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Merger remedies – is it time to go more behavioural?

Thomas Wilson (Kirkland & Ellis, Belgium) · Friday, February 21st, 2020

Most competition authorities have a preference for structural remedies in merger cases in the form of divestitures while behavioural remedies are used less frequently. The below blog post analyses whether the historical bias of behavioural remedies is still warranted or whether it is time that authorities take a more flexible and differentiated approach when considering remedies.

Structural vs. behavioural remedies

Merger control rules[1] make a distinction between structural remedies and behavioural (or conduct) remedies, even though the line between the two can be somewhat blurred and in practice a remedy will often include structural as well as some behavioural elements (so-called hybrid remedy).

Structural remedies are generally "one-off" measures that are intended to maintain or restore the structure of the market by creating a new or enhanced competitive player.[2] Such remedies are designed to have an immediate market impact (as opposed to having an effect only over time), are intended to be irreversible in nature and do not require continuous monitoring by the authority or third parties. The "classic" structural remedy is a divestiture, i.e. the commitment to sell a business unit. Divestitures are common especially in horizontal mergers.

Under the EU Remedies Notice, non-divestiture remedies need to be "*at least equivalent in [their] effects to a divestiture*".[3] Oddly, the reverse approach is taken under EU antitrust rules, i.e. behavioural remedies are generally preferred, even though in merger control the competition concern is prospective whereas in antitrust cases there already is evidence of an infringement that needs to be remedied.[4] Non-divestiture remedies can be the removal of links between competitors, for instance the disposal of a minority shareholding in a joint venture or the termination of a distribution agreement with a competitor.[5] A recent example of a non-structural remedy at EU level is the *JNJ/Actelion* case:[6] In order to resolve the Commission's competition concerns relating to pipeline insomnia drugs JNJ committed to limit its shareholding to 10% (or 16% as long it is not the largest shareholder) and not to nominate any board member in a newly created company to which Actelion's competing programme was going to be transferred before the merger. With regard to its own insomnia programme which was being co-developed with a third party (Minerva), JNJ gave Minerva new rights over the global development and it also waived its royalty rights on Minerva's sales in the EEA.

Behavioural remedies relate to the future behaviour of the merged entity.[7] Examples include access to key technology or infrastructure (if these measures require on-going monitoring), supply obligations, licencing or firewall provisions. Behavioural commitments are more commonly accepted in vertical or conglomerate mergers where the competition concern relates to foreclosure as opposed to an increase in market power in horizontal mergers and a divestment of the upstream or downstream business would be disproportionate in light of expected efficiency gains.[8] In horizontal cases there is however usually no debate about a loss of merger-related efficiencies resulting from a divestment. Behavioural remedies are also more likely to be accepted in regulated industries (where a government body can monitor market conditions on an on-going basis).

Traditional preference for divestments

Competition authorities at EU level (and most EU Member States) and in the US have a preference for structural remedies in the form of divestments, especially in horizontal merger cases. The current view is that divestments most effectively address the competition concern resulting from the merger (i.e. the elimination of a competitor) by creating or enhancing a new competitive player. Divestments are particularly "popular" in Phase 1 cases where competition authorities normally require remedies to be "clear cut". The "play it safe" approach to remedies is also generally applied by authorities in case of innovation concerns due to pipeline overlaps.[9] Divestitures are often combined with behavioural elements in order to ensure the effectiveness of the sale of the divestment business (e.g. the obligation to supply the divestment business with a key input product for a transitional period).

Jurisdictions with a general preference for "better go structural" approach include:

- *EU*. Under the Remedies Notice "*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*".[10]
- *US*. At a 2018 roundtable discussion in Washington D.C., the Assistant Attorney General of the Antitrust Division of the Department of Justice, *Makan Delrahim*, spoke of renewed emphasis on seeking structural relief to remedy anti-competitive mergers.[11]
- *Germany*. There is a clear preference for divestitures in horizontal cases. Also, under German merger control rules, behavioural commitments that require continued control of the merged entity's market conduct (e.g. Chinese walls) are not permitted (which is somewhat unusual by

international standards)[12] and are therefore insofar not accepted by the Federal Cartel Office in its remedies practice.[13]
- *UK*. The UK CMA's recent report on merger remedy evaluations finds a general superiority of structural over behavioural remedies[14] and this is also reflected in the CMA's remedies guidance.[15]

Purely behavioural remedies have traditionally been viewed as less effective, complex in nature and do require on-going monitoring by the authority or third parties (e.g. by a monitoring trustee or market participants). There is also concern that outcome controls, e.g. price caps or long-term supply commitments, may lead to market distortions or that firms could attempt to circumvent behavioural restrictions if the commitments are scoped narrowly (as such restrictions prevent profit maximisation).[16] Promises to abstain from certain commercial behaviour (e.g. the bundling of products) are normally not acceptable to the authorities.[17]

However, some regimes (including in Europe) already today use behavioural merger remedies more frequently. In Europe, France and Austria are likely to accept behavioural remedies.[18] A recent study shows that out of 26 merger jurisdictions in and outside of Europe 18 used behavioural commitments in 2018.[19] The study also found that, in that year, in jurisdictions such as China, Ireland, Turkey, COMESA and Singapore all commitments decisions also included behavioural elements. In addition, Russia and South Africa will normally require behavioural commitments, even if the overlap in activity is limited or non-existent (which is atypical by international standards).[20] In cross border remedies cases authorities may prefer a behavioural remedy if the divestment assets are located in a different jurisdiction as such remedy will allow them to more effectively monitor and enforce compliance with the commitments (even if they generally have a preference for structural relief).[21]

Recent calls for more openness towards behavioural remedies

Increasingly, there are voices calling for a more open approach towards behavioural remedies (at least in Europe):

- EU Commissioner *Margrethe Vestager* has said that she is open to behavioural remedies in digital mergers. In a speech given in July 2019, the Commissioner noted that in digital markets the merging parties may not always be straightforward competitors and the issue may not necessarily be the removal of a competitor but how markets interact and whether there are important input services such as access to key technology. In her speech the Commissioner made reference to the *Qualcomm/NXP* case[22] in which the commitments related to ensuring the interoperability of the merged entity's products with those of rivals as well as access to patents under fair and reasonable terms (there are other examples of such remedies at EU level in the high tech sector).[23]
- In the context of the on-going "European Champions" debate the German-French-Polish proposal on "Modernising EU Competition Policy" asks the EU Commission to consider behavioural remedies more frequently in all sectors.[24]
- The President of the French competition authority, *Isabelle de Silva*, said at the occasion of the publication of a new study on behavioural remedies in competition in January 2020: "*Flexible and adaptable in their definition, but rigorously imposed on companies, [behavioural remedies] make it possible to carry out mergers without harming competition.*"[25]
- At a conference in December 2019, the chairman of the Dutch competition authority, *Martijn Snoep*, said that behavioural remedies allow competition authorities to find the "*right balance*"

between over- and under-enforcement and that they should "*overcome their aversion to behavioural remedies*" especially in vertical and conglomerate mergers.[26]

Divestiture risks

There are risks to divestitures as well, in particular when it comes to the "right" composition of the remedy package or if the divestiture cannot be implemented in a reasonably short time period.

It can also be challenging to find a suitable divestment purchaser that is acceptable to the authorities. This may be more difficult in declining or mature industries where firms are not interested in acquiring the divestment business (or only some of the assets) or if pipeline assets have to be sold which require a lot of R&D investments without generating any immediate revenue streams (e.g. in the pharma space).

It furthermore seems that the EU Commission at least has gotten tougher in its scrutiny of potential purchasers:

- Additional purchaser criteria not included in the Commission's Standard Model Commitments text are increasingly common (e.g. relating to a need for industry-specific expertise and experience in Europe).[27]
- At the same time, the Commission's threshold to assume *prima facie* competition concerns with regard to the divestment deal is a rather low one. The need for both – industry-specific expertise and the absence of such concerns – can severely limit the universe of available buyers.
- Upfront buyer requirements are increasingly common which puts the purchaser risk on the parties and does not allow for closing of the main transaction before having obtained the purchaser approval from the Commission.
- Financial investors (e.g. private equity houses) are less likely to be accepted by the Commission (and other authorities) as divestment purchasers (even though it is claimed that there is no *per se* rule that PE houses cannot be divestment buyers).
- The Commission may delay the approval of the purchaser if merger filings for the divestment deal are necessary which delays closing of the main transaction if an upfront buyer is required (as was the case e.g. in *Bayer/Monsanto*,[28] *Solvay/Ineos*[29]).

Despite the Commission having become tougher on divestment candidates there are nonetheless cases of divestiture failures and it is unclear how the risk of failure can be managed or predicted (other than conducting a thorough ex ante purchaser assessment). "Complete" divestiture failure cases are rare but there are a number of cases where either a divestment purchaser could not be found over a longer time period or the remedy as accepted by the Commission had to be modified considerably before being implemented (e.g. a transfer of assets without certain production assets or personnel contrary to what was initially foreseen). A recent example of a "complete" divestiture failure in the EU is the *Nidec/Embraco* case which concerned the combination of two refrigeration compressor producers.[30] The case was cleared by the Commission subject to a divestiture of Nidec's plants in Austria, Slovakia and China. Only several months after having been approved by the Commission the new owner (ESSVP IV/Orlando, a consortium) announced plans to cease the production of refrigeration compressors in Austria.[31] As a consequence, the Commission is currently conducting a fact-finding exercise which includes investigating whether Nidec honoured the divestiture commitments (Nidec had promised significant funding for the divestment facilities). The Commission has called ESSVP IV/Orlando's decision to shut down the Austrian refrigeration compressors production "regrettable" but it could however not force the consortium to continue the

operation of the plant.

A plea for a more flexible and differentiated approach to remedies

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 (or late in Phase 2), remedies need to be "clear cut" in order to be acceptable to the Commission (even though – at least at EU level – this is not provided for in the law). The focus of authorities is normally on the (assumed) effectiveness of a divestiture and not on (cost) proportionality of the remedy or the loss of expected efficiencies as a result of a sale of a business. A risk of over-enforcement resulting from a need for a clear cut remedy (which admittedly may be difficult to measure) is usually not part of the remedies discussions with authorities. Such risk is exacerbated in cases where the competitive outcome is not entirely clear but the authority nevertheless insists on a remedy to resolve "serious doubts" in Phase 1, e.g. in innovation markets where products will not come to market for a number of years.[32] In short, authorities tend to take the "why take any risk" approach by going structural especially in Phase 1 cases.[33]

A more flexible and differentiated approach taking into account the specifics of the case and the industry sector would, in the author's view, generally be beneficial (whilst recognizing the authority's time pressures given the statutory timetable).[34] This seems to be particularly warranted in digital mergers where access to apps, platforms and data are likely more important in order to preserve competition than the transfer of physical assets. Access remedies aimed at ensuring interoperability of the merged entity products with those of rivals, access to apps and patents have been tested and accepted by the Commission in a number of vertical and conglomerate cases in the digital space (e.g. *Qualcomm/NXP*, *Microsoft/LinkedIn* and *Broadcom/Brocade, Daimler / BMW car sharing JV*).[35] So why not be open to using access remedies in horizontal digital cases as well?

In mergers relating to important intangible assets requiring continuous investment (e.g. R&D development programmes in the biotechnology space) behavioural remedies may also be a more effective way for market participants to benefit from these assets on a continuous basis rather than transferring them to one new owner who will be the sole beneficiary and which bring with it the divestiture risks described above. Ideally, competition authorities would factor in the difficulty for merging parties to find a divestment purchaser in obvious cases, e.g. in early stage pipeline products requiring significant investments (rather than requiring an upfront buyer or contemplating prohibition). Concerns regarding the lack of effective monitoring mechanisms can be mitigated by installing a Monitoring Trustee (as was done for instance in *Microsoft/LinkedIn* for a period of five years[36]) as well as rigorous enforcement in case of non-compliance with the commitments (as was done by the French competition authority in *Altice/SFR*[37]).

The views expressed in this articles are entirely those of the author and cannot be attributed to Kirkland & Ellis.

[1] See for instance the Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 ("EU Remedies Notice"), para. 17; Bundeskartellamt, Guidance on Remedies in Merger Control (May 2017) ("FCO Merger Guidance"), para. 23 (divestment vs. non-structural).

[2] See e.g. OECD Policy Roundtables, Remedies in Merger Cases 2011, p. 11; available at: http://www.oecd.org/daf/competition/RemediesinMergerCases2011.pdf; ICN Merger Working Group, Merger Remedies Guide 2016, p. 9; available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RemediesGuide.pdf.

[3] Paras 17, 61.

[4] See the wording of Article 7(1) 3 Reg. 1/2003: "*Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy.*" See also Rigaud, Behavioural vs Structural Remedies in EU Competition Law, p. 208. Available at: https://www.nera.com/content/dam/nera/upload/Behavioural_versus_Structural_Remedies_in_EU_Competition_Law-Abstract-.pdf.

[5] Non-divestiture remedies have for instance been commonly used in container liner shipping cases (withdrawal from cooperation agreements), see e.g. *Maersk Line/Hamburg Süd* (Decision of 10 April 2017, Case M.8330), *CSAV/HGV/Kühne/Hapag Lloyd* (Decision of 11 September 2014, Case M.7268). For a detailed overview of the different types of non-divestiture remedies, see Levy/Cook, European Merger Control Law, § 18.09[1] et seq.

[6] Decision of 9 June 2017, Case M.8401.

[7] EU Remedies Notice, para. 17.

[8] See e.g. FCO Remedies Guidance, para. 23.

[9] See e.g. the EU Commission in *Takeda/Shire* (Decision of 20 November 2018, Case M.8955), *Bayer/Monsanto* (Decision of 21 March 2018, Case M.8084) and *Dow/DuPont* (Decision of 27 March 2017, Case M.7932).

[10] Paras 17, 61.

[11] The use of behavioural remedies was also recently criticized by a senior DOJ official in the context of the Ticketmaster / Live Nation case. See: https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1157762&siteid=191&rdir=1.

[12] At EU level see e.g.: Decision of 20 July 2016, Case COMP/M.7724 *ASL/Arianespace*.

[13] FCO Merger Guidance, para. 21.

[14] P. 3. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/811252/Merger_remedy_evaluations_2019.pdf.

[15] CMA, Merger remedies, para. 3.5.

[16] For further details see CMA, Merger remedies, para. 7.4 et seq.

[17] EU Remedies Notice, para. 69.

[18] In France, for instance, 1/3 of the commitments in merger control are behavioural remedies, see: https://www.autoritedelaconcurrence.fr/en/press-release/autorite-de-la-concurrence-publishes-new-study-behavioural-remedies-competition-law.

[19] Allen & Overy, Global trends in merger control enforcement, February 2019, p. 12.

[20] In Russia, examples of behavioural commitments are supply obligations or price caps, in South Africa behavioural obligations are mainly aimed at protecting employees against job losses.

[21] As mentioned in the 2011 OECD paper on "Remedies in Merger Cases" (fn. 2), co-operation is of "critical importance" in order to avoid the risk of divergence (p. 22 et seq.).

[22] Decision of 18 January 2018, Case M.8306.

[23] See for further details Levy/Cook, European Merger Control Law, § 18.09[1] [b].

[24] P. 3, available at: https://www.bmwi.de/Redaktion/DE/Downloads/M-O/modernising-eu-competition-policy.pdf?__blob=publicationFile&v=4.

[25] See: https://www.autoritedelaconcurrence.fr/en/press-release/autorite-de-la-concurrence-publishes-new-study-behavioural-remedies-competition-law.

[26] CRA conference (Brussels), "Antitrust in Times of Upheaval – a Global Conversation", 10 December 2019.

[27] By way of example, in the *Takeda/Shire* case (Case M.8955) the Commission included *seven* additional purchaser criteria, see para. 17 of the Commitments (redacted in the public version of the decision).

[28] Case M.8851.

[29] Decision of 9 June 2015, Case M.7584.

[30] Decision of 12 April 2019, Case M.8947. US examples of divestiture failures include: *Dollar Tree / Family Dollar*, *Hertz / DollarThrifty* and *Albertsons/ Safeway*.

[31] See: https://www.ots.at/presseaussendung/OTS_20191022_OTS0148/restrukturierung-der-secop-austria-gmbh.

[32] For instance in pharma markets the Commission acknowledges that the likelihood of products coming to market is no more than 10% for phase I products, while the risk of failure of more advanced phase III products is more than 50%, see decision of 8 May 2000, Case COMP/M1846 – *Glaxo Wellcome/Smithkline Beecham*, para. 70.

[33] In fairness, there are Phase 1 cases where the Commission concluded that the deal was to be cleared unconditionally even though the parties had offered commitments, e.g. *Siemens / Senvion / Ria Blades* (decision of 20 December 2019, Case M.9582).

[34] This is not to say that the Commission does not at all take into account the specific facts of the case, see e.g. *JNJ/Actelion* (discussed in this article).

[35] Case M.8306 (*Qualcomm/NXP*), *Microsoft/LinkedIn* (decision of 6 December 2016, Case M.8124), *Broadcom/Brocade* (decision of 12 May 2017, Case M.8314), *Daimler / BMW car sharing JV* (decision of 7 November 2018, Case M.8744).

[36] Case M.8124, Commitments, para. 16.

[37] The French competition authority imposed a fine of EUR 15 million on Altice as it interfered in the business to be divested by raising tariffs between 17-60% imposed on existing and new customers without informing the authority in contradiction to the commitments.

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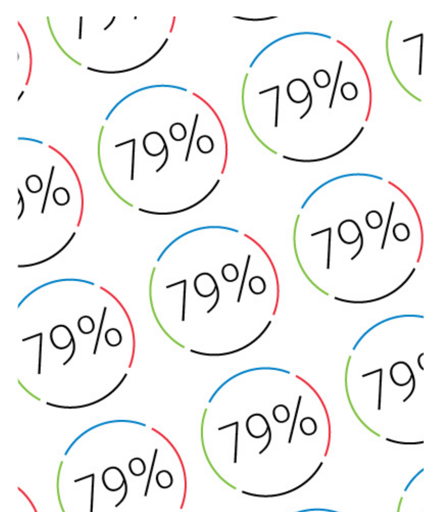

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This entry was posted on Friday, February 21st, 2020 at 7:18 pm and is filed under Source: OECD“>Competition, Competition law, Competition policy, Digitisation, European Union, Merger control, Remedies, Uncategorized
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