Most competition authorities have a preference for structural remedies in merger cases that are in the form of divestitures. While structural remedies are less focused on alleviating anti-competitive effects on the market, they are considered necessary to protect future competition. However, there are cases where structural remedies are not feasible or effective. In such cases, competition authorities may consider structural remedies as an alternative or in addition to structural remedies.

Structural vs. Behavioural remedies

Structural remedies are generally necessary to address the root cause of competition concerns with certain market structures. They are more effective in preventing competition concerns than behavioural remedies, which address market conduct. Structural remedies are more likely to be effective in preventing repeated violations of competition laws, as they address the underlying market structure.

Behavioural remedies, on the other hand, are more effective in situations where competition concerns arise from market conduct. They are more focused on addressing the market conduct and preventing future violations of competition laws. Behavioural remedies are more effective in situations where structural remedies are not feasible or effective.

Recent calls for more openness towards behavioural remedies

Recent calls for more openness towards behavioural remedies have been made by competition authorities and policymakers. The European Union Competition Commissioner has called for a more open approach towards structural remedies, especially in declining or mature industries where firms are not interested in acquiring the business unit. The Commission is increasingly adopting a more open approach towards structural remedies, especially in declining or mature industries where firms are not interested in acquiring the business unit.

Increasingly, there are voices calling for a more open approach towards behavioural remedies (at least in certain cases). This approach is based on the premise that behavioural remedies are more effective in preventing competition concerns than structural remedies. Behavioural remedies are more effective in preventing repeated violations of competition laws, as they address the underlying market conduct.

The use of structural remedies is often more difficult in declining or mature industries where firms are not interested in acquiring the business unit. Divestitures are particularly “popular” in declining or mature industries where firms are not interested in acquiring the business unit.

Divestiture failure

Divestiture failure is a common issue in merger cases. Divestiture failure can result from a number of factors, including a lack of interest on the part of the divesting company, difficulties in finding a buyer, or legal challenges. Divestiture failure can result in market distortions or that firms could attempt to circumvent behavioural restrictions if the divestiture is not successful. In such cases, competition authorities may consider behavioural remedies as an alternative or in addition to structural remedies.

Examples of divestiture failure

A recent example of divestiture failure is the failure of the Bayer/Monsanto divestiture. The Commission required a divestiture of Nidec's plants in Austria, Slovakia and China. Only several months after having been conducted, a transfer of assets without certain production assets or personnel contrary to what was initially foreseen). A complete divestiture failure case is when a combination of two refrigeration compressor producers was cleared by the Commission but a transfer of assets without certain production assets or personnel contrary to what was initially foreseen). A complete divestiture failure case is when a combination of two refrigeration compressor producers was cleared by the Commission but a transfer of assets without certain production assets or personnel contrary to what was initially foreseen).

Divestiture risks

Divestitures are often combined with behavioural elements in order to ensure the effectiveness of divestiture remedies. Divestitures are commonly accepted in vertical or conglomerate mergers where the combination causes competition concerns to be eliminated as an increased risk in horizontal mergers and a divestment of the upstream or downstream business would be disproportionate in terms of economic efficiency. In vertical or conglomerate mergers, divestitures are more likely to be accepted in regulated industries (where a governance body can ensure market conditions on an ongoing basis).
In its Remedies Notice the Commission states that the question which type of remedy is suitable for the removing competition concerns is examined on a "case-by-case" basis. However, in reality, in particular in Phase 1 cases, either a pre-phase 2 or a "one-off" in order to be acceptable to the Commission. Though, at least in the light of the fact that the nature of the remedies is normally the assumed effectiveness of a divestiture and not of the proportionality of the remedies or the lack of alternatives are more important issues, the law in this regard is rather vague. Given that the divestiture remedies are the most obvious case, (which specificity may be difficult to estimate) is usually part of the remedies discussed with authorities. Such a non-considerational approach is in conformity with competition law where the authority's advice is not mandatory. Clear definitions on the remedial nature insist on a remedy to remove "serious doubts" in Phase 1, e.g. in exceptional cases, where products not come to market in a number of years or, at worst, authorities tend to take the "longest way round" approach given structural remedies in Phase 2 are out of reach.

In mergers relating to important intangible assets requiring continuous investment (e.g. R&D development programmes in the biotechnology sector) divestiture remedies may be less of a more effective way for market participants to benefit from these assets on a continuous basis rather than transferring them to a new owner, even if the new owners would be able to get the necessary resources and who would enter in the divestiture into described plans. Ideally, competition authorities would factor in the difficulty for merging parties to find a divestment purchaser in obvious cases, especially in early stage products requiring significant investments (rather than requiring an upstream or compelling correlation). Concerning the lack of effective monitoring mechanisms can be illustrated by the divestiture remedies for phase I where the divestiture is the divestiture of a product and the core asset, access to apps and platforms are still open. This may impact the way companies compete with each other, and not the authority's insistence on a remedy to remove "serious doubts" in Phase 1.

In its Remedies Notice, the Commission notes that the question which type of remedy is suitable for resolving competition concerns is examined on a "case-by-case" basis. However, in reality, in particular in Phase 1 cases, either a pre-phase 2 or a "one-off" in order to be acceptable to the Commission. Though, at least in the light of the fact that the nature of the remedies is normally the assumed effectiveness of a divestiture and not of the proportionality of the remedies or the lack of alternatives are more important issues, the law in this regard is rather vague. Given that the divestiture remedies are the most obvious case, (which specificity may be difficult to estimate) is usually part of the remedies discussed with authorities. Such a non-considerational approach is in conformity with competition law where the authority's advice is not mandatory. Clear definitions on the remedial nature insist on a remedy to remove "serious doubts" in Phase 1, e.g. in exceptional cases, where products not come to market in a number of years or, at worst, authorities tend to take the "longest way round" approach given structural remedies in Phase 2 are out of reach.

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