le ministère américain de la Justice conserve le droit d'approuver l'acquéreur. L'approbation est subordonnée au respect de trois conditions. Premièrement, la cession d'actifs à l'acquéreur proposé ne doit pas causer d'atteinte à la concurrence. Deuxièmement, l'acquéreur doit être incité à utiliser les actifs pour soutenir efficacement la concurrence sur le(s) marché(s) concerné(s) et être en mesure de le faire. Troisièmement, l'acquéreur doit avoir le sens des affaires, ainsi que l'expérience et les ressources financières suffisantes pour faire efficacement face à la concurrence sur le(s) marché(s) concerné(s) sur le long terme.

En résumé, les États-Unis soulignent le fait que, plus qu'elle n'a modifié sur le fond l'approche du ministère américain de la Justice en matière de mesures correctives, la révision a mis à jour le guide sur les mesures correctives afin de l'harmoniser avec les pratiques du ministère. Le guide révisé s'intéresse plus à l'efficacité des mesures correctives qu'à la question de savoir si elles sont structurelles, comportementales ou hybrides.

La Présidente invite la délégation israélienne à présenter son projet de lignes directrices sur les mesures correctives dans les affaires de concentration.

La délégation d'Israël fait tout d'abord observer que son intervention porte pour l'essentiel sur certaines questions soulevées lors du débat autour de la rédaction des lignes directrices de l'autorité israélienne de la concurrence en matière de mesures correctives.

En premier lieu, les discussions ont surtout porté sur la conception du mécanisme et sur les problèmes de coûts. L'établissement d'un cadre pour les mesures correctives dans les affaires de concentration doit avoir pour objectif de prévenir les atteintes significatives à la concurrence. Plusieurs outils permettent d'atteindre cet objectif, chacun représentant un coût pour l'autorité, les parties à la fusion et le marché. Un cadre efficace pour les mesures correctives devrait s'efforcer de réduire ces coûts au minimum; or, il n'est pas aisé de parvenir à l'équilibre des coûts, en particulier pour différents acteurs.

En second lieu, lorsque la forte réduction de la concurrence constitue la norme d'examen de la fusion, les mesures correctives devraient-elles avoir pour but de rétablir la concurrence à son niveau antérieur à la fusion ou de la garantir contre toute atteinte substantielle? Cette question a été largement débattue, et l'autorité israélienne s'est efforcée d'étudier les approches adoptées dans d'autres pays. Dans ce contexte, la cession d'actifs peut s'avérer une mesure corrective particulièrement délicate. L'Israël a connu des affaires dans lesquelles les parties prétendaient qu'il leur fallait six ans pour accomplir les cessions requises. L'autorité a accepté ce long délai pour réduire au minimum les atteintes qui pourraient résulter d'une vente immédiate, comme notamment la réduction importante du prix des actifs. Ce délai a toutefois causé de nombreux problèmes et a permis aux parties d'arguer que les caractéristiques du marché avaient changé au moment où la cession d'actifs devait avoir lieu et que celle-ci n'était donc plus nécessaire. Le recours à un mandataire pourrait peut-être régler ce problème.

La délégation israélienne cite ensuite deux affaires en rapport avec cette discussion. La première concerne la fusion Bezeq/YES (2006) dans le secteur des télécommunications, à laquelle l'autorité s'est opposée en exigeant une cession que les parties n'étaient pas disposées à accepter. Le tribunal d'appel a rejeté la décision de l'autorité, et préconisé l'élaboration d'une mesure corrective comportementale complexe. Mais, lorsque l'autorité a recruté un expert en télécommunications pour contrôler sa mise en œuvre, il s'est avéré que la mesure corrective était impossible à surveiller. En appel, la Cour suprême a rejeté la mesure corrective comportementale et a préconisé la cession d'actifs initialement proposée par l'autorité de la concurrence. La deuxième affaire concerne la fusion Terraflex/Kafrit (2008) dans le cadre de laquelle l'autorité a ordonné la cession des actifs de propriété intellectuelle. À sa grande surprise, la partie procédant à l'acquisition a interjeté appel de l'ordonnance de cession, en prétendant que l'autorité de la concurrence aurait dû interdire la fusion. Le tribunal d'appel a confirmé la décision de l'autorité, considérant que l'application de la mesure corrective la moins préjudiciable était fondée. L'affaire a été portée devant la Cour suprême.

## **2. Les types de mesures correctives (structurelles, comportementales et hybrides)**

La Présidente remercie la délégation israélienne et invite la délégation autrichienne à rendre compte de l'étude réalisée en 2010 par l'autorité autrichienne sur les mesures correctives, dont la plupart étaient comportementales.

La délégation de l'Autriche décrit les deux principaux objectifs de cette étude, qui étaient premièrement, de déterminer si les mesures correctives imposées étaient respectées et, deuxièmement, d'évaluer leur efficacité. L'étude indique que depuis la création de l'autorité autrichienne de la concurrence en 2002, environ 135 mesures correctives – en majorité comportementales – ont été imposées dans quelque 55 affaires. Elle montre que la plupart des mesures correctives ont été respectées mais met aussi en lumière

quelques rares cas de non-conformité. Jusqu'à présent, seule une affaire de non-conformité a été portée devant le tribunal des cartels autrichien, qui a infligé une amende de 200 000 euros, mais d'autres affaires sont susceptibles de suivre. L'étude a par ailleurs abouti à une plus grande prise de conscience de la part des entreprises de la nécessité de respecter scrupuleusement les règles et, à ce titre, elle s'est avérée très fructueuse.

Concernant le deuxième objectif, la délégation autrichienne indique que l'évaluation de l'efficacité des mesures correctives est toujours en cours. L'étude a conclu que la plupart des mesures correctives imposées étaient comportementales par nature, ce qui contraste quelque peu avec la situation d'autres pays qui imposent surtout des mesures structurelles. Aucune explication claire de ce fait n'a été donnée. S'il est vrai que, dans certains cas, les mesures correctives comportementales ont pu tout simplement être plus appropriées, dans d'autres, elles ont pu s'imposer d'elles-mêmes dans la mesure où, compte tenu de la superficie relativement faible de l'Autriche, les actifs qui auraient pu faire l'objet d'une mesure structurelle étaient situés en dehors du pays.

La Présidente indique brièvement que les conclusions du ministère américain de la Justice sur la fusion Ticketmaster/Live Nation pourraient présenter un intérêt pour la délégation autrichienne. Les mesures correctives adoptées dans cette affaire étaient une combinaison de mesures structurelles et comportementales. Certaines preuves anecdotiques laissent penser que les prix des billets ont été réduits de 25 % et que les actifs cédés ont permis l'émergence d'un concurrent majeur. Cette affaire montre que l'efficacité des mesures correctives prime sur le fait de savoir si elles sont comportementales ou structurelles.

La Présidente se tourne ensuite vers la délégation de la Nouvelle-Zélande afin qu'elle décrive l'approche suivie par l'autorité de son pays, qui impose surtout des mesures correctives structurelles.

La délégation de la Nouvelle-Zélande explique que dans les affaires de concentration, la Commerce Commission de Nouvelle-Zélande n'accepte que les mesures correctives structurelles. L'impossibilité d'imposer des mesures comportementales n'est cependant pas problématique puisque la Commerce Commission préfère les mesures structurelles, du fait de la difficulté à élaborer, contrôler et faire respecter les mesures comportementales.

La Présidente remercie la délégation néo-zélandaise et invite la délégation grecque à relater son expérience relative aux mesures correctives dans les cas de fusions verticales.

La délégation de la Grèce indique que depuis l'entrée en vigueur du contrôle des fusions en Grèce, l'autorité de la concurrence n'a bloqué qu'une seule fusion. À l'origine, les mesures correctives imposées étaient surtout comportementales, mais ces dernières années, l'autorité a imposé un nombre croissant de mesures structurelles, y compris des cessions d'actifs. Cela a été le cas, par exemple, dans les affaires du lait (VIVARTIA/MEVGAL) et du gaz (ELPE/BP) évoquées dans la contribution écrite de la Grèce.

S'agissant des fusions verticales, la fusion VIVARTIA/MEVGAL (2011) illustre bien l'avantage de combiner des mesures correctives structurelles et comportementales. Dans cette affaire, en plus d'exiger une cession d'actifs, l'autorité grecque a imposé des mesures correctives comportementales sur les marchés tant en amont qu'en aval. En aval, la nouvelle entité n'était pas autorisée à conclure des contrats d'exclusivité pendant une période de cinq ans après la fusion. En amont, la nouvelle entité était tenue de vendre du lait aux concurrents pendant cinq ans sur la base d'un prix fixé sur des critères objectifs et transparents. La délégation grecque explique que, en plus d'être délicate du point de vue de la concurrence, cette affaire était également très politique. À terme, il a été jugé que la résolution et les mesures correctives imposées avaient réussi à régler les problèmes de concurrence en amont et en aval, tout en préservant les avantages de la fusion.

La Présidente remercie la délégation grecque et se tourne vers la délégation chilienne, dont la présentation mentionne des mesures correctives structurelles prospectives, et lui demande d'expliquer les caractéristiques de ces mesures.

La délégation du Chili explique que l'autorité nationale de la concurrence distingue deux types de mesures correctives structurelles : la cession d'actifs et ce que l'on appelle les mesures correctives structurelles prospectives, qui soit constituent un complément à une cession d'actifs, soit visent d'une autre manière à résoudre les problèmes de concurrence soulevés par une fusion. Une fusion dans le secteur de la télévision par câble datant de 2004 offre un exemple de mesure corrective structurelle prospective. Dans cette fusion, en plus d'ordonner la cession de tous les actifs sur certains marchés, le tribunal de la concurrence a interdit à la nouvelle entité de participer à ces marchés dans l'avenir. Un autre exemple tient à l'obligation de garantir la conservation d'une certaine part de l'activité dans une société cotée en bourse soumise aux règles sur les valeurs mobilières. Un dernier exemple de mesure corrective prospective, imposée dans plusieurs fusions dans les secteurs des supermarchés et de la radio, tient à l'obligation de notifier toute fusion ou acquisition ultérieure à laquelle la nouvelle entité prendrait part. La délégation chilienne explique que cette mesure corrective présente un grand intérêt, sachant que la notification des concentrations est facultative au Chili. Les notifications permettent au tribunal de la concurrence d'examiner toute fusion future qui conduirait à accroître le niveau de concentration sur le marché.

La Présidente remercie la délégation chilienne et invite la délégation finlandaise à faire part de ses observations sur la question soulevée dans sa contribution écrite, selon laquelle les mesures correctives devraient être adaptées au secteur auquel elles sont imposées.

La délégation de la Finlande explique que sa communication écrite ne tend pas à affirmer que les mesures correctives devraient être dictées par le type de secteur concerné, mais simplement qu'il convient de le prendre en compte pour déterminer la mesure corrective appropriée. L'expérience de l'autorité finlandaise de la concurrence montre que des mesures correctives ont été imposées dans certains secteurs, comme les télécommunications, plus souvent que dans d'autres. Le secteur des télécommunications étant très fortement réglementé, il est nécessaire d'en tenir compte et de veiller à ce que les mesures correctives imposées ne soient pas en conflit avec les réglementations en vigueur. Concernant le type de mesures correctives imposées dans ce secteur, la délégation finlandaise observe que, d'une manière générale, les mesures structurelles servent à résoudre les problèmes dans les fusions horizontales et que les mesures comportementales conviennent mieux aux fusions verticales.

La Présidente demande ensuite à la délégation italienne de faire part de son expérience en matière de mesures correctives dans le secteur bancaire, dans lequel l'autorité italienne de la concurrence a pris en considération certains facteurs spécifiques.

La délégation de l'Italie explique que ces dernières années, l'autorité nationale de la concurrence a passé en revue un grand nombre de fusions ayant fait l'objet de mesures correctives dans le secteur bancaire. Comme ces fusions faisaient partie d'un processus de consolidation du secteur plus qu'elles n'étaient la conséquence de la crise financière, elles ont généralement produit des gains d'efficacité. Certaines d'entre elles ont toutefois entraîné des problèmes de concurrence, qui ont été résolus grâce à des mesures correctives structurelles (comme la cession d'actifs de filiales en cas de chevauchement horizontal ou la cession de parts dans les coentreprises). Compte tenu de la nature particulière du secteur bancaire italien, qui connaît un degré élevé de cumul de mandats d'administrateurs et de chevauchement des postes de direction, l'autorité de la concurrence a également imposé des mesures comportementales complémentaires dans certains cas, pour répondre aux inquiétudes soulevées par ces questions. Ces mesures comprenaient des restrictions à l'exercice des droits de vote et l'engagement de ne pas siéger en même temps aux conseils d'administration des banques concurrentes. En conclusion, la délégation

italienne souligne que ces mesures correctives comportementales n'ont été appliquées qu'en complément de mesures structurelles, qui demeurent par ailleurs l'option privilégiée dans ce secteur.

La Présidente remercie la délégation italienne et demande à la délégation australienne de commenter l'acquisition par la National Australia Bank d'AXA Asia/Pacific Holding, examinée dans sa communication écrite.

La délégation de l'Australie souligne d'abord que la Commission australienne de la concurrence et des consommateurs (Australian Competition and Consumer Commission - ACCC) préfère elle aussi les mesures structurelles aux mesures comportementales pour les raisons déjà citées par les autres délégations.

Quant à la fusion National Australia Bank (NAB)/AXA Asia Pacific Holdings (AXA) (2010), qui concernait le secteur de la gestion du patrimoine, son évaluation a été particulièrement difficile en raison de la complexité des réseaux de distribution des produits. Les investisseurs, qui sont les clients, ont accès à un réseau de conseillers en placement qui, à leur tour, ont accès aux plateformes d'investissement sur lesquelles les banques et autres institutions proposent leurs produits d'investissement. L'accès aux plateformes d'investissement est essentiel au bon fonctionnement de la concurrence. À travers la fusion, NAB, acteur prédominant sur le marché, a cherché à faire l'acquisition d'un acteur plus petit, AXA, qui était très compétitif dans le développement de sa plateforme d'investissement et envisageait d'innover et d'étoffer son offre.

L'ACCC a soulevé des objections sur la fusion, que NAB a par la suite proposé de lever en cédant la plateforme en développement d'AXA. Or, les négociations et la consultation publique qui ont suivi ont mis en évidence que ce qui semblait à première vue une mesure corrective structurelle était en fait une mesure comportementale, puisque NAB proposait de ne céder qu'un seul projet en développement sans inclure aucun produit ou réseau de distribution de conseillers en placement. Le succès de cette mesure corrective, qui aurait exigé une surveillance importante, était très incertain dans la mesure où il dépendait des actions de différents acteurs externes, allant des conseillers en placement aux développeurs de plateformes.

Pour ces raisons, l'ACCC a décidé de ne pas accepter la mesure corrective et de maintenir sa décision de s'opposer à la fusion. Cette décision a été très controversée en ce qu'elle a été prise tardivement dans le processus de négociation, qui décrivait de manière très détaillée la mesure corrective envisagée, laissant par là même les parties espérer que la mesure corrective serait acceptée. Rétrospectivement, une décision plus précoce d'interdire la fusion aurait profité à toutes les parties intéressées ; mais, compte tenu de la complexité de la mesure corrective proposée, des investigations approfondies étaient à l'évidence nécessaires.

La Présidente remercie la délégation australienne et invite les délégations à formuler des observations sur le concept général de mesures correctives structurelles opposées aux mesures comportementales.

Le BIAC prend la parole et souligne l'importance de cette table ronde. Les mesures correctives dans les affaires de concentration ont des répercussions importantes sur les investissements des entreprises, et un degré trop élevé d'incertitude quant au type de mesures correctives à appliquer pourrait dissuader les investissements par ailleurs destinés à améliorer le bien-être des consommateurs. Le BIAC invite les autorités de la concurrence à en tenir compte lors de l'évaluation de l'efficacité et du coût des mesures correctives envisagées. Quant à la pertinence des mesures structurelles par rapport aux mesures comportementales, le BIAC relève que jusqu'à présent, le débat sur les principaux inconvénients des mesures correctives structurelles, à savoir le coût qu'elles représentent pour les parties à la fusion et les consommateurs, n'a suscité que peu d'intérêt. D'après le BIAC, quatre aspects mériteraient d'être approfondis. Premièrement, les mesures correctives structurelles éliminent ou réduisent souvent la portée des gains d'efficacité statiques et dynamiques. Deuxièmement, les atteintes à la concurrence résultant

d'une fusion sont souvent plus faibles qu'on ne l'imagine, voire inexistantes, ce qui rend la mesure corrective appliquée disproportionnée. Troisièmement, même en cas d'atteintes à la concurrence suite à la fusion, celles-ci sont souvent transitoires et n'impliquent pas l'entrée sur le marché, ni un repositionnement ou une variation de la demande des consommateurs, alors que les effets d'une mesure structurelle sont, eux, durables. Enfin, les mesures structurelles peuvent créer des perturbations en aval, qui influencent les relations client, ce qui peut expliquer que les clients leur préfèrent parfois les mesures comportementales.

Dans cette optique, le BIAC fait valoir qu'une quasi-présomption en faveur des mesures correctives structurelles pour les concentrations horizontales ne serait pas appropriée. Dans la pratique, les mesures structurelles ne devraient être envisagées qu'en dernier recours. S'il est vrai que, comme d'autres délégations l'ont indiqué, les mesures comportementales soulèvent leurs propres difficultés, elles peuvent éviter certains inconvénients des mesures structurelles déjà mentionnés. Le BIAC déconseille donc toute présomption lorsque les fusions horizontales sont systématiquement traitées par des mesures structurelles et les fusions verticales par des mesures comportementales, et encourage les autorités de la concurrence à s'intéresser à l'efficacité et au coût de la mesure corrective envisagée pour l'ensemble des acteurs. Pour ce faire, il est souvent nécessaire d'affiner l'analyse factuelle et économique, et d'accorder une plus grande attention aux résultats de la mesure corrective préconisée. À cet égard, le BIAC se félicite des modifications apportées aux lignes directrices américaines sur les mesures correctives, qui vont largement dans ce sens et privilégient l'efficacité et la rentabilité des mesures correctives propres à chaque opération.

En réaction à l'intervention du BIAC, la délégation du Brésil mentionne la fusion Braskem/Quattor (2011), que des mesures correctives comportementales ont permis de résoudre même si l'opération a abouti à une situation de monopole sur le marché brésilien. Dans cette affaire, les mesures comportementales ont été jugées plus appropriées, compte tenu des effets néfastes qu'une mesure structurelle aurait pu avoir pour un grand nombre d'acteurs sur le marché. Elles ont par ailleurs permis à l'autorité d'exercer un contrôle sur la nouvelle entité et lui ont donné les outils nécessaires pour engager plus facilement des poursuites en cas d'usage abusif du pouvoir de marché nouvellement acquis. Cette mesure corrective a ainsi donné à l'autorité de meilleurs outils pour lutter contre toute atteinte à la concurrence postérieure à la fusion.

La Présidente remercie le BIAC et la délégation brésilienne et donne la parole à la délégation allemande afin qu'elle fasse part de ses observations.

La délégation allemande note que la discussion en cours est le signe d'une évolution positive vers la reconnaissance de l'efficacité comme critère principal de l'examen des mesures correctives. La loi allemande interdit toute mesure équivalant au contrôle permanent d'une entreprise, ce qui permet à l'autorité de se concentrer sur la définition de la mesure corrective la plus efficace, dans le cadre de ces limites. Le contrôle durable ou permanent du comportement d'une entreprise requiert un niveau de surveillance réglementaire que les autorités de la concurrence n'ont ni les moyens ni la responsabilité de fournir.

Avant de passer à l'examen des mesures correctives individuelles, la Présidente demande à la délégation d'Israël de présenter ses observations finales sur les différences entre mesures correctives structurelles et comportementales.

La délégation d'Israël a plusieurs observations à formuler en réponse aux questions soulevées lors de la discussion. Premièrement, au moment d'apprécier le coût d'une mesure corrective, les coûts pour l'autorité de la concurrence doivent être mis en balance avec les coûts pour les parties à la fusion. De la même manière, l'autorité devrait prendre en considération les économies de coûts réalisées par les parties mais qui ne sont pas répercutées sur les consommateurs. Deuxièmement, les gains d'efficacité doivent, bien sûr, être pris en compte au moment de décider de la meilleure mesure corrective possible et peuvent parfaitement faire pencher la balance en faveur d'une mesure corrective comportementale, même si sur la

seule base des considérations de coût, une mesure structurelle pourrait sembler préférable. Troisièmement, les mesures correctives comportementales ne sont pas toujours suffisamment efficaces. Par exemple, dans le cas d'une fusion verticale impliquant la détention intégrale du capital, une clause de non-discrimination ne garantirait pas efficacement l'égalité tarifaire. Enfin, les mesures correctives comportementales nécessitent un contrôle qui transforme quasiment l'autorité de la concurrence en organisme de réglementation, rôle pour lequel elle est imparfaitement armée. Cela pourrait en particulier poser problème dans les secteurs réglementés où deux organismes gouvernementaux auraient des compétences parallèles qui exigeraient leur co-ordination.

### 3. Accords de séparation et acquéreurs initiaux

La Présidente remercie toutes les délégations pour leurs contributions sur les différences d'ordre général entre les mesures correctives comportementales et structurelles et passe à l'examen des problèmes spécifiques posés par les mesures individuelles. La Présidente demande à la délégation canadienne de faire part de ses observations sur la question des accords « de séparation » et des acquéreurs initiaux.

La délégation du Canada explique qu'un accord de séparation a pour objet de garantir la préservation et la viabilité des actifs à céder pendant toute la période de cession en les tenant séparés de la nouvelle entité. Le Bureau canadien de la concurrence (ci-après « le Bureau ») peut envisager de recourir à un accord de séparation dans deux cas : soit pendant la cession des actifs après un accord consensuel, soit au cours de la procédure litigieuse précédant la prise de décision. Le Bureau exige en général qu'un gestionnaire expérimenté, indépendant de l'acquéreur, gère l'activité séparée. La nouvelle entité peut par ailleurs être tenue de fournir le soutien financier nécessaire pour garantir la viabilité de l'activité séparée. Le Bureau a récemment réalisé une étude sur les mesures correctives dans les affaires de concentration imposées entre 1995 et 2005. Cette étude, disponible sur son site Internet<sup>1</sup>, indique que certains accords de séparation imposés au cours de la période examinée ne répondaient pas à l'ensemble des conditions visant à garantir la viabilité des actifs séparés. Dans certains cas, les actifs séparés se sont dégradés en raison d'une longue période de vente initiale, de l'absence de gestionnaire indépendant responsable ou d'un manque de moyens financiers. Ces résultats renforcent les exigences du Bureau concernant les accords de séparation définies dans le Bulletin d'information sur les mesures correctives de 2006 et sa détermination à imposer toutes les dispositions nécessaires dans des accords de séparation.

La Présidente remercie la délégation canadienne et demande à la délégation du Royaume-Uni de décrire son expérience en matière de mesures correctives de type « acquéreur initial ».

La délégation du Royaume-Uni explique que, dans son pays, les fusions sont d'abord évaluées par l'Office of Fair Trading (OFT). Lorsqu'elles ne sont pas résolues au cours de cette première phase, elles sont alors soumises à une enquête plus approfondie menée par la Commission de la concurrence. D'un point de vue technique, si l'OFT approuve la fusion en l'assortissant d'une mesure corrective au cours de la première phase (en acceptant ce que l'on appelle « un engagement au lieu d'un renvoi ») et si les parties ne parviennent pas ultérieurement à l'appliquer (par exemple, si elles ne trouvent pas d'acquéreur), l'OFT ne peut plus soumettre l'affaire à la Commission de la concurrence (CC). Par conséquent, l'OFT exigera souvent une mesure corrective de type « acquéreur initial » avant d'accepter l'engagement afin de conserver la capacité de faire appel à la CC.

Pour cette raison, l'OFT exige souvent que la transaction soit non seulement signée mais également réalisée avant l'approbation de la fusion. La vente initiale en première phase présente l'avantage de s'accompagner d'une période de vente initiale relativement courte, ce qui limite le risque de détérioration des actifs mentionné précédemment par la délégation canadienne. De la même façon, l'OFT peut consulter

<sup>1</sup> <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03392.html>.

les acteurs du marché sur l'ensemble des mesures de cession et sur l'identité de l'acquéreur avant d'approuver la fusion. Enfin, régler une affaire avec une mesure corrective de type « acquéreur initial » pendant la première phase évite aux autorités (et donc aux contribuables) et aux parties à la fusion de supporter la lourde charge que représente l'enquête de deuxième phase.

S'il n'est pas possible d'obtenir des engagements au lieu de mesures correctives dans les affaires controversées lors de la première phase, l'affaire fait alors l'objet d'une enquête de la Commission de la concurrence. Si la cession d'actifs est la mesure corrective jugée la plus appropriée, l'enquête de deuxième phase aura alors principalement pour but d'inciter les parties à la fusion à l'appliquer. Il existe pour ce faire trois principaux types de mesures incitatives. Premièrement, l'identification d'un acquéreur qui s'engage contractuellement ou la réalisation d'une cession d'actifs peut devenir une condition préalable à la transaction souhaitée par les parties (acheteur initial). Un exemple est donné par l'affaire Hamsard/Academy Music Holdings (2007), où il a été demandé aux acheteurs de s'engager par contrat à acquérir deux salles de concert avant d'autoriser la fusion proposée. L'approche « joyau de la couronne » constitue un deuxième type de mesures incitatives, en vertu duquel les parties qui ne veulent pas ou ne peuvent pas céder l'ensemble d'actifs requis se voient menacées d'avoir à le remplacer par la cession d'un ensemble d'actifs plus important encore. EWS Railway Holdings/Marcroft Engineering (2006) est un exemple de cette approche. Le dernier type de mesures incitatives consiste pour la CC à pouvoir désigner un mandataire chargé de la cession en vue de vendre l'ensemble d'actifs sans prix minimum. Le mandataire doit généralement être désigné si les parties n'ont pas procédé à la cession dans le délai imparti. L'affaire Stonegate Farmers/Dean Foods Group (2007) offre un exemple de cette approche.

La Présidente remercie la délégation du Royaume-Uni et se tourne vers la délégation slovaque afin qu'elle relate son expérience en matière de mesures correctives de type « acquéreur initial » dans la fusion Tesco-Carrefour.

La délégation de la République slovaque décrit tout d'abord les faits de l'affaire, qui vise une grande fusion transnationale réalisée en 2006 entre deux géants de la vente au détail, Tesco et Carrefour. L'autorité slovaque de la concurrence a évalué la partie de la fusion qui touchait le marché slovaque, sur lequel Tesco et Carrefour étaient les seuls opérateurs de la grande distribution, l'activité des autres opérateurs de vente au détail sur le marché slovaque étant surtout tournée vers les petits supermarchés et les magasins à prix réduits. La fusion a soulevé d'importants problèmes de concurrence, qui ont conduit Tesco à proposer la cession de trois de ses supermarchés. Or, aucun des repreneurs n'a souhaité acheter ces actifs, en raison de la proximité directe des supermarchés qui resteraient sous la responsabilité de Tesco d'une part, et de la stratégie d'entreprise de certains des repreneurs qui les portait à privilégier les magasins locaux et les petits supermarchés, d'autre part. Face à cette situation, l'autorité de la concurrence a demandé l'application de la solution de « l'acquéreur initial », ce que Tesco a refusé, raison pour laquelle la fusion a été bloquée. Chose intéressante, Tesco n'a pas contesté la décision, peut-être parce qu'entre-temps elle s'était désintéressée de l'acquisition des supermarchés de Carrefour du fait de la saturation relative de ce segment du marché en Slovaquie.

Après l'intervention slovaque, la Présidente invite la délégation suisse à faire part de son expérience en matière de fusion de supermarchés.

La délégation de la Suisse fait remarquer que son expérience de la fusion Coop/Carrefour (2008) est très similaire à celle de la Slovaquie. Le marché de détail en Suisse est très concentré, Migros contrôlant 40 % du marché, suivie de Coop avec 35 %. Carrefour était un acteur relativement petit qui souhaitait quitter le marché et vendre ses magasins à Coop. Pour résoudre les importants problèmes de concurrence soulevés par cette transaction, Coop a dû céder une grande part de sa surface commerciale dans les régions problématiques. En revanche, trouver un acquéreur pour l'ensemble s'est avéré impossible en raison de plusieurs éléments. Premièrement, les baux des surfaces commerciales étaient trop élevés pour la plupart



des petits concurrents. Deuxièmement, les emplacements n'étaient pas particulièrement attrayants. Enfin, le fait que le marché de détail était déjà très concentré a fait naître de sérieux doutes quant à la possibilité de gérer de façon viable les activités cédées face à la concurrence de Migros et de Coop. L'autorité a alors proposé aux opérateurs allemands de magasins à prix réduits Aldi et Lidl, qui étaient sur le point d'entrer sur le marché suisse, d'acheter l'ensemble des activités cédées. Mais, leurs stratégies d'entreprise ne correspondaient pas aux actifs à céder, en termes d'emplacements et de dimensions souhaitées. Au final, aucun acquéreur n'a pu être trouvé pour l'ensemble. Cet exemple illustre les limites des mesures correctives structurelles sur les marchés concentrés des petites économies : lorsqu'il n'y a pas d'acquéreur pour les activités cédées, les mesures structurelles sont vouées à l'échec.

La Présidente demande à la délégation mexicaine d'exprimer son point de vue sur la cession comme mesure corrective.

La délégation du Mexique explique que l'autorité mexicaine de la concurrence garantit le respect des mesures correctives soit par l'annulation a posteriori de l'approbation d'une fusion en cas de non-conformité, soit par l'imposition d'une amende pouvant atteindre 10 % de la vente. La délégation décrit ensuite les différents facteurs identifiés par l'autorité mexicaine de la concurrence comme contribuant au succès d'une cession. Premièrement, la portée des mesures correctives doit être clairement définie. Deuxièmement, le plan de cession doit contenir un minimum d'éléments pour assurer une cession fructueuse et rapide. Troisièmement, les activités cédées devraient inclure non seulement des actifs physiques mais aussi tous les éléments qui en assureront la viabilité (comme les stocks, le personnel clé, les droits de propriété intellectuelle, etc.). Quatrièmement, les repreneurs potentiels doivent être approuvés par l'autorité de la concurrence pour s'assurer qu'ils ont une connaissance du marché et une solidité financière suffisantes pour bien gérer les actifs cédés. Cinquièmement, la période de vente initiale devrait être raisonnablement courte de manière à éviter la détérioration des actifs cédés. Sixièmement, les actifs cédés devraient être gérés par un mandataire spécialisé qui encourage la cession. Enfin, les modalités des mesures correctives doivent rester confidentielles jusqu'à la conclusion du processus de cession. En réponse à la question de la Présidente, la délégation mexicaine indique que l'approbation d'une fusion n'a jamais été retirée pour cause de non-conformité avec l'ordonnance de cession, en partie grâce aux éléments mentionnés ci-dessus et en partie en raison de la difficulté de revenir sur une fusion déjà consommée.

#### **4. Le recours à des mandataires chargés du contrôle**

La Présidente invite ensuite la délégation espagnole à faire part de sa présentation, qui met l'accent sur quatre éléments fondamentaux présidant au choix d'un bon mandataire.

La délégation de l'Espagne indique pour commencer que l'autorité espagnole de la concurrence fixe le délai précis pendant lequel les parties peuvent procéder à une cession. Si la cession n'est pas réalisée dans le délai imparti, l'autorité désigne un mandataire. Pour ce faire, l'autorité tient compte d'un certain nombre d'éléments :

- Premièrement, l'autorité s'efforce de garantir l'indépendance du mandataire chargé de la vente en analysant les liens qui existent entre le mandataire potentiel et les parties. Une totale indépendance n'est généralement pas possible dans la mesure où de nombreux mandataires sont des banques d'investissement ou des sociétés de conseil. Cela étant, l'autorité veille toujours à ce que le personnel du mandataire n'ait pas d'intérêt, positif ou négatif, dans la cession des actifs.
- Deuxièmement, le mandataire ne devrait pas se trouver dans une situation de conflit d'intérêts au regard de la cession (par exemple, il ne peut pas être lié à un concurrent et ne doit pas accepter de travailler pour l'entreprise pendant une période donnée après la conclusion de l'accord de fiducie).

- Troisièmement, les mandataires devraient justifier d'une expérience étendue en matière de sélection des éventuels acquéreurs et de négociation des transactions impliquant des actifs similaires. Les mandataires potentiels doivent présenter un plan d'action détaillé fixant des échéanciers et établissant des mécanismes permettant de mener à bien la transaction.
- Enfin, la rémunération du mandataire doit être suffisante pour garantir qu'il mène à bien sa mission en toute indépendance.

La Présidente demande alors à la délégation irlandaise de commenter les deux exemples cités dans sa présentation sur le rôle joué par les mandataires dans la mise en œuvre des mesures correctives structurelles et comportementales.

La délégation de l'Irlande décrit tout d'abord la fusion de deux journaux gratuits du matin, appartenant à des journaux payants, qui a abouti à la création de la coentreprise Metro/Herald en 2009. Outre la question de savoir si la coentreprise pouvait fonctionner indépendamment de ses sociétés mères, l'autorité irlandaise de la concurrence s'est inquiétée du comportement de l'entreprise commune, qui pourrait devenir un lieu d'échange d'informations entre les sociétés mères, ou entre une des sociétés mères et Metro-Herald. Un mandataire indépendant a été désigné pour contrôler le respect des engagements de ne pas partager d'informations sensibles sur le plan commercial d'une part, et de permettre à Metro-Herald de fonctionner de manière autonome vis-à-vis de ses actionnaires d'autre part. Le mandataire doit rendre compte à l'autorité chaque année, mais la question de savoir pendant combien de temps est restée ouverte.

Le deuxième exemple concerne la fusion de deux stations de radio qui se trouvaient en concurrence étroite. Les parties devaient trouver un acquéreur initial et se sont vues accorder un délai de trois mois pour réaliser la cession avant qu'un mandataire soit désigné. Cela a suffi à inciter les parties à procéder à la cession pendant cette période initiale de trois mois. La délégation évoque la contribution du Royaume-Uni, qui soulignait également la nécessité d'inciter fortement les entreprises à honorer leurs engagements.

La Présidente note que la présentation de la Corée analyse les coûts liés à la désignation d'un mandataire chargé du contrôle, ainsi que diverses alternatives à la désignation d'un mandataire, comme la création d'un comité de surveillance ou d'organes consultatifs. La Présidente demande à la délégation coréenne de préciser.

La délégation de la Corée explique que dans certaines affaires, la Commission coréenne de la concurrence (KFTC) a choisi d'imposer des mesures correctives comportementales plutôt que structurelles au vu de la situation économique ou du cadre réglementaire du secteur concerné. Le suivi continu constituant une charge pour l'autorité de la concurrence, la KFTC a ordonné la création d'un comité de suivi, composé des parties prenantes directement affectées par la fusion, telles que les clients, les contreparties et les concurrents des entreprises ayant fusionné. Ce type de solution ne convient pas aux concentrations horizontales dans la mesure où, après la fusion, ce comité pourrait donner l'occasion aux concurrents de constituer une entente sur un marché comptant déjà un nombre limité d'acteurs.

La fusion de Posco avec Hankook Core en 2007 en offre un exemple. Posco couvrait 92 % du marché intérieur des tôles magnétiques utilisées dans les composants fabriqués par Hankook Core. La KFTC a donné l'ordre aux parties à la fusion de créer un comité de suivi composé de concurrents et de superviseurs commerciaux indépendants, et a demandé à ce que le comité lui fasse rapport tous les six mois. Dans ce cas – et dans d'autres – de recours à des comités de suivi, les parties à la fusion ont toujours appliqué et respecté la mesure corrective. Cependant, la délégation s'empresse de souligner qu'il est difficile d'évaluer l'efficacité de ces comités. En tout état de cause, il est clair que, lorsque des mesures correctives comportementales sont appliquées, l'autorité en supporte la charge. Pour cette raison, la KFTC a

récemment actualisé ses lignes directrices pour privilégier les mesures correctives structurelles aussi souvent que possible.

## 5. Questions de procédure

La Présidente passe ensuite à l'examen des questions de procédure. La communication écrite de l'Allemagne examine le rôle joué par les tiers tels que les clients et les concurrents pour garantir l'efficacité d'une mesure corrective préconisée face aux préoccupations de l'autorité de la concurrence. La Présidente demande alors à la délégation allemande d'évoquer le rôle joué par les tiers dans la détermination des mesures correctives à adopter.

La délégation de l'Allemagne souligne l'importance des contributions des tiers, non seulement pour comprendre le marché, mais aussi pour élaborer des mesures correctives efficaces. Les tiers peuvent préciser quels actifs sont vraiment essentiels à la poursuite d'une activité viable et faire apparaître les risques cachés, comme les droits de propriété ou la durée des contrats de bail et des permis nécessaires à l'exercice de l'activité. Cela étant, la délégation allemande relève les problèmes que pourrait poser le fait de s'en remettre aux tiers. Plus précisément, les concurrents ont des intérêts contraires et pourraient inciter l'autorité à imposer la cession d'une activité attrayante qu'ils pourraient ensuite racheter. Les fournisseurs, eux, pourraient ne pas s'y montrer tout à fait favorables par crainte de perdre des clients. Quant aux clients, ils sont souvent plus neutres, mais ont parfois une moins bonne connaissance du secteur. La délégation allemande explique ensuite comment sont prises en compte les contributions des tiers. La première étape consiste à identifier les clients, les fournisseurs et les concurrents qui pourraient fournir des informations pertinentes. Mettre rapidement en place les circuits de communication adéquats permet d'accélérer l'obtention d'informations par la suite, au moment des mesures correctives, lorsque les délais sont vraiment serrés. L'Office fédéral des cartels consulte régulièrement les acteurs du marché sur les mesures correctives préconisées.

La Présidente demande au Portugal d'expliquer comment la clause de révision, qui permet à l'autorité de modifier les engagements, fonctionne en pratique.

La délégation du Portugal explique que les mesures correctives peuvent être modifiées par une clause de révision ou par voie d'amendement à la décision. On a recours à la clause de révision lorsque l'autorité prévoit la possibilité que des modifications (par exemple, des modifications de délais ou de fréquence des rapports) soient nécessaires au moment de mettre en œuvre les mesures correctives. Cette voie laisse une importante marge d'appréciation et n'exige pas la consultation des tiers. L'autorité portugaise de la concurrence peut également modifier les mesures correctives imposées par le biais d'une décision d'amendement. À la différence de la clause de révision, la modification d'une décision laisse à l'autorité une très faible marge d'appréciation. Les tiers opposés à la décision doivent être consultés et il revient aux parties notifiantes de justifier que la situation a évolué dans une mesure telle qu'un amendement s'impose. Compte tenu de ces difficultés et des délais fixés pour la mise en œuvre des mesures correctives, les amendements seront probablement rares.

La Présidente pose ensuite la question du délai alloué aux parties à la fusion pour mettre en œuvre les mesures correctives imposées. Elle demande à la délégation turque d'explicitement sa présentation consacrée aux avantages et inconvénients d'accorder aux parties à la fusion un délai plus long que celui imposé par d'autres autorités.

La délégation de la Turquie explique que par le passé, l'autorité turque de la concurrence octroyait dans la plupart des cas un délai de deux ans pour réaliser la cession, sachant que la décision d'apurement des comptes ne nécessitait pas que la clôture soit finalisée. Ces dernières années, pourtant, l'autorité a ramené ce délai à un an, compte tenu des risques indéniables qui pèsent sur la concurrence si les actifs à

céder restent plus longtemps sous le contrôle de la nouvelle entité. Dans l'intervalle, l'entreprise pourrait par exemple déprécier les actifs avant de les vendre. En pratique, l'autorité a observé que les obligations formelles pouvaient être mises en œuvre en trois mois, de sorte qu'un délai de six mois suffirait probablement largement pour réaliser une cession.

La Présidente se tourne vers la délégation lituanienne afin qu'elle évoque son expérience relative à l'implication de tiers dans l'élaboration de mesures correctives appropriées.

La délégation de la Lituanie explique que seules des procédures générales permettent aux tiers de présenter des observations avant l'adoption d'une décision conditionnelle définitive. Chaque fusion notifiée doit faire l'objet d'une publication au Journal officiel et sur le site internet de l'autorité de la concurrence, après quoi les parties intéressées ou affectées disposent de deux semaines pour présenter leurs vues. En pratique, la plupart des fusions que l'autorité a à connaître ne posent pas de problèmes de concurrence. Même lorsqu'elles en posent, les tiers exercent rarement leur droit de participer à la procédure, dans la mesure où la plupart d'entre eux n'ont qu'une faible envergure et ne sont pas représentés par des conseils. Ceux qui seraient à même d'apporter une contribution significative pourraient craindre de nuire à leurs relations d'affaires, compte tenu de la taille limitée des entreprises.

La délégation cite deux exemples rares de participation active des tiers, qui concernent tous deux la maison d'édition finlandaise Rautakirja. Dans la première fusion, l'autorité a organisé une réunion officielle avec les éditeurs, les revendeurs et les concurrents des entreprises ayant fusionné, dont certains ont soutenu les mesures correctives. Dans la deuxième, l'autorité a sondé les tiers, et les discussions entre les concurrents et les clients ont permis de dresser une longue liste de mesures correctives. Il devrait être possible d'améliorer la prévisibilité au niveau souhaité en clarifiant la procédure de participation des tiers.

## **6. Coopération internationale dans l'élaboration et la mise en œuvre des mesures correctives dans les affaires de concentration**

La Présidente demande ensuite à la délégation de l'Union européenne (UE) d'engager le débat sur la coopération internationale.

L'UE relève tout d'abord l'accroissement du nombre des concentrations internationales et multi-juridictionnelles au cours des dix-huit derniers mois, sous le double effet de la mondialisation et de la prolifération des systèmes de contrôle des concentrations. Depuis 2009-2010, pas moins de 25 % des mesures correctives dans les affaires de concentration ont été adoptées sur la base de la discussion ou de la coopération internationale. Dans ce contexte, les parties sont fortement encouragées à aider les autorités à coopérer les unes avec les autres en vue d'harmoniser les mesures correctives à travers les différents pays, sachant qu'elles supporteraient les coûts élevés liés à des mesures correctives ultérieures contradictoires. La délégation évoque quelques récents exemples de coopération multi-juridictionnelle réussie dans les fusions Thomson-Reuters (2008), Pfizer-Wyeth (2009), Panasonic-Sanyo (2009) et Cisco-Tandberg (2010).

Il existe aussi une coopération entre les États membres de l'UE. La Commission européenne et les autorités nationales de la concurrence dans l'UE ont élaboré conjointement des principes de pratiques d'excellence pour les fusions qui ne répondent pas aux obligations européennes régissant la notification mais sont examinées par chacun des États membres de l'UE. Lorsque ces principes ont été publiés pour consultation publique, les parties ont exprimé leur fort désir de voir les différentes autorités nationales appliquer des mesures correctives identiques, ou pour le moins non contradictoires.

La coopération est toujours utile, même lorsque le marché géographique concerné n'est pas international, sachant que les mesures correctives dans un pays peuvent avoir des répercussions dans

d'autres pays. L'UE cite l'exemple de l'industrie pharmaceutique qui, bien qu'elle comprenne 27 marchés nationaux, est très largement interconnectée. La cession d'une marque sur un marché ou d'une usine auprès de laquelle d'autres pays se fournissent est susceptible d'avoir une incidence sur l'évaluation concurrentielle d'autres autorités. La coopération peut permettre d'éviter des mesures correctives contradictoires, susceptibles d'affecter d'autres pays outre mesure.

La délégation de l'UE souligne également que la coopération devrait débiter dès les premières phases de l'évaluation, de manière à ce que les organismes développent une compréhension commune de ce qu'est une atteinte à la concurrence, et qu'elle devrait s'étendre à la mise en œuvre des mesures correctives. Un système de notification des moments importants du processus de décision permettrait d'harmoniser ces procédures. L'UE propose un mécanisme d'avertissement rapide entre les autorités, permettant d'examiner les procédures parallèles avec les parties, en particulier dans les cas où des mesures correctives sont susceptibles d'être prescrites. Des contacts réguliers entre les autorités grâce aux dérogations accordées par les parties permettront aux autorités d'élaborer des mesures correctives communes ou interconnectées. Des discussions régulières avec les parties et les tiers contributeurs pourraient de la même façon s'avérer utiles pour parvenir à des résultats non contradictoires. Cela étant, même avec une coopération efficace, il est impossible de dire exactement quels éléments de la mesure corrective devraient être identiques. La mesure corrective appropriée dépendra toujours de la structure du marché en cause. Dans le cas d'un marché international, une seule série de mesures correctives peut suffire. Les autorités doivent alors se mettre d'accord sur le périmètre de cession approprié.

Lorsque les marchés ne sont pas internationaux mais interconnectés, la coordination peut s'avérer nécessaire pour veiller à ce que les relations de fourniture soient garanties même après une cession, de manière à rendre la mesure corrective efficace. Par exemple, la mesure corrective appliquée dans la fusion Pfizer-Wyeth (2009) préconisait un désengagement de l'UE. Or, pour que cette mesure soit efficace, certains produits ont dû être transférés à destination et en provenance des États-Unis pour garantir la viabilité des appareils de production européens. Les mesures correctives autres que la cession exigent aussi une coordination. Dans la fusion Cisco-Tandberg (2010), la Commission européenne et le ministère américain de la Justice ont travaillé ensemble sur une mesure corrective d'interopérabilité.

S'agissant de la mise en œuvre, la coopération est utile à la fois pour définir les dispositions d'application et l'application proprement dite. Il n'est pas nécessaire que les délais soient les mêmes, mais la mise en adéquation des calendriers d'application présente des avantages. Dans certains cas, il est possible de recourir à des mandataires communs, ce qui évidemment réduit les frais pour les parties. À l'issue du processus d'application de la mesure corrective, un acquéreur doit acheter l'actif cédé. C'est pourquoi les organismes devraient par ailleurs pouvoir convenir ensemble d'un acquéreur approprié. La délégation de l'UE relève que les organismes appliquent différentes approches de mise en œuvre des mesures correctives pour s'adapter aux exigences procédurales et matérielles de chaque pays. Les autorités doivent ainsi faire preuve de souplesse et d'esprit de communication pour concilier ces approches, tout en s'assurant néanmoins que les parties demeurent en mesure de les appliquer.

La Présidente demande ensuite à la délégation japonaise de faire part de son expérience relative aux dépôts de notification multi-juridictionnels dans l'acquisition de Varian par Agilent Technologies.

La délégation du Japon explique qu'Agilent et Varian sont toutes deux spécialisées dans la fabrication et la distribution d'instruments d'analyse dans le monde entier, y compris au Japon par le biais de leurs filiales japonaises respectives. La US Federal Trade Commission (US FTC) et la Commission européenne (CE) ayant estimé que la transaction prévue soulevait des problèmes de concurrence sur certains marchés, les parties ont proposé de céder une ligne de produits Agilent et deux lignes de produits Varian. La US FTC et la CE ont approuvé la transaction, sous réserve qu'elle respecte ces mesures correctives. Les parties ont alors proposé des mesures correctives similaires à la Commission japonaise de la concurrence (JFTC),

qui a procédé à une double évaluation de l'efficacité de ces cessions pour régler les problèmes de concurrence. Dans un premier temps, la JFTC a conclu que la transaction prévue n'entraînerait aucune augmentation des parts de marché. Mais, les acquéreurs de ces lignes de produits avaient des filiales au Japon qui disposaient de circuits de distribution. La JFTC a donc estimé qu'ils deviendraient de puissants concurrents sur le marché japonais, raison pour laquelle elle a approuvé la transaction avec les mesures correctives préconisées par les parties en 2010.

La Présidente se tourne vers la délégation française pour qu'elle relate son expérience relative à la fusion des sociétés Marine Harvest et Pan Fish, qui constitue également un cas de fusion multi-juridictionnelle.

La délégation de la France indique que cette fusion, datant de 2006, offre un bon exemple d'enquêtes menées en parallèle au Royaume-Uni et en France. Pan Fish, société norvégienne, a fait l'acquisition d'une société néerlandaise concurrente sur le marché de l'élevage du saumon de l'Atlantique. Si l'opération a d'abord été approuvée aux États-Unis et en Espagne, le Royaume-Uni et la France ont pour leur part demandé une enquête plus approfondie. Les autorités française et britannique ont été en contact régulier, et l'autorité française a même tenu compte de nombreux points du rapport du Royaume-Uni dans sa décision. Au final, l'autorité de la concurrence du Royaume-Uni a considéré que l'opération ne serait pas problématique sur son marché. En revanche, l'autorité française a jugé que la nouvelle entité pourrait réduire en terme de rentabilité la quantité de saumon produit en Écosse et que les consommateurs français étaient moins susceptibles de le remplacer par du saumon d'une autre région. Par ailleurs, l'autorité britannique a informé l'autorité française que la capacité de production de l'Écosse était faible et que les coûts de production étaient élevés. Pour ce qui est des mesures correctives, Pan Fish a proposé de se défaire de certains actifs en Écosse. Malgré la simplicité de ce plan de cession d'actifs, il a fallu plus de deux ans pour mener à bien la mesure corrective.

La Présidente donne ensuite la parole aux délégués qui auraient des commentaires ou des questions d'ordre général.

La délégation des États-Unis relève que les autorités adoptent toutes sensiblement la même attitude et la même approche en matière d'application des mesures correctives. Les divergences semblent davantage tenir à la diversité des expériences qu'à une divergence de vues, ce qui constitue une évolution par rapport à il y a 10 ou 20 ans. Un deuxième point concerne l'importance de la communication et de la co-ordination dans l'élaboration des mesures correctives, pour éviter de porter atteinte à la concurrence dans un autre pays. Enfin, les États-Unis notent que les nouvelles lignes directrices du ministère américain de la Justice sont conformes à la pratique suivie depuis un moment à la fois par le ministère américain de la Justice et par la Fair Trade Commission américaine. Les lignes directrices proposent une approche très pragmatique qui tient compte des conceptions de l'atteinte à la concurrence présentes dans chaque affaire, sans s'en remettre à un modèle universel.

La Présidente conclut alors la table ronde et remercie l'ensemble des délégations pour leurs contributions.