

# Timing and Factors for Considering Remedies

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## Who should propose the remedies: EU legislation

- Commission Notice on remedies (2008/C267/01) General Principles, Paragraph 6

*“...It is then for the parties to put forward commitments. The Commission is not in a position to impose unilaterally any conditions to an authorization decision, but only on the basis of the parties commitments”.*
- Commission Regulation 1033/2008 **requires the parties** to submit a Form RM with their commitments proposal providing information on the commitments offered, the conditions for their implementation and showing their suitability to remove and significant impediment of effective competition.
- the Commission will generally be open to discussions with the notifying parties.



## Who should propose the remedies: Italian legislation

- The Italian Competition Law (Law n. 287/90) provides the possibility of clearing a merger with remedies aimed at addressing the competition concerns stemming from the merger. There are some differences with the EU norms:
- Pursuant to the Italian Law:
  - i) the **parties may offer commitments** that offset the competitive concerns raised by a merger;
  - ii) the Italian Competition Authority **can impose remedies**, even in those cases where the parties did not offer any.
- In practice remedies offered by the parties are sometimes complemented by the Authority



## Who should propose the remedies: Italian legislation

- Recent **example of remedies proposed by the parties and complemented by the Authority**
- Moby/Toremar a merger of two companies operating ferry services between mainland Italy and Elba island. The merger would create a dominant position for the route Piombino/Portoferraio.
- The parties proposed some structural remedies: release of 5 time slots for berthings/departures in the ports of Piombino and Portoferraio
- The Authority deemed that in order to make entry possible for more than one competitor at a minimum efficient scale the release of at least 6 slots was necessary and imposed this measure



## Timing in the proposal of remedies

Since remedies should address competitive concerns raised by the mergers, identification of these concern is preliminary to remedies' proposal;

However, this can take place even at very early stages of the assessment of the merger;

Competition authorities do, in fact, encourage the parties to start thinking about remedies **as soon as they are aware** that the merger might raise competitive concerns;

Commission Notice on remedies (par. 78): *“Parties can submit proposals for commitments to the Commission on an informal basis even before notification”.*



## Timing in the proposal of remedies: EU

- Commitments in Phase I have to be submitted to the Commission within 20 working days from the date of receipt of the notification (and in practice in draft form earlier);
- If commitments are submitted in Phase I, the basic review period of 25 working days is extended to 35 working days;
- The Commission informs the parties about its serious doubts in due time before that deadline (State of the Play meetings);



# Timing in the proposal of remedies

- The Commission will also accept commitments in phase II. They must be submitted at the latest within 65 working days from the initiation of the phase II investigation.
- If commitments are presented in Phase II the review period of 90 working days is extended to 105 working days, unless the commitments have been filed within the first 55 working days after notification
- In EDP and MyTravel, the Court of First Instance held that the Commission must take account of commitments offered in violation of the deadlines mentioned above provided: first that those commitments clearly, and without the need for further investigation, resolve the competition concerns previously identified; and second, that the Commission has sufficient time to consult the member states on those commitments.



## Timing in the proposal of remedies: Italy

- The Italian Authority may point out to the notifying parties the competitive concerns raised by the merger at both stages of the proceedings, but **binding remedies are only available in Phase II under Italian law.**
- Commitments voluntarily adopted by the parties in Phase I are not binding and in the case of violation the ICA may only reopen the case since the transaction that was cleared was different from the one actually implemented
- This means that **Phase I commitments have been very rare** and must be clear-cut for the ICA to take them into consideration
- However informal discussion on remedies can take place at any stage of the merger (and usually at early stage)





## Timing in the proposal of remedies: Italy

- There is no express deadline for the presentation of commitments in the course of a merger review proceeding. The commitments can formally be submitted by the parties at any moment in time during the 45 days of Phase II (that may be extended by up to 30 days in case the undertakings do not provide the information and data requested).
- Although not provided for by the Law, the ICA usually sends a Statement of Objections (SO) to the parties in relation to mergers in Phase II and the parties are asked to submit any comments and/or commitments or additional commitments within the timeframe established by the ICA.
- A formal hearing normally occurs before the deadline set for the end of the proceedings. This may also allow the parties to formally offer commitments after having received the SO, although the timeframe for the submission becomes very tight in such a case.



## Relevant factors: effectiveness

- Assessing the effectiveness of a remedy will involve:
- **Comprehensive Impact** : deal with all competitive detriments
- **Acceptable Risks**: low level of risk of not addressing competitive detriment
- **Practicality**: practical implementation, monitoring and enforcement
- **Appropriate Duration and Timing**: remedies that act quickly are preferable



## Relevant factors: effectiveness

- The remedies must be capable of restoring effective competition while being simple enough to allow the authority to determine this with sufficient certainty.
- Commission Notice: Remedies need to “*eliminate the competition concerns **entirely** and have to be **comprehensive** and **effective** from all points of view*”. In addition acceptable remedies must be “*capable of being implemented effectively within a **short period of time***”.
- When assessing whether the proposed remedy is able to eliminate the competition problem in question, in the Commission's decision practice, '*structural commitments*' are preferred over '*behavioural remedies*'.



## Relevant factors: effectiveness

- The Italian Competition Authority has often indicated in its decision that, whenever possible, structural remedies are more effective, in consideration with the difficulties in monitoring compliance to behavioural remedies.
- However, structural remedies have often been used in combination with behavioural ones in a relevant number of cases while the adoption of behavioural remedies was limited to those cases where a divestiture could compromise the completion of the merger
- **Example:** Recent wave of mergers in Italian banking sector. Competitive effects on local markets were generally solved through measures involving divestment of local branches. Competitive concerns involving the structure of corporate governance that might lead to collusive outcomes (such as interlocking directorates) through behavioural remedies requiring merging parties to exit from existing alliances .



## Relevant factors: proportionality

- Competition authorities normally seek to implement **the least burdensome** remedy or package of remedies that will be fully effective in eliminating the specific competitive detriment of the merger.
- The principle of proportionality in the design of remedies might be considered in various ways:
  - For example type of remedy
  - structural/behavioral,
  - divestment of stand alone business/divestment of assets or carve outs
  - duration of behavioral remedies.



## Relevant factors: proportionality in EUMR

- Proportionality is a general principle of Community law
- Pursuant to **recital 30 of the EUMR**, “*commitments should be proportionate to the competition problem and entirely eliminate it*”.
- When assessing whether the proposed remedy is sufficient under these criteria, the Commission considers, according to the **Remedies Notice**, all relevant factors relating to the remedy itself, including, inter alia, the “*type, scale and scope of the remedy proposed, together with the likelihood of its successful, full and timely implementation by the parties*”. These factors are judged “*by reference to the structure and particular characteristics*” of the relevant market.
- The Italian Competition authority relies on the same principle



# Market tests on remedies

- It is **important to get a view from third parties** (customers, competitors and suppliers of the merging parties) on the effectiveness of proposed remedies
- This might be done through a formal market test or by allowing third parties to take part in the proceeding and therein expressing their views
- Under the **ECMR** remedy proposals by the parties which may be suitable to solve the competition concerns identified and which are submitted in time will normally be market tested. The market testing is carried out through a questionnaire together with a non confidential version of the remedies proposal.
- **In Italy** very tight time framework for the assessment of mergers does not allow the ICA to conduct a formal market test on remedies. Interested third parties can be admitted to take part in the proceeding if they present a reasonable request, and are, therefore, in the position to make comments on the commitments proposed by the parties. The Authority can rely on these comments when assessing the remedies.



## Market tests on remedies

- Market testing the remedies **enhance the transparency** of merger reviewing and give the competition authorities an opportunity to **get the view from market participants** which may have better knowledge of the markets affected by the merger (especially when remedies involve technical issues. Example: energy, TLC, IP rights)
- There might be cases, however, when market participants may be seeking to advance their individual interests. This might be particularly problematic in those cases where it is the competition authority that imposes remedies to the parties
- **Example:** Italian Case C4158 a decision where remedies were adopted implying an obligation for the telecom incumbent to give access to its infrastructure facilities





## Market tests on remedies: Case 4158

- In January 2001 the Italian Authority authorized with remedies the purchase of two free to air national television chains by Telecom, the former telecommunication monopolist and owner of TLC infrastructures.
- The Authority concluded that the merger could strengthen the dominant position of the Telecom group in the new markets deriving from TV-telecommunications convergence.
- Among the remedies adopted with the decision there was an obligation for Telecom to give access to its infrastructure facilities on non-discriminatory terms and at a price reflecting costs, to all operators so requesting for laying optical fibre cables for multimedia and interactive services.
- Third parties, operating in telecommunications market strongly expressed themselves in favour of the adoption of the remedies. However the implementation proved very difficult and involved the Authority in technical and regulatory issues that had little to do with the competitive concerns raised by the merger.

