



Determining Appropriate Merger Remedies: The use of evaluation studies

12th EU-China Competition Week, Beijing

Prof. Dr. Stephan Simon

Senior Expert Mergers/
Case Manager
Directorate F- Services
DG Competition
17 March 2016

The Commission's remedy policy

- 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 concerns, if they have equivalent effects to a divestiture
- **Other** behavioural commitments may be acceptable only exceptionally (and generally not in horizontal cases, but vertical and conglomerate)

Types of Appropriate Remedies

Structural:

- Divestiture (of a viable, existing stand-alone business such as a production plant or subsidiary, or, exceptionally, a carve-out). Overlap may not be enough.
- Removal of link with competitor (e.g. minority shareholding, consortium, long-term supply agreements)

Access:

- Access to IP rights, interoperability information
- Slot remedies in air transport cases (may become structural due to grandfathering)
- Access to spectrum and access to network in mobile telephony cases

Behavioural

- Prohibition of MFN clauses (*Universal/EMI*)
- Commitment not to degrade interface (e.g. *Intel/McAfee*)

Typical implementation issues

- **Interim preservation** of business to be divested
 - **Hold separate** obligations: e.g. cut-off of information flows
 - **Preserve viability** during the interim period: e.g. capital injections
- **Extension of deadlines** for implementation
- **Purchaser suitability:**
 - **Verify** that purchaser chosen by parties fulfils **buyer criteria** (e.g. independence)
 - **Find suitable purchaser** (if parties fail and you did not go for up-front)
 - **Remedy modification amendment / waiver**



International Co-operation

- In mergers subject to multiple jurisdictions, a remedy accepted in one jurisdiction may have an impact on other jurisdictions
- International cooperation aims at facilitating coherence and compatibility in remedies. Key issue for parties:
 - Coordinate timing of merger review in different jurisdictions
 - Ensure that agencies can exchange information on remedies (waivers)
 - Find mutually compatible remedies capable of solving competition issues in all jurisdictions at the same time
- Example: M.7585 -NXP / Freescale (2015)
 - Reviewed in parallel by EU Commission, Mofcom, US-FTC, J-FTC, K-FTC and Mexican Cofece. Adoption of clearance decision on the very same day, 25 November 2015, subject to up-front commitment to divest RF power transistor business by all agencies except Mexico which had cleared unconditionally earlier on.

International Co-operation

- Example: M.6944 – Thermo-Fisher / Life Technologies (2013)
- USD 13 billion transaction in the life science industry
- Case reviewed by **nine jurisdictions** (including EU, Australia, Canada, China, US)
- All major jurisdictions find concerns on:
 - **Gene modulation**
 - **Cell culture**
- In addition:
 - EU: serious doubts on **magnetic beads**
 - China: concerns in **HLA typing** and **protein standards**



International Co-operation

- Intense cooperation with all jurisdictions
- In spite of some differences in assessment, remedies mutually compatible
- Timing of review well aligned:
 - 15 April 2013: deal announced
 - 7 October 2013: deal notified to Commission
 - 26 November 2013: Commission clears subject to remedies
 - 16 December 2013: CCB clears unconditionally due to EU remedies
 - 19 December 2013: ACCC clears unconditionally due to EU remedies
 - 15 January 2014: MOFCOM clears subject to remedies
 - 31 January 2014: FTC clears subject to remedies – on the same day Commission issues buyer approval decision

Ex-post evaluation studies

- 1st Merger Remedy Study 2005, COMP in-house: Covered 40 remedy decisions from 1996-2000 which contained 96 remedies.
- Mainly qualitative assessment – interviews and questionnaires
- 74 of 84 divested business still operating 3-5 years afterwards
- Generally, evolution of divested business found to be weaker than of business retained by the parties
- 57% of remedies were effective in restoring competition
- Main design issues: Insufficient scope of the remedy in particular problems re. vertical links and small businesses
- “Overlap” divestitures were often not sufficient
- Implementation issues concerned incomplete carve-outs, interim preservation and hold-separate issues, incomplete transfer of assets, unsuitable purchasers and insufficient monitoring
- Access remedies found effective in only 2 of 5 instances

Ex-post evaluation studies

- Meta-Study: "A review of merger decisions in the EU: What can we learn from ex-post evaluations?". Peter Ormosi/ Franco Mariuzzo/ Richard Havell/ Amelia Fletcher/ Bruce Lyons (Final report July 2015)
- In around 60% of the sample of 23 mergers decided between 2000 to 2012, mergers are followed by a price increase
- On average, mergers are followed by a price increase of around 4% for unconditionally approved mergers the price increase is just under 5%
- For remedied mergers, the price increase is between 1% and 2%
- Conclusion: Remedies in the EU appear to work well on average.
- However, sample is small and non-random (borderline cases are more likely to be subject to an ex-post evaluation)

Ex-post evaluation studies

Study "Economic impact of enforcement of competition policies on the functioning of the energy markets", Final report, ICF Consulting Services/ DIW Berlin (November 2015). Therein

- **Gaz de France/Suez (2006)**: anticompetitive effects in the gas and electricity wholesale and retail markets in Belgium and in the gas markets in France e.g. cut-off of information flows. Study confirms effectiveness of remedy.