



Challenges in designing and implementing remedies – a monitoring trustee perspective

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About Me



NERA
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- Partner, PricewaterhouseCoopers, 2000-2009
- Founding Director CompetitionRx, 2009 – 2015
- Panel Member UK Competition and Markets Authority, 2009 – 2017
- Visiting Professor/Director IP Research Centre, Imperial College Business School 2003 – 2013
- Senior Advisors Mazars LLP (since 2015)
- Affiliated Consultants NERA Economic Consulting, Berlin/London (since 2017)
- Visiting Researcher University of Hamburg (since 2019)



Five major challenges



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complexity



<https://lankydanblog.com/2017/04/23/learning-big->



Competition policy for the digital era

A report by
Jacques Cr  mer
Yves-Alexandre de Montjoye
Heike Schweitzer

independence

[g/independence/](#)

inc



<https://smallbusiness.chron.com/gross-profit-compared-profit-margin-ratio-34617.html>

urgency



<https://enterpriseproject.com/article/2014/8/20-ways-create-sense-urgency>

- Antitrust Remedies
 - Art 7 Regulation (EC) 1/2003 – Sanctions (Microsoft, 2014)
 - Art 9 Regulation (EC) 1/2003 – Commitments (Samsung, 2014)
- Merger Remedies
 - Art 6(2) and 8(2) Regulation (EC) 139/2004 - Commitments (Dow/DuPont, 2017)
- State Aid Remedies
 - Art 108(2) TFEU and Art 16(1) Regulation (EC) 2015/1589 (Dexia, 2009)

Remedy typology



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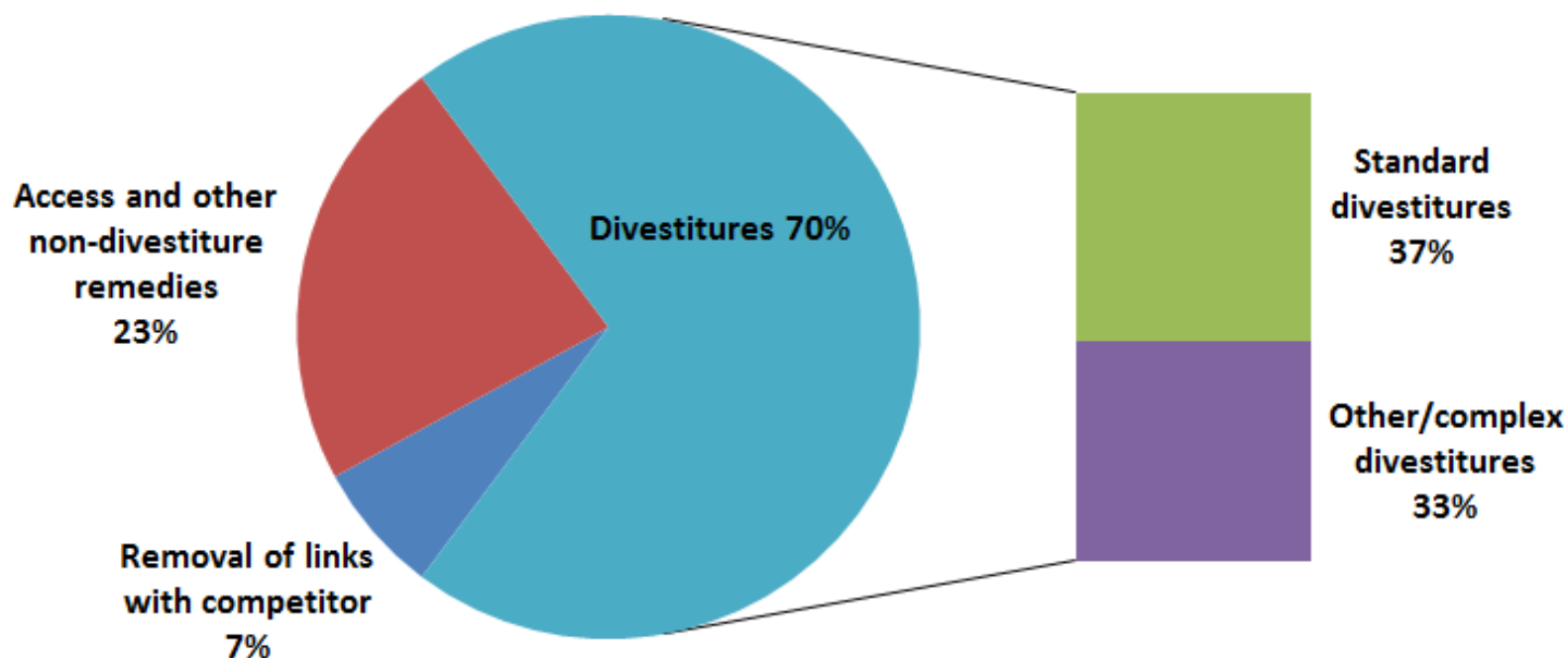
Structural remedies	Behavioural remedies
Divestiture of a controlling stake in a viable standalone business	Granting of access to infrastructure
Divestiture of a business unit carved out from a company structure	Granting of access to technology
Divestiture of assets package	Termination of exclusive vertical agreements
Divestiture or grant of long-term licence	Other behavioural
Commitments to exit from a JV	
Other structural	

EU Merger Remedies Practice



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Types of remedies: 2011-16 (88 cases until 15/10/2016)



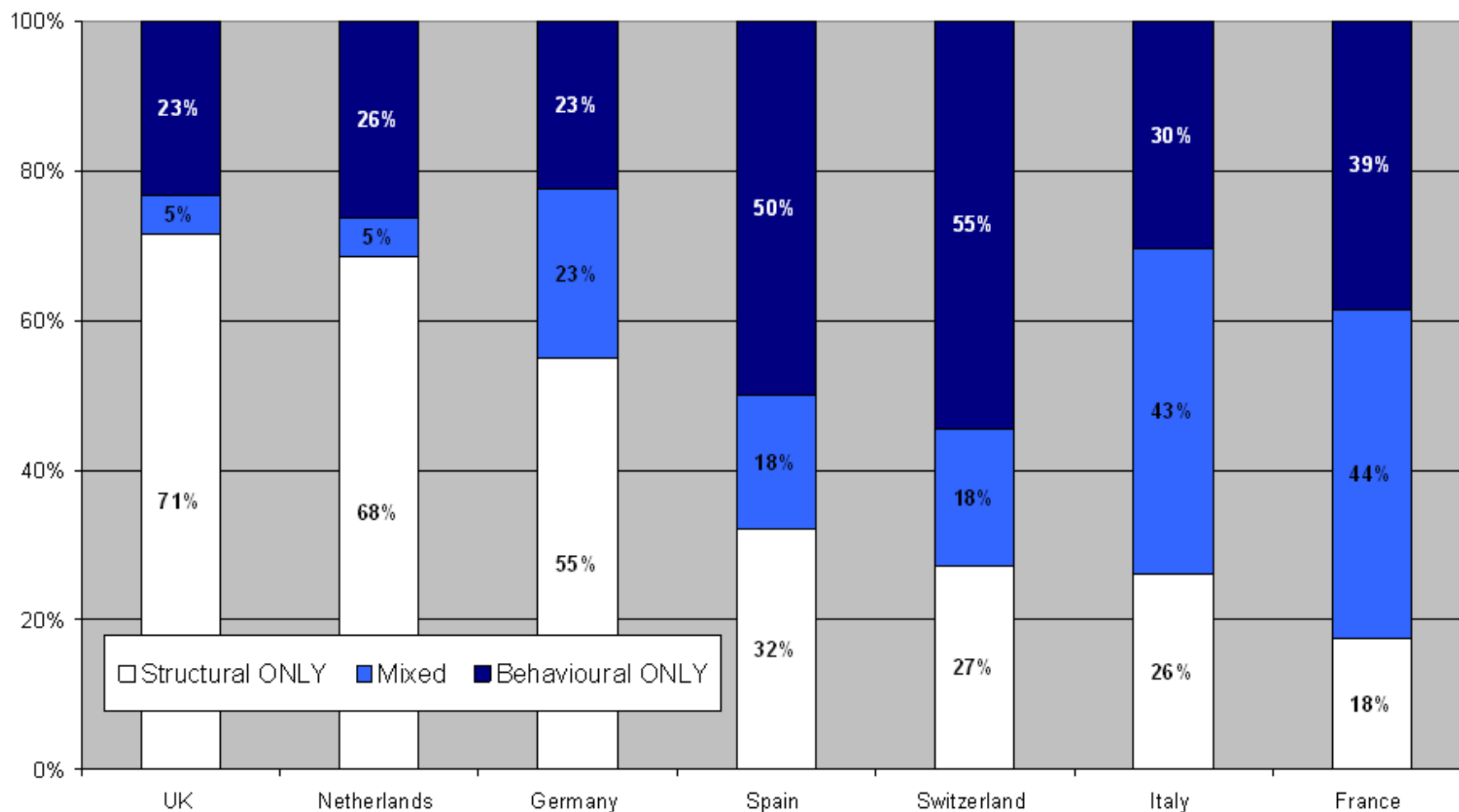
Ulrich von Koppenfels, Post mortem: Pitfalls for remedies and their implementation Global Competition Law Centre, College of Europe, 24 October 2016.

National remedies practice



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Type of Remedy by Country 2000 – 2008 (n= 234)



Hoehn, Thomas, 'Structure Versus Conduct – A Comparison of the National Merger Remedies Practice in Seven European Countries', International Journal of the Economics of Business, Vol.17, No. 1, February 2010, pp.9-32.

Role of the Monitoring Trustee in merger control



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Overall objective is to ensure the timely and effective implementation of the commitments

Monitoring Hold Separate Commitment

- Monitor implementation of carve-out, hold-separate and ring-fencing obligations
- Oversee ongoing management of the Divestment Business and supervise HSM
- Avoid delays and compliance issues

Monitoring Divestiture Commitment

- Monitor sales process and report on potential purchasers
- Review the suitability of the proposed purchaser
- Review the consistency of the transaction documents with the Commitments

General Duties

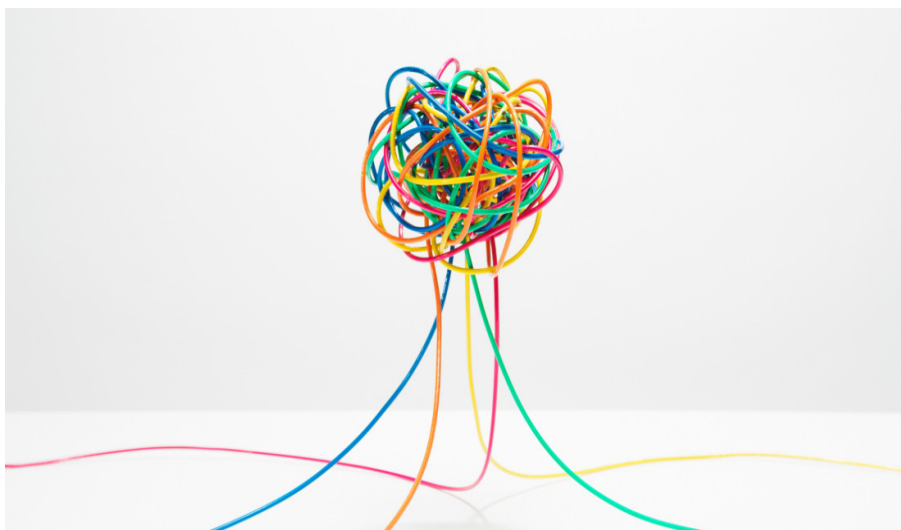
Advise the client and foresee potential issues

Act as intermediary between the Commission and the Parties

Specific tasks and responsibilities as identified and outlined in the commitments text and the Trustee Mandate



Dimensions of complexity:



- Technical
- Legal
- Institutional
- Financial
- Economic

Major types of risk in divestiture remedies



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 merging 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.

Classification adopted by UK Competition Commission, Merger remedies guidance, CMA87, 2018, p38

Complex innovation mergers



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Innovation Mergers in 2015 -2017

Pharmaceutical and medical devices

1. BD/Bard,
2. J&J/ Actelion,
3. Boehringer Ingelheim/Sanofi Animal Health Business
4. Novartis/GSK Oncology Business,
5. Pfizer/Hospira,
6. Medtronic/Covidien

Industrial or vehicle components

7. General Electric/Alstom
8. Halliburton/Baker Hughes
9. Knorr-Bremse/Haldex

Agrochemicals

10. Dow/DuPont

Source: Esteva Mosso, 2018

Other mergers in innovation industries 2015-2018

Agrochemicals

1. Bayer/Monsanto (2018)

ITC industries

2. Discovery/Scripps (2018)
3. Qualcomm/NXP (2018)
4. Microsoft/LinkedIn (2016)
5. Brocade/Broadcom (2017)
6. Equens/Worldline (2016)

High Tech engineering

7. RR/ITC (2017)

Media & Telecom

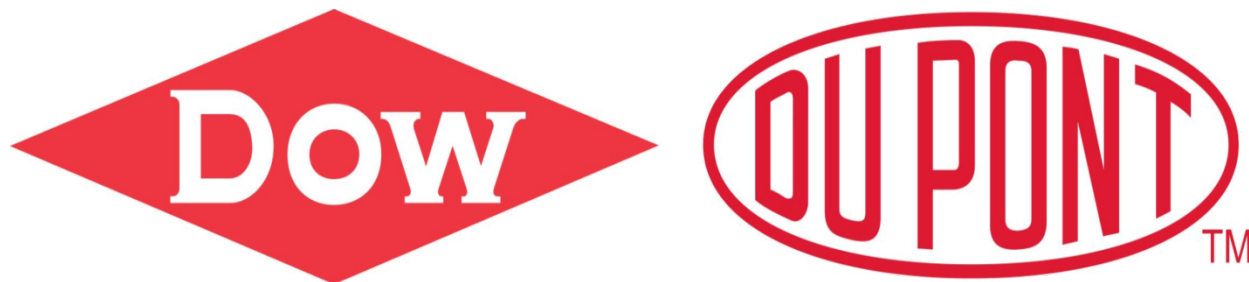
8. Vivendi/Italia Telecom (2017)
9. Discovery/Scripps (2018)

Source: Hoehn, 2018

The biggest merger in 2017: \$130 bn



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European Commission - Press release

Mergers: Commission clears merger between Dow and DuPont, subject to conditions

Brussels, 27 March 2017



The parties will divest a significant part of DuPont's existing pesticide business, including its R&D organisation, in particular;

1. **Globally, DuPont's herbicides** for cereals, oilseed rape, sunflower, rice and pasture and **insecticides** for chewing insect and sucking insect control for fruits and vegetables etc.
2. **An exclusive license to DuPont's product for rice cultivation** in the European Economic Area to address the more limited concerns relating to **fungicides**.
3. **DuPont's global R&D organisation**, with the exception of a few limited assets that support the part of DuPont's pesticide business, which is not being divested.



Behavioural remedies: **Who is holding the world record?**

CANAL+



59 commitments
(30 August 2006)

comcast®



43 (79) commitments
(9 January 2011)

Press room

Press Releases

Press releases 2011

21 September 2011: Broadcasting - pay television

The *Autorité de la concurrence* finds that Canal Plus Group did not comply with several commitments subscribed – including key ones – when it took over TPS.

The *Autorité* withdraws the decision authorizing the merger, thus requiring from the parties to renotify the transaction within one month. Moreover, Canal Plus Group is fined 30 million euros.

> *Version française* 

The *Autorité de la concurrence* has just issued a decision in which it establishes that **Canal Plus Group** did not fulfill several commitments – including key ones – that were attached to the decision¹ authorizing in 2006 the acquisition of **TPS** and **CanalSatellite** by **Vivendi Universal** and Canal Plus Group.

The *Autorité de la concurrence* therefore withdraws the decision authorizing the merger. Unless they restore the previous situation (before the merger), Vivendi and Canal Plus Group will have to renotify the transaction to the *Autorité* within one month.

The *Autorité* noted the seriousness of the breaches established – that are the result of some negligence and, generally speaking, of a repeated lack of diligence and ill will from Canal Plus – as well as the harm to competition that may be generated by these breaches to the commitments. Therefore, the *Autorité* imposed Canal Plus Group a financial penalty amounting 30 million euros.

Incentives to compete / innovate



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Purchaser approval and suitability



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The Purchaser, in order to be approved by the Commission, must:

- (a) Be independent of and unconnected to the Parties;*
- (b) Have the financial resources, proven expertise and **incentive to maintain and develop the Divestment Business** as a viable and active competitive force in competition with the Parties and other competitors;*
- (c) Neither be likely to create, in the light of the information available to the Commission, prima facie competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed, and must, in particular, reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business*

Legal framework for Innovation mergers



Fundamental objective of EU merger control

8. ***Effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation.*** Through its control of mergers, the Commission prevents mergers that would be likely to deprive customers of these benefits by significantly increasing the market power of firms. By "increased market power" is meant the ability of one or more firms to profitably increase prices, reduce output, choice or quality of goods and services, diminish innovation, or otherwise influence parameters of competition.

Innovation as an important competitive force

38. In markets where innovation is an important competitive force, a merger may increase the firms' ability and incentive to bring new innovations to the market and, thereby, the competitive pressure on rivals to innovate in that market. ***Alternatively, effective competition may be significantly impeded by a merger between two important innovators, for instance between two companies with "pipeline" products related to a specific product market.*** Similarly, a firm with a relatively small market share may nevertheless be an important competitive force if it has promising pipeline products

Source: Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03)

US Horizontal Merger Guidelines are similar



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Horizontal Merger Guidelines



U.S. Department of Justice
and the
Federal Trade Commission

Issued: August 19, 2010

“The agencies may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger. That curtailment of innovation could take the form of reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products”.

Source: section 6.4 of the U.S. Horizontal
Merger Guidelines

Balancing pro- and anticompetitive effects on innovation



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Anti-competitive unilateral effects:

If a merger brings together two out of a limited number of effective innovators which, but for the merger, would have been likely to divert significant profitable future sales from each other by investing and by competing in improved, innovative, products. A merger, therefore, can **reduce innovation incentives**, and more generally reduce the intensity of competition in innovative products, **by internalising these competitive effects**.

Pro-competitive effects:

Conversely, a merger may stimulate innovation if it allows firms to better appropriate the social value of their innovation. For example, in the absence of a merger competitors may be able to free-ride on successful innovation carried out by their rivals. A merger could **boost innovation by internalising these involuntary knowledge spill-overs**. Similarly, a merger may enhance innovation by bringing together complementary R&D assets, by allowing for greater scale economies in process innovation, or by enabling cost efficiencies in R&D.

The Commission's CET starts a lively debate

Horizontal Mergers and Product Innovation

Abstract

We set up a stylized oligopoly model of uncertain product innovation to analyze the effects of a merger on innovation incentives and on consumer surplus. The model incorporates two competitive channels for merger effects: the "price coordination" channel and the internalization of the "innovation externality". We solve the model numerically and find that price coordination between the two products of the merged firm tends to stimulate innovation, while internalization of the innovation externality depresses it. The latter effect is stronger in our simulations and, as a result, the merger leads to lower innovation incentives for the merged entity, absent cost efficiencies and knowledge spillovers. In our numerical analysis both overall innovation and consumer welfare fall after a merger.



Federico, Giulio and Langus, Gregor and Valletti, Tommaso M., A simple model of mergers and innovation, Economics Letters, 157, 136-140.

There are other views...



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Duplicative Research, Mergers and Innovation

Vincenzo Denicolò

University of Bologna

Michele Polo

Bocconi University - Department of Economics

Date Written: December 2017

Abstract

We show that in the model of Federico, Langus and Valletti (2017) [A simple model of mergers and innovation, Economics Letters, 157, 136-140] horizontal mergers may actually spur innovation by preventing duplication of R&D efforts. This possibility is more likely, the greater is the value of innovations, the less rapidly diminishing are the returns to R&D, and the more highly correlated are the R&D projects of different firms. Federico, Langus and Valletti (2017) do not obtain this result because they focus only on the case in which the merged firm spreads total R&D expenditure evenly across the individual research units of the merging firms -- a strategy which is optimal, however, only if the returns to R&D diminish sufficiently rapidly.

Denicolò, Vincenzo and Polo, Michele, Duplicative Research, Mergers and Innovation (December 2017). CEPR Discussion Paper No. DP12511. Available at SSRN:

<https://ssrn.com/abstract=3089768>

The UK Open Banking policy combines competition policy and regulatory action



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“We are breaking down the barriers which have made it too easy for established banks to hold on to their customers. Open Banking will increase innovation and competition in a sector whose performance is crucial for the economy.” **CMA Retail Banking Market Investigation, 2016.**



“Consumers put at the heart of financial services revolution: a new regulatory regime for innovative FinTech firms will transform the way people engage with their finances and make it possible to manage all of their finances at the touch of a button. Consumers will switch to the best product for them, and this competition will compel firms to provide better products.” **EU second Payment Services Directive implementation, 2017.**



Status report OBIE March 2019



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OPEN BANKING



98.78%
of API calls were
successful in February

Welcome to new Open Banking entrants:

- Creation Financial Services Limited
- Investec Bank PLC
- Trutify Limited
- Tesco Personal Finance PLC
- C. Hoare & Co
- A J Bell Management Limited
- Streeva Ltd
- Oval Money Limited
- Currency UK Limited
- Vanquis Bank Limited

Powered by Open Banking...

Experian has targeted radically reducing the UK's 'Invisible' population by harnessing the potential of new data sources, which can help organisations make more informed decisions.

CreditLadder and the world's largest building society, Nationwide Building Society, have joined forces to help first-time buyers move on to the property ladder.

Circit brings Open Banking to the audit profession, connecting auditors with independent sources of audit evidence held by banks.

Highlights March 2019

Key milestones...

13 March 2019 Open Banking and the Road to PSD2 delivery updated

Representing significant changes to Open Banking and PSD2, namely the adoption of the OBIE Standard, introduction of eIDAS certificates, and opening of Testing Facilities to Third Parties.

15 March 2019 Open Banking publishes version 3.1.1 of Standard

This is a minor update from version 3.1 (released in Nov 2018), and provides further clarifications as well as enhanced functionality and features as well as the latest version of the Customer Experience Guidelines.

20 March 2019 Functional Conformance Tool live in Beta

OBIE has developed a conformance tool to help implementers to test interfaces and data endpoints against the Functional API standard.

25 March 2019 Open Banking Innovation forum launched

In conjunction with UK Finance and Addleshaw Goddard OBIE ran a one-day 'hackathon' styled event to bring together bank and fintech technical representatives which represented Open Banking innovation in action.

A look ahead...

- The OBIE is alerting EEA-based firms within its ecosystem about the FCA's **Temporary Permissions Regime (TPR)** allowing them to continue passporting into the UK.
- In response to requests from ASPSPs, the OBIE and UK Finance have worked together and will publish example answers for the FCA forms that deal with firms' **contingency mechanism exemption** (FCA's forms A and B).



Information correct as at 31 March 2019.
Produced by Open Banking Implementation Entity (OBIE).

www.openbanking.org.uk

Independence



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The Trustee review of the proposed purchaser



What do we look at?

- Independence
- Finances
- Expertise, strategic rationale and incentives
- Competition issues

This requires expertise in:

- Finance and accounting
- Business strategy
- Economics

Is common ownership
becoming an issue for
purchaser approval?

Praxair, Inc. Signs Agreement to Sell European Assets to Taiyo Nippon Sanso Corporation

DANBURY, Conn., July 5, 2018 – Praxair, Inc. (NYSE:PX), in accordance with its proposed business combination with Linde AG (LIN.DE), has signed an agreement to sell the majority of its businesses in Europe to Taiyo Nippon Sanso Corporation.

Shareholder Structures

Praxair/Tayo Nippon Sanso



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PRAXAIR (PX) / Linde PLC

Major Shareholders	Equities %
Capital Research & Management Co. (World Investors)	6.11%
The Vanguard Group, Inc.	4.05%
Norges Bank Investment Management	3.27%
SSgA Funds Management, Inc.	2.37%
Massachusetts Financial Services Co.	2.37%
BlackRock Fund Advisors	2.21%
Wellington Management Co. LLP	1.47%
Parnassus Investments	1.02%
Franklin Advisers, Inc.	0.97%
Walter Scott & Partners Ltd.	0.80%

TAIYO NIPPON SANZO CORPORATION (4091)

Major Shareholders	Equities %
<u>Mitsubishi Chemical Holdings Corp.</u>	50.60%
Taiyo Nippon Sanzo Business Association	4.33%
<u>JFE Holdings, Inc.</u>	2.92%
Meiji Yasuda Life Insurance Co.	2.31%
<u>Mizuho Financial Group, Inc.</u>	1.89%
Japan Agricultural Cooperatives Group	1.62%
Asset Management One Co., Ltd.	1.49%
Nomura Asset Management Co., Ltd.	0.89%
The Vanguard Group, Inc.	0.85%
Capital Research & Management Co. (Global Investors)	0.84%

MITSUBISHI CHEMICAL HOLDINGS CORP. (4188)

Major Shareholders	Equities %
<u>Mitsubishi Chemical Holdings Corp.</u>	5.52%
Meiji Yasuda Life Insurance Co.	4.27%
Asset Management One Co., Ltd.	4.20%
Sumitomo Mitsui Trust Asset Management Co., Ltd.	4.05%
BlackRock Fund Advisors	3.58%
Nippon Life Insurance Co.	2.82%
Nomura Asset Management Co., Ltd.	2.66%
The Vanguard Group, Inc.	2.19%
BlackRock Japan Co., Ltd.	1.80%
Norges Bank Investment Management	1.60%

Independence of the Trustee (Council Regulation (EC) 139/2004)



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124.The appointment and the mandate will be subject to the approval by the Commission which will have discretion in the selection of the trustee and will assess whether the proposed candidate is suitable for the tasks in the specific case. **The trustee shall be independent of the parties, possess the necessary qualifications to carry out its mandate and shall not be, or become, exposed to a conflict of interests.**

125.The independence of the trustee is crucial in order to enable the trustee to properly fulfil its role of monitoring the parties' compliance for the Commission and to ensure its credibility vis-à-vis third parties. In particular, the Commission will not accept persons or institutions as trustees which are at the same time the parties' auditors or their investment advisors in the divestiture.

General duties of the Trustee (model text trustee mandate)



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5. The Commission may, on its own initiative or at the request of the Trustee or [X], give any orders or instructions to the Trustee in order to ensure compliance with the Commitments. [X] may not give instructions to the Trustee.

http://ec.europa.eu/competition/mergers/legislation/trustee_mandate_en.pdf

Urgency



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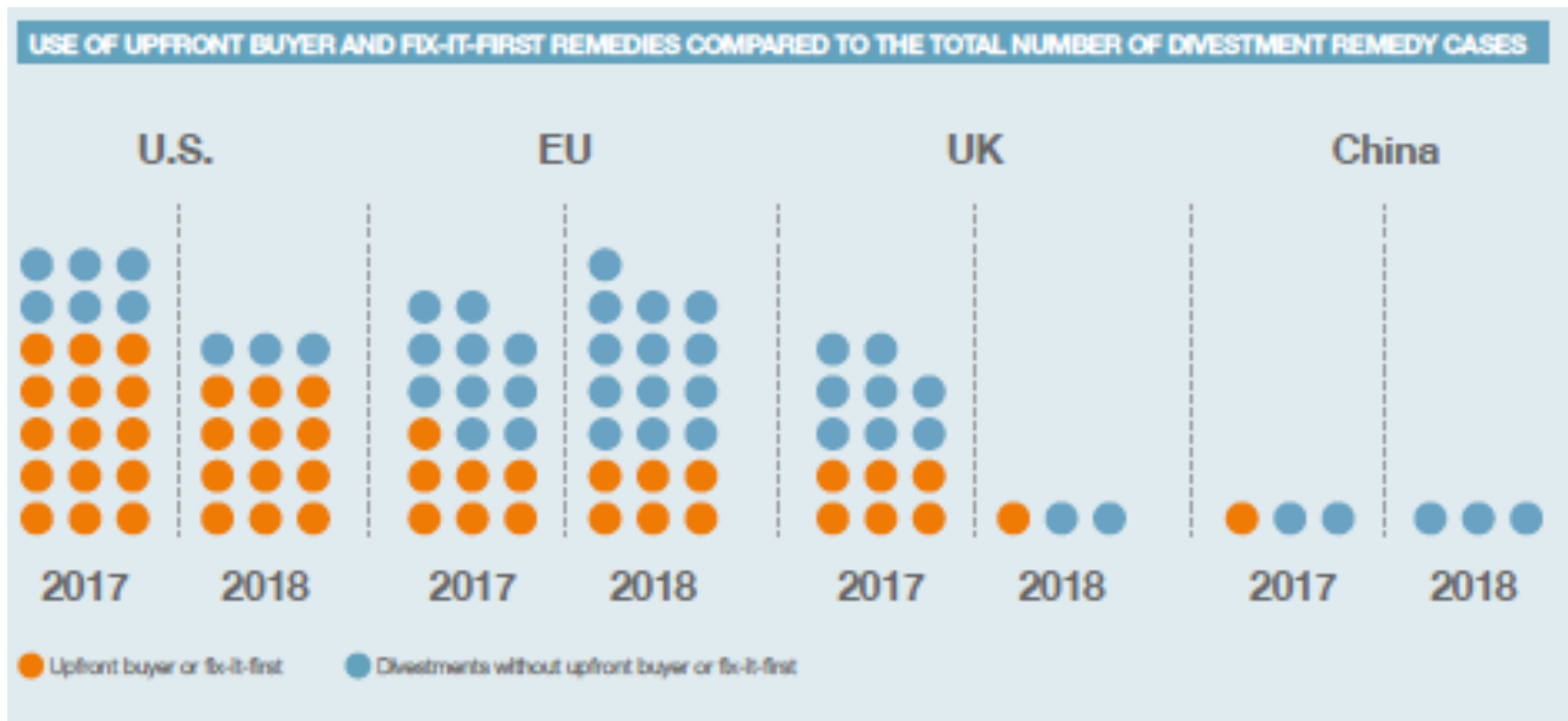
1/3

In 2017 and 2018, approximately one in three of all EC remedy decisions imposed an upfront or fix-it-first purchaser clause

A rising tide of upfront buyer and fix-it-first remedies



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Source Allen Overy (2019). Global Trends in Merger Control Enforcement

Competition issues in the digital data economy



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- DG Comp academic panel consisting of **Cremer, de Montjoye and Schweitzer (2019)** suggest more sharing of data alongside other comments and suggestions on how EU Competition Policy should deal with increased scope for market power through digital platforms.
- **Furman et al (2019)** on creation of digital market unit alongside suggestions for greater personal data mobility and greater data openness (see CMA Open Banking Investigation 2016 and Open Banking Orders 2017)
- Recent investigations and decisions by the Federal Trade Commission and the BKart etc
- **FTC** investigating breach of 2011 privacy commitments, risking multi-billion fines for Facebook



Policy proposals and remedies



- Digital markets unit (Furman 2019)
- Shifting burden of proof of beneficial impact of certain behaviour for dominant platforms (Cremer et al 2019)
- Data and Identity portability (GDPR, Gans 2018)
- Data openness (Open Banking, CMA 2016)
- Structural remedies (Break up Facebook)
- Criminal sanctions for ‘hard core’ privacy violations (Health Insurance Portability and Accountability Act – HIPAA)

Data Access – from data portability to full protocol interoperability



- **Data portability:** Individual right of access to personal data (e.g Art 20 GDPR) which can facilitate switching between data driven services for users but is limited to accumulated historical data.
- **Data sharing:** The pooling of similar or complementary data may enable firms to develop new or better products or services or train algorithm on broader and more meaningful data sets
- **Data interoperability:** A more comprehensive potentially standardized system of access to data (incl real-time) for data subjects and machine users, often through a sector-specific access regime requiring protocol interoperability (e.g. APIs) to open up secondary markets for new or competing providers (e.g. PSD2 Directive).
- **Protocol interoperability:** Ensures that two systems can fully work together that complementary services can be provided (e.g. Microsoft operating system software). Full protocol interoperability requires a much deeper integration and requiring common standards (e.g. telecommunications services)

Learning from experience



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Merger Remedies Study

Public version

DG COMP, European Commission
October 2005



Understanding past merger remedies

Report on case study research

The FTC's Merger Remedies 2006-2012

A Report of the Bureaus of Competition and Economics

January 2017



FEDERAL TRADE COMMISSION

In 2017 the UK CMA published a review of 15 merger remedies:

[://www.gov.uk/government/publications/understanding-past-merger-remedies](https://www.gov.uk/government/publications/understanding-past-merger-remedies)

Also in 2017 the FTC published a review of 89 merger remedies over a period 2006 - 2012:

<https://www.ftc.gov/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics>

In 2005 the European Commission published a merger remedies study:

http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf



Allen & Overy, Global Trends in merger control enforcement, February 2019.

Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, Competition policy for the digital era, Directorate-General for Competition, Luxembourg Publication Office of the European Union, April 2019.

Carles Esteva Mosso, Deputy DG for Mergers, DG Comp, ABA Spring Meeting, Washington, 12 April 2018,

Federico, Giulio and Langus, Gregor and Valletti, Tommaso M., Horizontal Mergers and Product Innovation (February 26, 2018).

Thomas Hoehn and Jonas S Brueckner, Compliance with Merger Remedies – the Role of the Monitoring Trustee, Competition Polciy International, 2010

Thomas Hoehn, Merger Remedies and competition law: An overview of recent EU case law and international policy developments, Foreword to the e-Competition special issues on merger remedies, 27 September 2018.

Thomas Hoehn, 'Structure Versus Conduct – A Comparison of the National Merger Remedies Practice in Seven European Countries', International Journal of the Economics of Business, Vol.17, No. 1, February 2010, pp.9-32.



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