

Merger Remedies: The Portuguese Experience

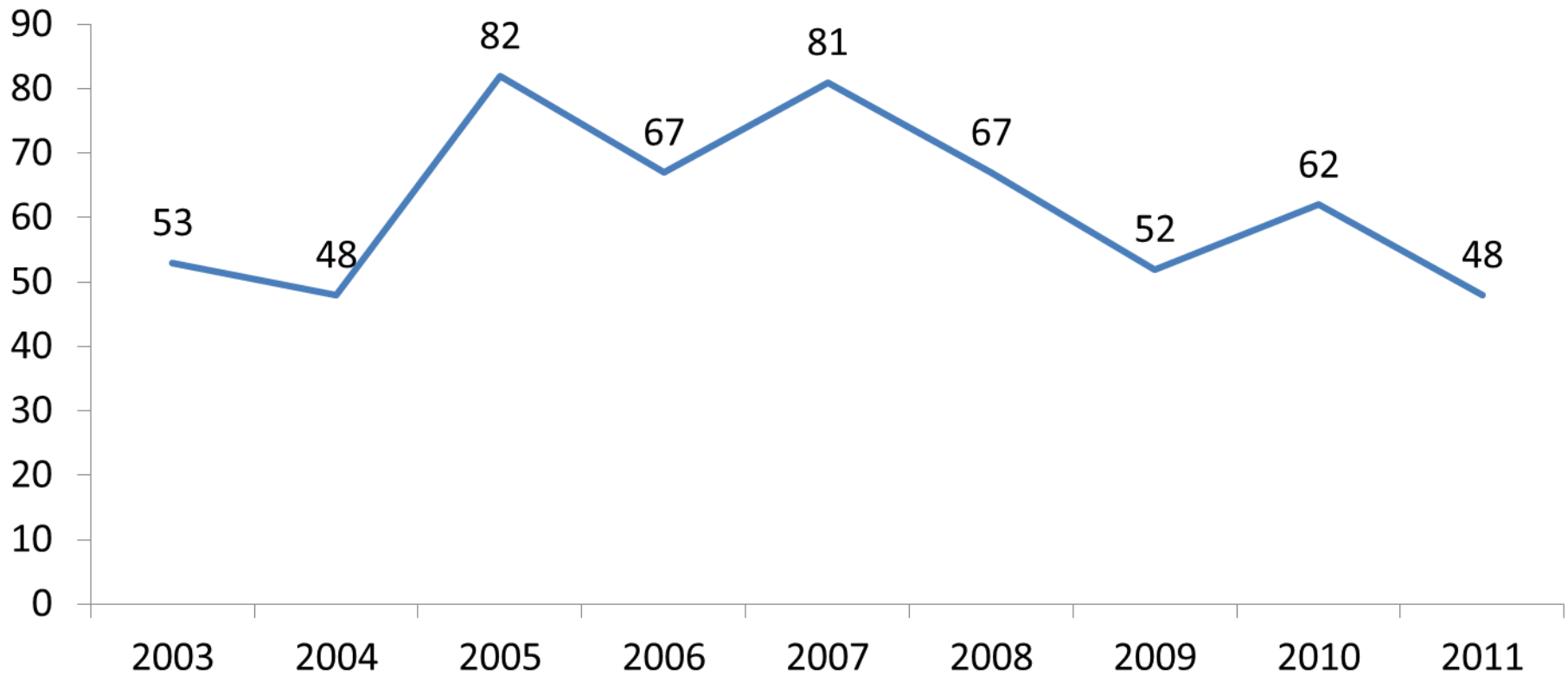


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The views expressed are personal and do not necessarily reflect those of the Portuguese Competition Authority

Merger Control in Portugal

Merger Notifications



Merger Control in Portugal

Legal Deadlines:

Phase I - 30 working days

Phase II - 90 working days starting at the beginning of Phase I

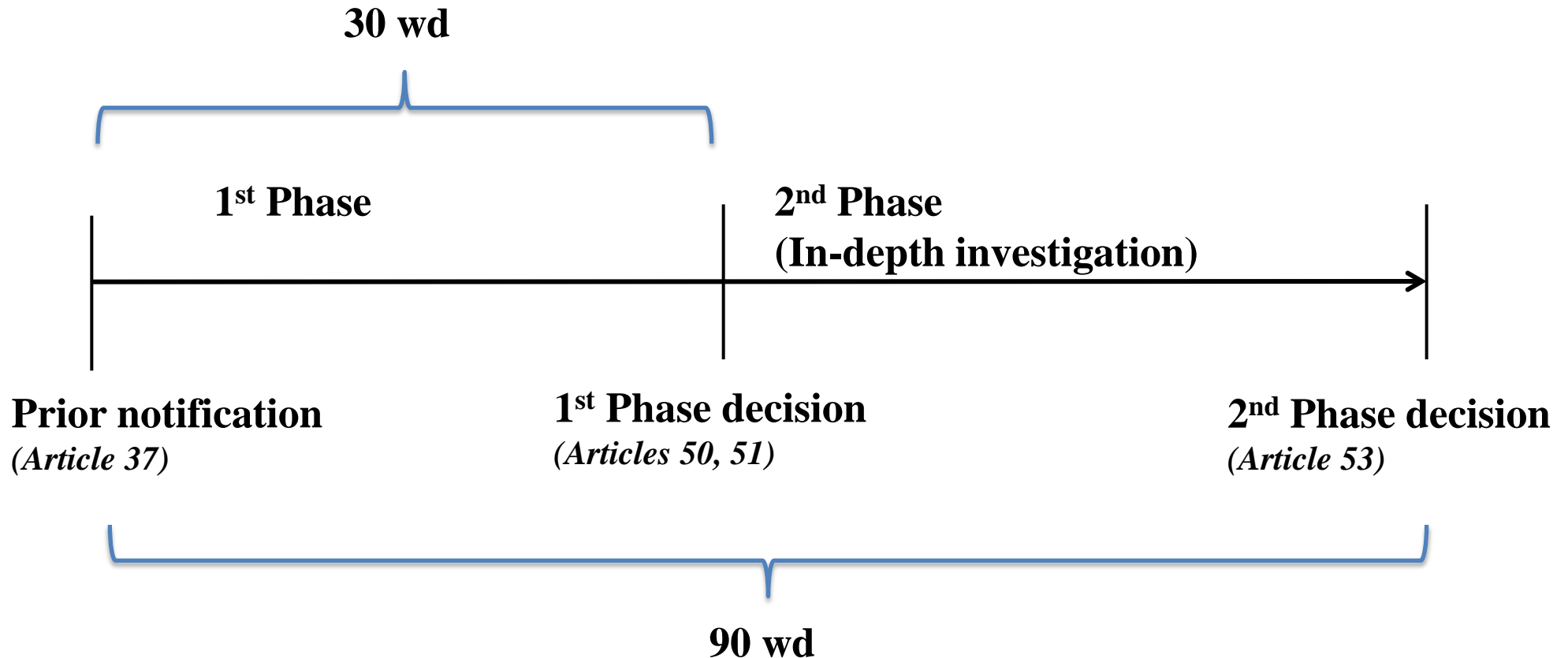
Type of decisions:

- Non-applicability
- Clearance (without or with remedies)
- Prohibition

Substantive test:

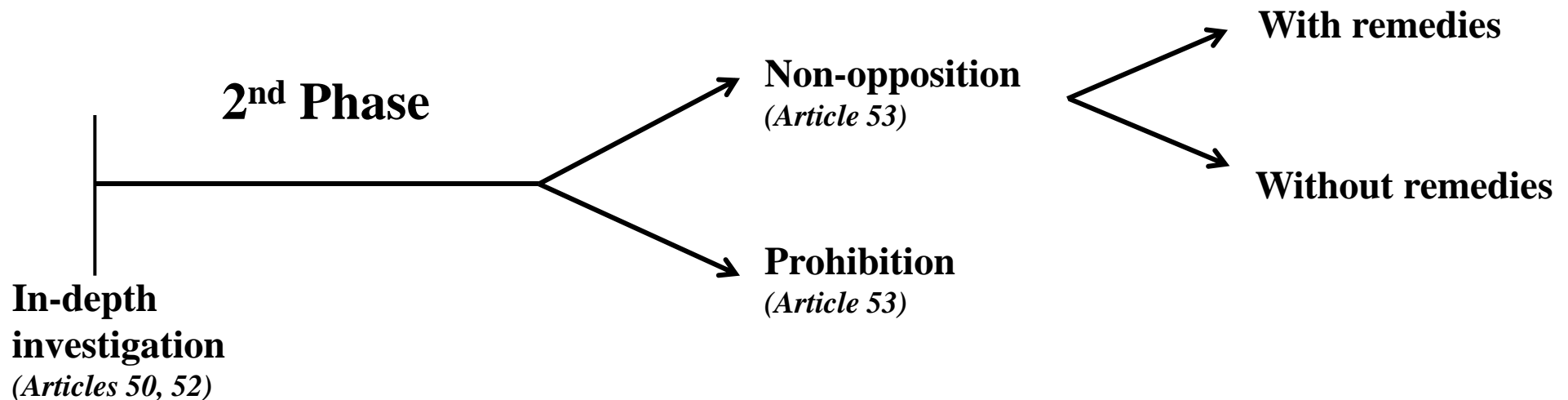
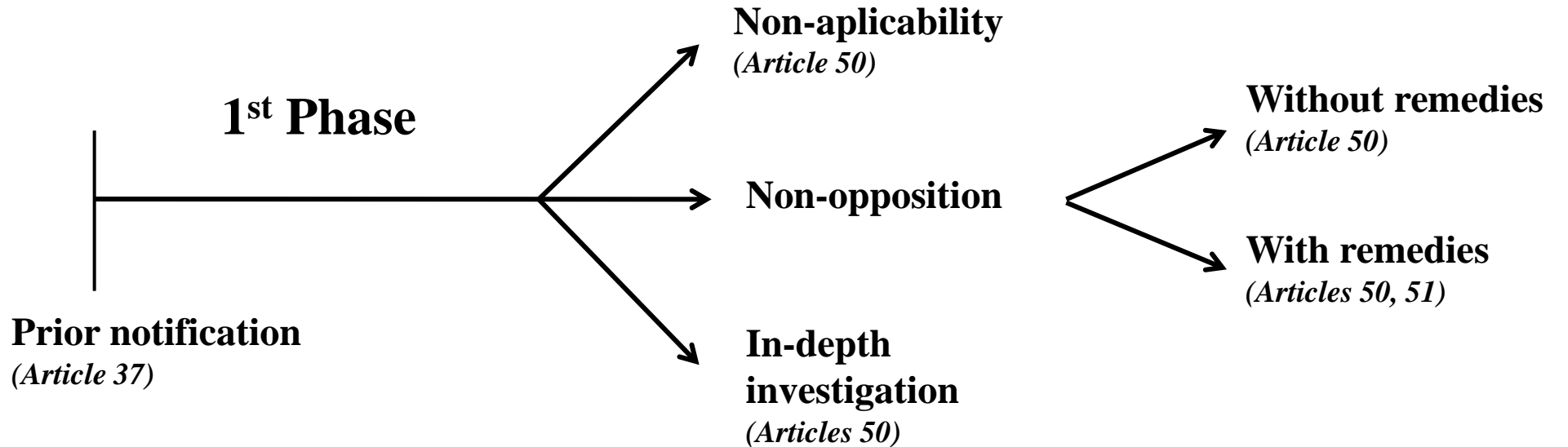
SIEC (Significant Impediment to Effective Competition) introduced by the new competition law (Law 19/2012, 8 May)

Merger Control in Portugal



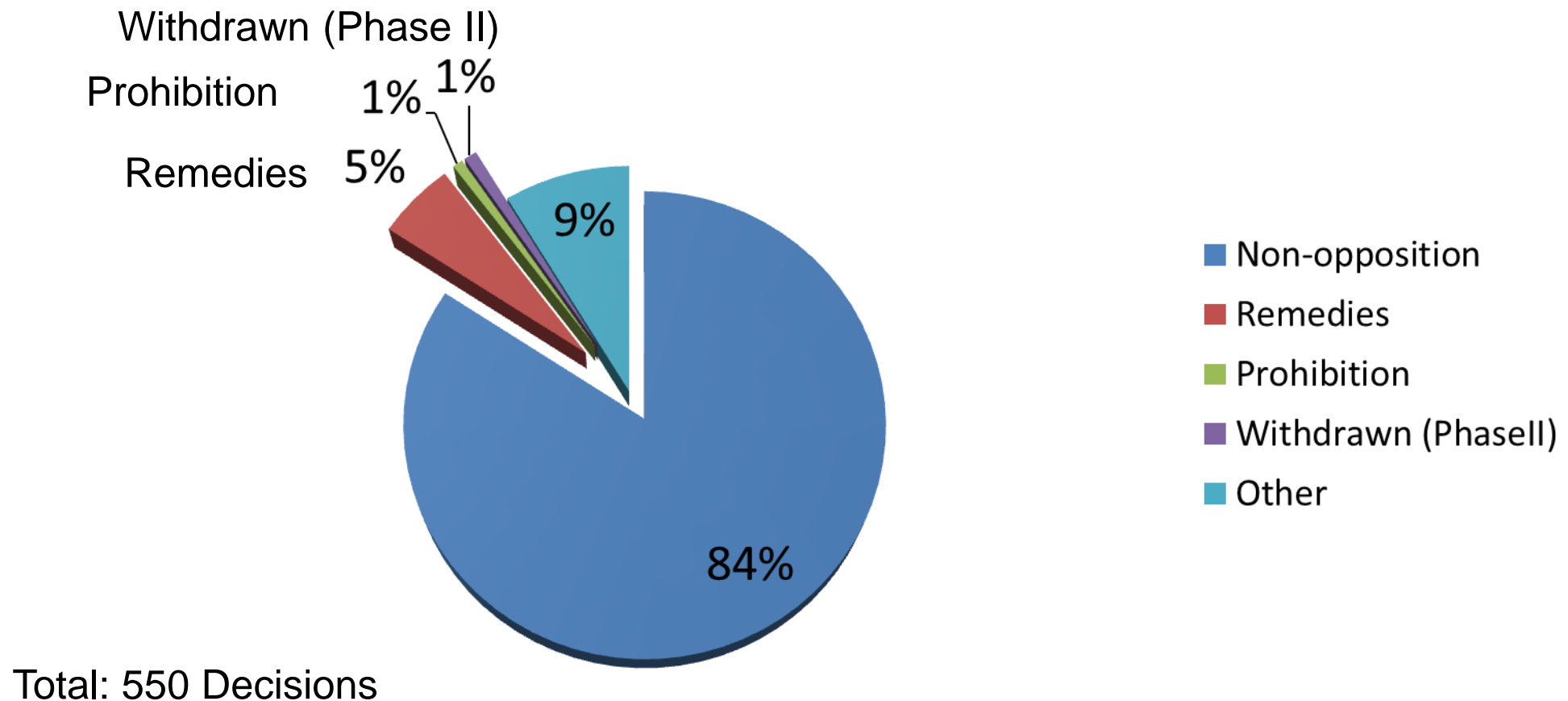
Law 19/2012, 8 May

Merger Control in Portugal



Merger Control in Portugal

Type of Decisions (2003-2011)



Merger Control in Portugal

Statistics: 2003-2011

Prohibition Cases	Number
Transport Sector	3
Fuel Sector	1
Total	4

Non-opposition with remedies	Number
Energy Sector	7
Telecommunications Sector	3
Transport Sector	4
Grocery Retail Sector	2
Banking and Insurance Sector	2
Media Sector	2
Cement and Concrete Sector	2
Dairy Sector	1
Beverages Sector	1
Construction Sector	1
Food Sector	1
Fuel Sector	1
Other	3
Total	30

Guidelines on Merger Remedies

- PCA issued its Guidelines on Merger Remedies in 2011
- Based on the **PCA's experience** and the guidelines of other competition authorities and the ICN:
 - **European Commission:** Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Official Journal C 267, 22.10.2008)
 - **Competition Commission (UK):** Merger Remedies: Competition Commission Guidelines (November 2008)
 - **ICN:** ICN's Merger Remedies Project – Report for the fourth ICN annual conference (June 2005)

- New Competition Law in Portugal which came into force in July 2012 (Law 19/2012, 8 May)
- The legislator introduced specific norms on merger remedies, in particular in terms of procedure
- “The notifying party may at any time submit **commitments** with a view to **ensuring that effective competition is maintained**” (Art. 51(1))

- Submission of merger remedies determines the suspension of the review period – maximum of 20 working days
- The PCA must issue a decision of acceptance or refusal of the remedies package proposed by the merging parties
- Various subsequent suspensions are possible (not necessarily desirable)
- In Phase II, the PCA is bound to issue a project decision (similar to a Statement of Objections) within not more than 75 working days from the day of effective notification
- Legally established motives for refusal of remedies:
 - Submissions which have only the intent of delaying proceedings
 - Insufficient or inadequate remedies to overcome the identified SIEC
 - Uncertain implementation of the remedies proposed

- Remedies are proposed by the notifying parties, not imposed by the PCA
- Measures to **eliminate the significant impediment to effective competition which may result from the merger** as identified in the merger analysis
- If the remedies are accepted, the PCA will issue a non-opposition decision with remedies

Principles in the Evaluation of Remedies

Effectiveness

- Be able to eliminate the competition concerns identified (importance of the competitive assessment)
- Be executable (both in terms of implementation and monitoring)
- Present a high level to certainty on the achievement of their objectives (acceptable level of risk)

Efficiency – Choosing the solution with less costs, taking into account:

- Costs of market distortion resulting from behavioural remedies: costs concerning static efficiency (e.g. resource allocation and cost efficiency) and costs concerning dynamic efficiency (e.g. incentives to innovate)
- Costs resulting from the reduction or elimination of synergies and specific efficiencies of the merger, specially those that would presumably be passed on to the consumer

Proportionality – Balance between the means and the objective

- Have a direct influence in the market structure
- Are usually implemented on a one-off basis
- Usually correspond to the divestiture of assets, companies or part of companies, with direct impact in the market structure and its concentration levels, also having the following objectives:
 - The preservation of the structural competition conditions that would characterize the market situation in the absence of the merger
 - The avoidance of the loss of competitive rivalry that would exist in the absence of the merger
 - The creation of conditions to the arrival of a new competitor or the expansion of existing competitors, which implicates the need to evaluate the ability and the incentive of the acquirers to compete

- Intended to create or reinforce the contestability conditions of the markets, by eliminating the barriers to effective competition or stimulating potential competition
- Exceptionally (not desirable) could regulate the parties behaviour (e.g. price cap), but should necessarily be transitory and complement other remedies
- The PCA tends to prefer structural remedies to behavioural remedies, accepting these last mainly as accessory to the first

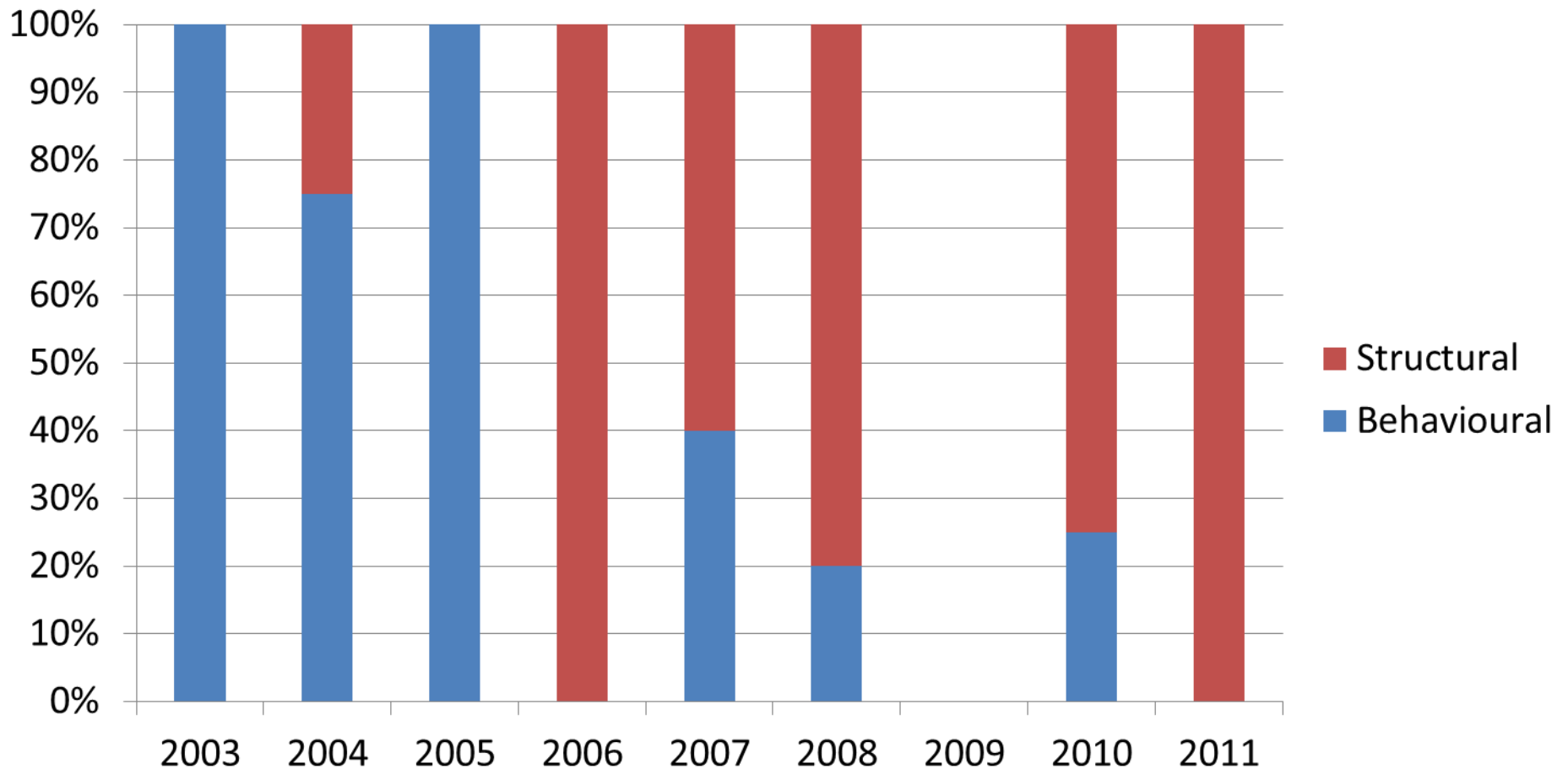
Behavioural Remedies

Examples

- Prohibition of customer loyalty tactics (in order to lower the clients' costs to change supplier)
- Elimination of exclusivity clauses or long-term contracts on what sales of the parties are concerned
- Elimination of distribution contracts with competitors or other contracts that may allow coordinated behaviour
- Prohibition of certain commercial practices, such as tying and bundling
- Access remedies: (i) infra-structures and, in particular: (i) networks (ii) essential facilities; (iii) technologies; e (iv) patents, know-how and other IP rights
- Exceptionally, direct intervention in the parties decisions, namely on what prices/ quantities/ production capacity and quality are concerned (not desirable; transitory)

Remedies in Portugal

Structural vs Behavioural



- The PCA conducts an analysis of the likely risks involved in the execution of the remedies
- If the risks are not reduced to levels accepted by the PCA, the remedies are not accepted
- The bigger the risks and the uncertainty associated with the implementation of the remedies, the bigger the necessity to implement safeguard measures and specific compensation factors
- The typical risks differ when behavioural and structural remedies are concerned
- Important to have a structured approach to the evaluation of risks (The PCA follows closely the approach of the UK's Competition Commission in its Guidelines)

Structural Remedies

Risks and Solutions

Type of Risk	Adequate Solution
Composition risks <ul style="list-style-type: none"> Divestiture package attracts suitable purchaser? Can the purchaser operate efficiently and viably with these assets? 	<ul style="list-style-type: none"> Divestiture of a pre-existent autonomous activity (avoid mix-and-match divestitures) - 16/2011 - Powervia/ Laso*Auto-Laso*Probilog*Laso Ab (12.1.2012) Divesting crown jewels - 49/2010 – TRPN/Internorte (13.9.2011) Market test
Purchaser risks <ul style="list-style-type: none"> Is there a suitable purchaser? Risk of divestiture to a weak competitor? 	<ul style="list-style-type: none"> Up-front buyer (buyer pre-implementation) - 16/2011 - Powervia/ Laso*Auto-Laso*Probilog*Laso Ab (12.1.2012) fix-it-first (buyer pre-decision) Divestiture of a pre-existent autonomous productive unit Market test
Asset risks <ul style="list-style-type: none"> Risk of asset deterioration prior to the completion of divestment (e.g. loss of clients or key employees) 	<ul style="list-style-type: none"> Short term remedies (in general up to 9 months) Fire sale Divesting crown jewels Management guarantees regarding the period until the divestiture (monitoring trustee, hold separate manager)

- The divestiture should include all the assets and personnel necessary to guarantee the viability and competitiveness of the activity
- It may be necessary to include remedies related to markets where no competition concerns were identified by the PCA
- When a “*fix-it-first*” remedy is offered, the PCA takes into account the complementarity of the activities divested with those of the buyer, to determine what needs to be divested
- The PCA has to assure that no legal or economic relations remaining after the divestiture limit the incentives of the buyer to operate autonomously in the market

- Divestitures of a business generally appear preferable to the granting of licenses to IP rights
- Brand divestiture, without the corresponding production and/or distribution assets may involve significant composition risks

Ccent. n.º 22/2008 – Sumolis/Compal (14.8.2008) – sale of a beverage brand in Portugal and Spain, together with the sale of formulas, the obligation to provide filling/packing of beverages services for a limited time period and the elimination of exclusivity clauses in distribution contracts

Suitable Purchaser

- Independence (no economic, legal or other relations with merging parties)
- Capability (financial resources and competence; capacity and incentive to maintain and develop the divested activity in a viable way)
- Not likely to lead to new competition concerns

Approval of suitable purchaser

- In a pre-determined term after the PCA's decision
- Before the implementation of the merger (*up-front buyer*)
- Before the PCA's decision (*fix-it-first*)

Risks

Specification risks

- Example: access remedy “in fair and reasonable conditions” or “in market conditions”

Circumvention risks

- Example: controlling prices may alter the incentives of the company, which may reduce the quantity or quality

Distortion risks

- Example: a commitment not to sign long-term contracts may result in the lack of the incentives to capture new customers or to invest
- Example: remedies with benchmark prices – if the parties that offer the remedy are also present in the market that is used as benchmark, they may influence the reference price (Ccent. 57/2006 – TAP/PGA)

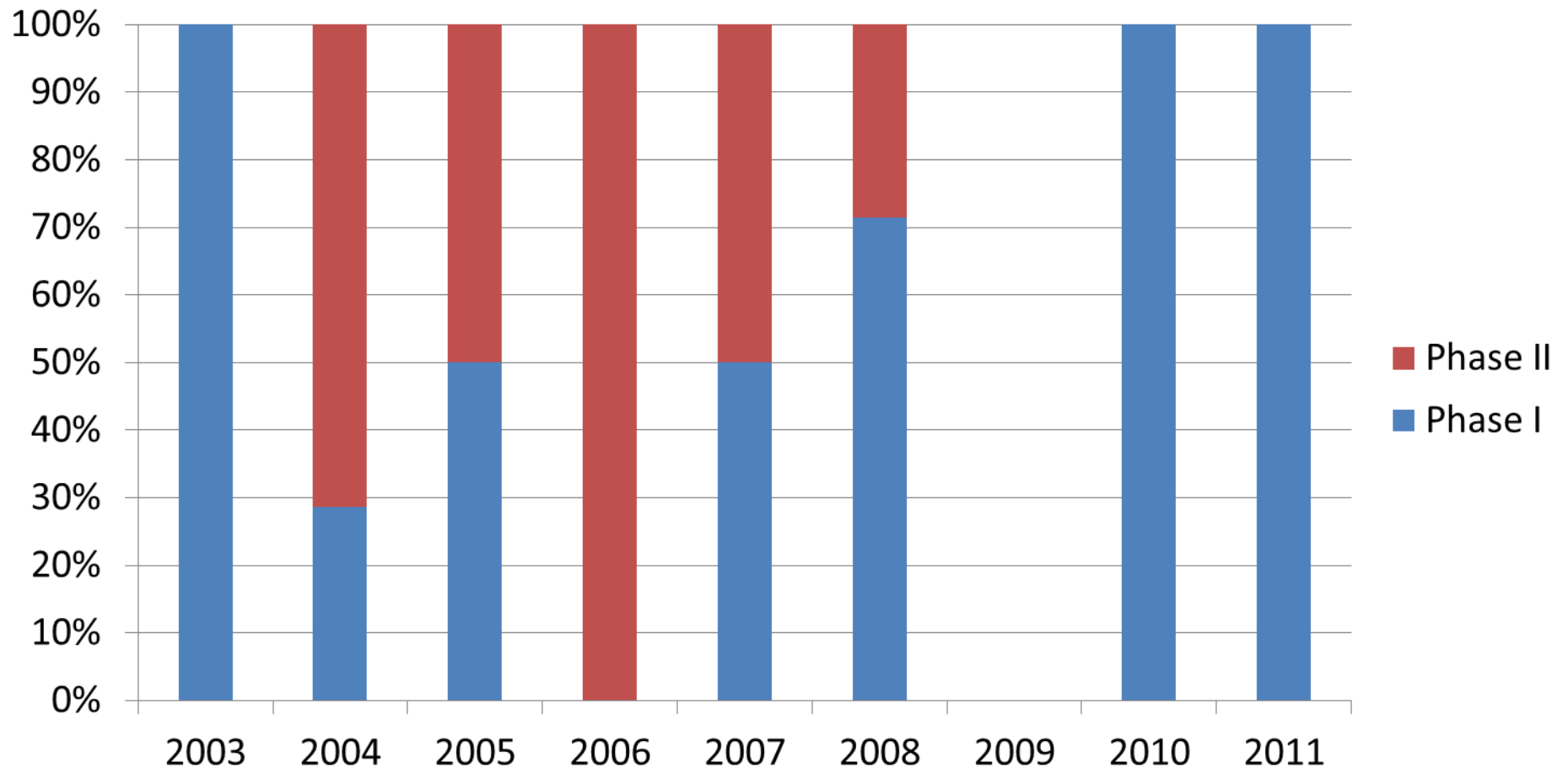
Monitoring and implementing risks

- High volume and complexity of information, asymmetry of information and costs of monitoring for a long period of time

Remedies in Phase I and in Phase II

- Remedies can be offered in Phase I or in Phase II
- The remedies' scope varies according to the analysis and the identification of concerns (more detailed analysis in Phase II)
- Phase I remedies are intended to eliminate any possible doubt related to the creation of significant impediments to effective competition – they are in general broader
- Phase II remedies can be more accurate and specific as possible SIEC has in general been identified

Remedies in Phase I and in Phase II



Phase I Remedies

Difficulties	Solutions
Negotiations usually start without a decision project	<ul style="list-style-type: none">• Broader remedies in phase I• Reinforcement of pre-notification contacts• The new Portuguese Competition Law (2012) solved some of those difficulties by considering a suspension of the review period when remedies are submitted (20 wd)
The PCA may not yet have identified the specific competition concerns raised by the merger	
The parties present remedies without knowing the specific problems	
Remedies' analysis tends to divert the team from the analysis of the merger itself (identifying and testing the possible theories of harm)	
Difficulties in managing time limits: the discussion of remedies usually takes longer than anticipated	
Solution of fix-it-first is more difficult with limited time in Phase I	
Time limitations for developing a market test	

Monitoring Trustees

In order to ensure that the remedies are complied with, it may be necessary for the parties to contract a monitoring trustee, whose functions are, namely:

- To oversee the implementation of the commitments, in particular, those in the intermediate period that are intended to guarantee the integrity and autonomy of the activity to divest (in some cases it may be necessary to include in the remedy package a hold separate manager)
- To oversee the carve-out of assets and personnel
- To send the PCA all the relevant information requested, as well as to draft the necessary reports on the implementation of the remedies
- To oversee the compliance of the behavioural remedies

- In case structural remedies are offered, they may involve the divestiture by an independent divestiture trustee, with a irrevocable and exclusive mandate to divest, under the supervision of the PCA
- Typically a fire-sale of the divestment package is imposed as a last resort (no minimum price)
- The intervention of a divestiture trustee does not diminish the parties responsibility in case of non-compliance

Revision of Remedies

- The main criteria for a **revision of remedies** are the public interest and the safeguard of competition, together with:
 - A **material change of circumstances** with an impact in the market structure
 - The proposed changes also eliminate the competition concerns identified (effectiveness)
- The revision of remedies implies a revision of the PCA's decision on the merger
 - interested third parties must be heard before a final decision

- Opening of a procedure to investigate the potential violation
- Violation of conditions: application of a monetary sanction, contracts considered null and void
- Violation of obligations (instrumental *vis a vis* the conditions): application of a monetary sanction
- Imposition of measures necessary and adequate to restore the level of competition that existed before the merger (e.g. separation of firms or assets – divestiture -; merger reversal; and cease of control)
- The PCA revokes its previous decision, substituting the non-opposition with remedies decision with a prohibition decision, imposing measures, if necessary

Up-front buyer solution: a recent case

16/2011 – Powervia / Laso (Phase II Clearance Decision subject to Remedies)

- Merger operation consisting in the acquisition by Powervia of Laso, Auto-Laso, Probilog, and Laso Ab
- **Powervia (acquirer):** group of companies active in the supply of transport services of goods through *Transportes Gonçalo (TG)* and *FHM*
- **Laso (target):** active in the sector of freight transport by road providing services to customers in different business areas, namely, industry, energy, petrochemicals, metallurgical, construction, public works, machinery, pre-fabricated mounting beams. Also active through Auto-Laso in the supply of service, maintenance and repair services

Up-front buyer solution: a recent case

- **Horizontal overlap:**
 - Market for the provision of special/exceptional road transport services of goods
 - special/exceptional transport services include the transport of indivisible objects the size or weight of which exceeds the regulatory limits as legally defined
- Notifying party did not agree with the PCA on market definition, defending a general market for the supply of road transport services of goods
- PCA conducted a market investigation in order to gather evidence on market definition and on the impact of the proposed merger, involving the various players active in the supply of road transport services of goods, as well as clients

Up-front buyer solution: a recent case

Competition concerns:

- High market shares of the merging parties: 80-90% of the market
- Parties were each other's closest competitors (market investigation)
- Merger was eliminating an important supply alternative for customers with a substantial impact in their bargaining power (no other relevant alternative)
- High barriers to entry and expansion in the market
- Merger would create or reinforce a dominant position that could lead to significant impediments to effective competition in the relevant market identified (this case was still analysed under the dominance test)

Remedies:

- Notifying party submitted 3 different remedies' packages
- First two packages were rejected by PCA – high levels of risk (composition risk; purchaser risk; asset risk)

Up-front buyer solution: a recent case

Package 1 – Main Risks

Composition Risk

- Divestment of a legally autonomous company of the target group, but not an economically autonomous business
 - Significant part of turnover resulting from contracts with other companies of the target group
 - Significant part of the equipment used by this company belonged to other companies of the group
- Divestment of assets from the target group (equipment and personnel)
 - Personnel had to accept being transferred to the divestment business (uncertainty)
 - Difficulties in identifying key personnel
 - Difficulties in assessing the adequate level of equipment

Purchaser Risk

- Uncertainty regarding the existence of a suitable purchaser able to ensure effective competition in the market, in particular in the difficult economic and financial context

Up-front buyer solution: a recent case

Package 2 – Main Risks

Composition Risk

- Divestment of the same company as in the first package but including more assets (improvement of first package)
 - Equipment: equivalent to the one from the acquiring group (Transportes Gonçalo and FHM)
 - Transfer of personnel including management personnel dedicated to this activity
- PCA conducted a Market Test
 - Not clear the assets were adequate (no information on the condition of the trucks, age, kms, or on the experience of personnel)
- Not an existing business, with a stabilized customer base, capable of attracting a suitable purchaser with the capability of being an effective competitor

Purchaser Risk

- Market test revealed difficulties in finding a suitable purchaser
- Merging parties offered an **up-front buyer solution**

Up-front buyer solution: a recent case

Package 3 – Package accepted by the PCA (non-opposition decision)

Composition Risk

- Divestment of Transportes Gonçalo and FHM (acquiring group Powervia)
- Eliminates the overlap between the merging parties in this relevant market
- Divestment of an autonomous business (both legally and economically), with a stabilized customer base

Purchaser Risk

- Merging parties offered an **up-front buyer solution**
- PCA would have to approve the potential purchaser according to independence, capability and no new competition concerns
- condition not to repurchase the divested business within five years

Asset Risk

- Short divestment period
- Monitoring Trustee

Up-front buyer solution: a recent case

- Powervia was not able to satisfy the divestiture within the time limit prescribed in the Decision
- The PCA declared the extinction of the monitoring proceedings, since the precondition for the implementation of the merger had not been satisfied
- Therefore, the merger is not authorized and cannot be implemented

Practical Aspects from the Portuguese Experience

- Give the opportunity to parties to start negotiating remedies as soon as competition concerns are identified (state-of-play meetings)
- Important to have a written document to allow the parties to understand which are the concerns and if they are correctly identified (Statement of Objections; draft decision)
- Need to know very clearly what are the concerns and what is the competition authority aiming at (eliminate overlap? Promote contestability?...)
- Parties almost always tend to offer the least possible
- The importance of remedies guidelines and templates
- Structural vs behavioural remedies
- Importance of market test (weight confidentiality against effectiveness - the lack of information to third parties concerning remedies may hinder effectiveness)

Practical Aspects from the Portuguese Experience

- Structural remedies should be implemented in a short period of time (risk of loss of value of assets to divest; risk of requests to alter remedies)
- Advantages of fix-it-first or up-front buyer
- Behavioural remedies – should clearly be limited in time (transitory) and the market should not need them after that time period
- If the implementation of the remedies' package is dependent on regulators' licences and approval, make sure this is accounted for, and it will not undermine effectiveness
- The devil is in the detail:
 - Remedies when set in main objectives may seem adequate, but still a long way before reaching a final document (the importance of templates)
 - Have the case team ready to check if detail ensure the correct implementation of the remedies, in particular lawyers
- Monitoring is as important as negotiating remedies (case team; remedies' unit)

Thank you!

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