



European Commission

**Competition**

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# **MOFCOM: Workshop on Behavioural Remedies in Merger Cases**

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## Agenda

- Types of Remedies: an overview
- EU policy on behavioural remedies
- EU practice on behavioural remedies
- Design of effective behavioural remedies



## **I. TYPES OF REMEDIES: AN OVERVIEW**



## Structural Remedies ...

Parties commit to take a one-off action which durably removes their **ability** to negatively affect competition in the future

- Divestitures of a business

- Stand alone business: e.g. *Outokumpu/Inoxum*
- Carved out business unit: e.g. *Thermo Fisher/Life Technologies*
- Package of "mix and match" assets: e.g. *Norsk Hydro/Orkla*
- Brands or patents constituting a business: e.g. *McCain/Lutosa, Teva/Cephalon*

- Removal of links with competitors

- Exit from a Joint Venture with a competitor: e.g. *Südzucker/EDFM*
- Termination of long term supply/distribution or other contractual arrangements with competitor: e.g. *Glencore/Xstrata*
- Divestiture of minority shareholding or, exceptionally, waiving rights related to minority stakes: e.g. *Glencore/Xstrata*



## Features of structural remedies

- Definitive/durable solution without time limit
- Accessory anti-circumvention commitments are the only behavioural element requiring future 'co-operation' from the parties
- *Ex ante*-control of conflict of interest, but later the problem of misaligned incentives does not arise
- Only limited monitoring necessary
- No or limited need for review at a later stage



## Behavioural remedies

Parties **retain in principle the ability to negatively affect competition**, but commit (1) not to make use of that ability and/or (2) to facilitate competition by others

- Access commitments as a means to (1) allow entry or expansion of competitors or (2) prevent foreclosure of competitors
  - Granting of access to infrastructure, networks, technology/IP rights, interoperability information or other essential inputs
  - Can be actually **structural** if access is granted to a resource **not controlled by the parties** such as slot remedies in air transport cases, access to spectrum in mobile telephony cases
  - On non-discriminatory and transparent terms
- Termination of *de lege* or *de facto* exclusivity of supply relationships as a means to prevent input or customer foreclosure
- Other behavioural remedies:
  - Promises by the parties to abstain from certain behaviour (tying/bundling): e.g. Intel/McAfee
  - Firewalls e.g. *GE/Avio*
  - Maximum prices...



## Features of non-structural remedies

- need to decide on duration,
- need for safeguards against mis-alignment of incentives,
- need for strong monitoring
- possibly need to adapt remedy to changing market circumstances



## **II. EU POLICY ON BEHAVIOURAL REMEDIES**





## Basic principles for all remedies

- Remove the competition concerns in their entirety
- Viable and effective from all points of view
- Proportionate
- Case by case approach



## EU policy on behavioural remedies

- **Merger control seeks to protect competitive market structures =>** preferred solution is usually also **structural**
- **Structural** commitments
  - are best way to address horizontal overlaps
  - may be best way to address vertical and conglomerate concerns
- **Access** commitments may be good remedies for all three types of concerns, if they have equivalent effects to a divestiture
- **Other behavioural** commitments may be acceptable only exceptionally
  - generally not in horizontal cases,
  - possibly in conglomerate cases,
  - only if subject to effective monitoring and safeguards



## EU scepticism on behavioural remedies

- Risk **not removing the competition problem in its entirety**
  - Structural problem created by the merger actually not removed (ability and incentive to act anticompetitively remain in place)
  - What happens to competition after the end of the behavioural remedy?
- **Misalignment of incentives**
  - Need for strong safeguards
  - High monitoring costs for both the authority and the parties
- Risk of **regulatory failure**
  - Right duration?
  - Right price?
  - Risk of circumvention
  - Risk of creating anticompetitive side effects
- Need to **adapt remedy** throughout its life time

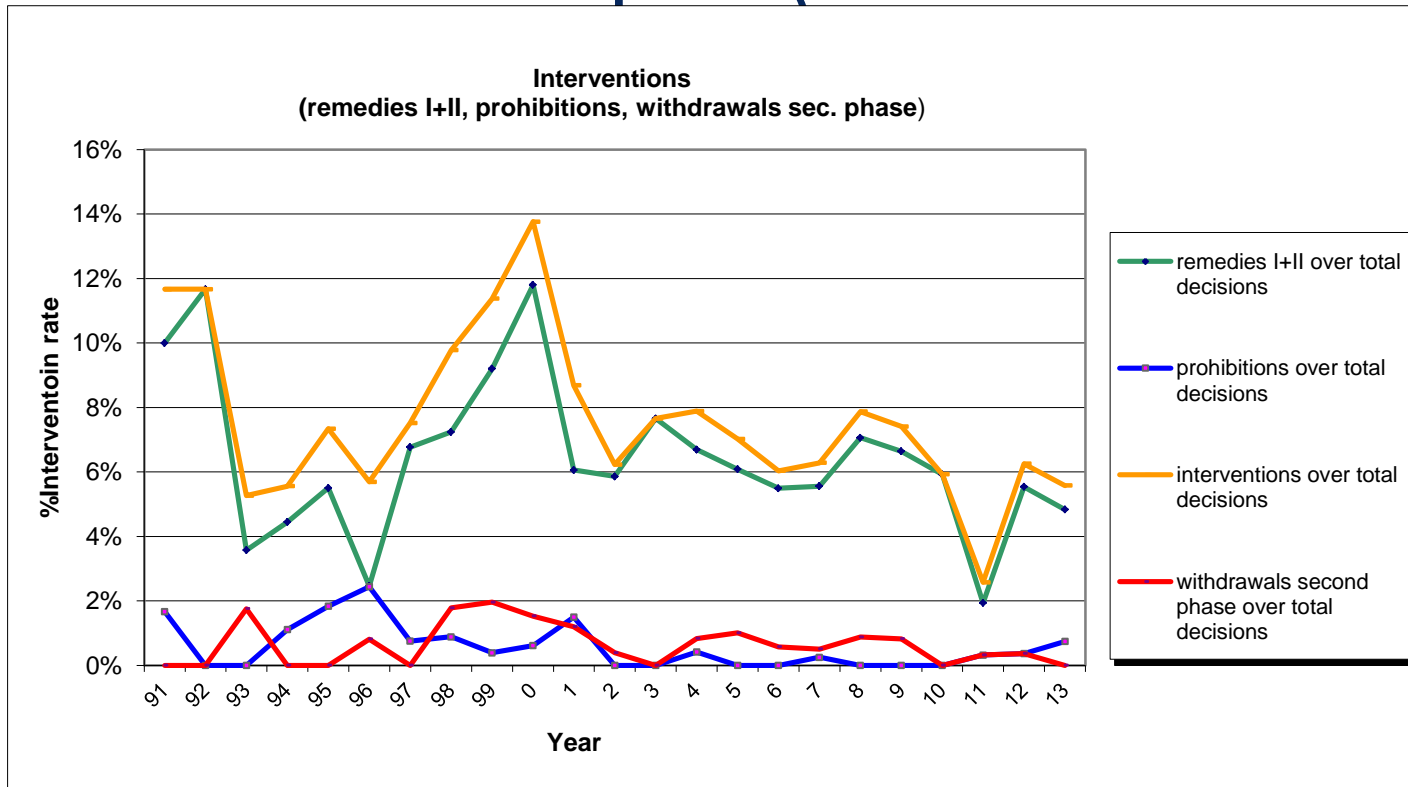


## **III. EU PRACTICE ON BEHAVIOURAL REMEDIES**



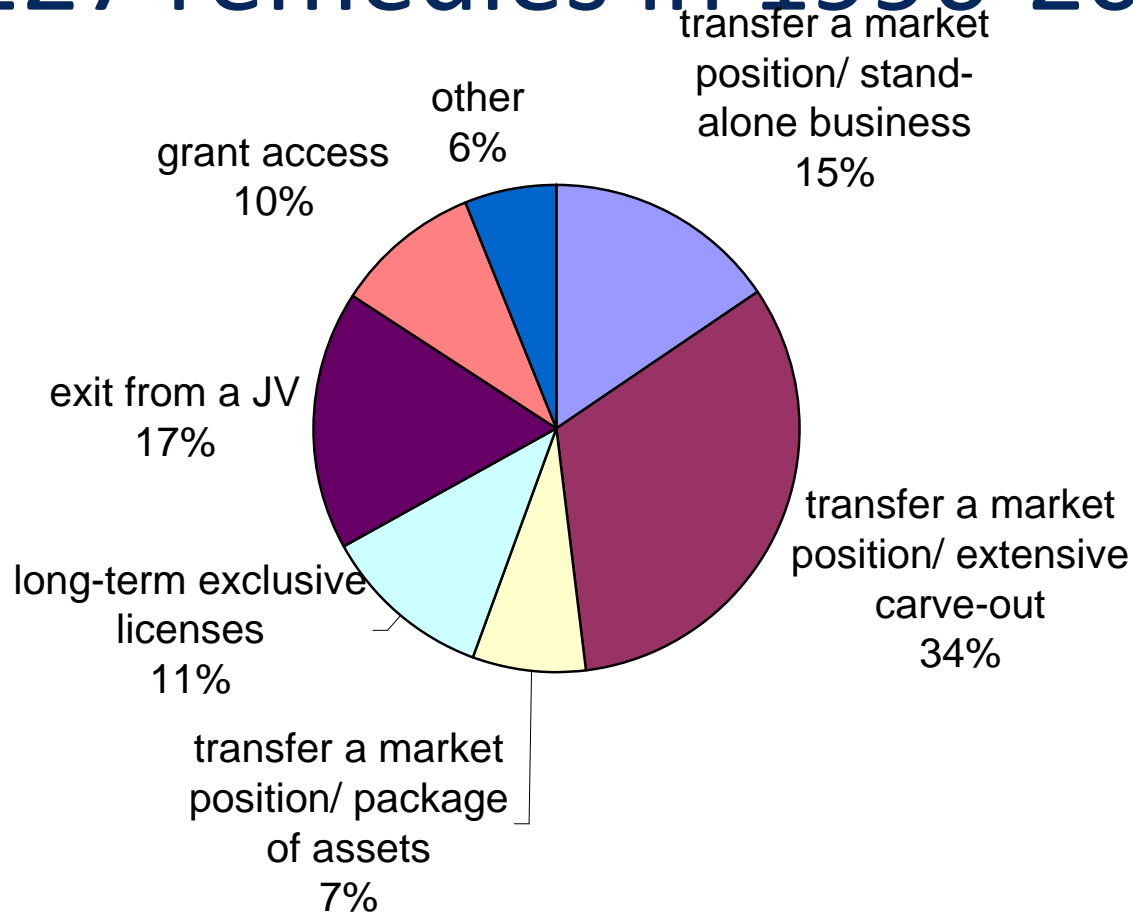
## Interventions

(remedies, prohibitions, withdrawals sec.)





## All 227 remedies in 1996-2000





## Remedies from 2011 to 2013...

- 33 decisions with remedies
  - 24 phase I
  - 9 phase II
- 28 cases: exclusively **horizontal** concerns
- **Vertical** concerns only in: *UTC/Goodrich* (partly), *GE/Avio*, *Friesland/Campina Zeijerveld* (partly)
- **Conglomerate** concerns only in: *Intel/McAfee*, *Arm/Giesecke*



## ... Remedies from 2011 to 2013...

### Horizontal concerns

- Solved almost always **structurally**
  - 22 divestiture case
  - 3 cases with removal of link with competitor (*Glencore/Xstrata*, *Südzucker/EDFM*, *GDF Suez/International power*)
- Only 3 non-divestiture remedies
  - Access/slot remedies in two air transport cases
  - Access to spectrum and access for MVNOs to network in H3G Austria/Orange
  - (In addition to divestiture, behavioural prohibition of MFN clauses in *Universal/EMI*)





## ...Remedies from 2011 to 2013

**Vertical concerns** in three cases solved through

- divestiture commitments (*UTC/Goodrich*)
- Removal of links with competitor/access commitment (*Friesland Campina/Zijerveld*)
- 'Take note' of 'assurance of continuation' contracts (*GE/Avio*)
- Firewall commitment for the special Eurofighter issue (*GE/Avio*)

**Conglomerate concerns** in both *Intel/McAfee* and *Arm/Gisecke* solved through

- access to interoperability information +
- behavioural commitment not to degrade interface



## **IV. DESIGN OF EFFECTIVE BEHAVIOURAL REMEDIES**



## Access Remedies

- Access remedies: non-discriminatory access to infrastructure, networks, technology/IP rights or essential inputs
  - Acceptable if same effect as a divestiture
    - Lowering entry barriers: only if there will be actual entry of new competitors and such entry will be timely and likely
    - Foreclosure concerns: only if competitors will actually use these commitments
  - Requires clear rules on
    - non-discriminatory access
    - scope of access
    - terms of remuneration (if any)
  - Monitoring of such commitments
    - Via market participants: self-enforcement of commitments (arbitration clauses)
    - Via national regulators



## Access Remedies

- Slot release remedies – *Iberia/Clickair/Vueling, Lufthansa/SN Airholding, Lufthansa/Austrian Airlines, US Airways/American Airlines, IAG/BMI*
  - Release (and eventually transfer) of slots without compensation in a 20 minutes' window and without limitations regarding peak hours
  - Slots (initially) earmarked with regard to the problematic routes
  - Transfer of grandfather rights if slots used regularly in a minimum period (e.g. 4/2 IATA seasons)
- Legal standard for slot release remedies under the Remedies Notice and the CFI's *easyJet* Judgment
  - Remedies must lead to actual entry of new competitors and such entry must be timely and likely
  - Market test of the remedies should confirm interest of competitors to enter the problematic routes



## Other Behavioral Remedies

### General Court in Tetra Laval/Sidel

- Conglomerate merger combining carton and PET packaging for liquids
- Theory of harm: Dominant position in carton (TetraPak) will be leveraged into market for PET via tying, predatory pricing, price wars and loyalty rebates
- Commitment offered: hold separate of Tetra and Sidel; no bundling, no predation/discrimination (=Art. 82 decision against TetraPak)
- Remedies rejected by COM: purely behavioural and mere promise not to abuse, impossible to monitor
- General Court: stresses particularity of conglomerate mergers where dominant position is only created via a certain behaviour, as opposed to direct change in market structure (<-> Gencor)
- in these situations behavioural remedies have to be considered by the agency, even if they overlap with duties under Art. 82 and amount to promises not to abuse
- confirmed in Court of Justice appeal



## Intel/McAfee

- Conglomerate merger between dominant chipmaker and number two security software vendor
- Interoperability
  - continue disclosure to SSV
  - 1 year before commercial launch of new hardware
  - opportunity to compete like McAfee
- Tying
  - Possibility to switch off the tied endpoint security product
- No separate remedy on commercial bundling
- McAfee interoperability with AMD CPU
  - no active unnecessary degradation of McAfee performance
- Scope: computers, worldwide, 5 years



## Behavioural Remedies – Problematic solutions

Long term supply contracts or other continued economic links with parties

- can create links and interaction between competitors
- information dissemination about cost structure
- fixes existing market structures

Price caps

- do not address harmful effects on innovation and choice
- heavy market intervention
- risk of not being adapted to changing market
- risk of circumvention and perverse effects

Firewalls

- Difficult to monitor



## Effective behavioural remedies - Essentials

- Precise drafting is vital
  - Define essentials of access etc. as comprehensively as possible
  - Revert to feedback of the market test and experts for technical details
  - Fees/Pricing: Determine upfront with clear criteria for potential adjustment (indices)
  - References to “industry practice” etc. possible if backed up by efficient dispute settlement mechanism
- Foresee adjustment to changing market conditions
  - Changing market can make remedy counterproductive or superfluous
  - Remedy can be limited in time upfront: legal certainty for all market participants, but difficult to prolong if necessary
  - Preferable: Possibility for review after initial period upon request