REMEDIES ACCEPTED BY THE EUROPEAN COMMISSION
FACTS AND TENSIONS

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Types of remedies

Antitrust remedies

• Regulation 1/2003, Art. 7 foresees that behavioural or structural remedies can be imposed:

“[…]The Commission] may impose […] any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. 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[…].”

Recital 12: “[…] Changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.”

• Art. 9 does not contain comparable provisions. Requirements of effectiveness and proportionality still apply.
Types of remedies

**Merger remedies**

- Remedies Notice sets out a preference for structural remedies (and against behavioural remedies) in merger cases:
  
  Para.12: “[…] the basic aim of commitments is to ensure competitive market structures. Accordingly, commitments which are structural in nature, such as the commitment to sell a business unit, are, as a rule, preferable from the point of view of the Merger Regulation’s objective, inasmuch as such commitments prevent, durably, the competition concerns which would be raised by the merger as notified, and do not, moreover, require medium or long-term monitoring measures […].”

  Para.17: “[…] Commitments relating to the future behavior of the merged entity may be acceptable only exceptionally in very specific circumstances […].”

- The Remedies Notice notes different types of remedies:
  - Divestiture of a business to a suitable purchaser
  - Removal of links with competitors
  - Other remedies
    - Access Remedies
    - Change of long-term exclusive contracts
    - Other non-divestiture remedies
Access remedies
Access remedies can take many forms

• Neither clear-cut structural nor behavioural type of remedies:
  – Remedies Notice refers to access remedies as “other remedies” but refers to the granting of access to key infrastructure as a structural remedy
  – Sometimes in the literature considered as behavioural or “quasi-structural”

• Access to infrastructure, e.g.:
  – Airport slots
  – Mobile networks
  – Energy infrastructure (gas, electricity)

• Access to intellectual property, e.g.:
  – Copyrighted data
  – Patents
  – Hardware / software interoperability information (e.g., semiconductors; high-end video conferencing)

→ Access remedies are capable of achieving a structural effect
→ But, a structural effect is not guaranteed, e.g., if there is no third party requesting access
The EC’s remedies practice

Pool of cases reviewed

Our review covers merger and Art. 9 remedies cases of 2005-2018:

<table>
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<tr>
<th>Mergers</th>
<th>Phase I</th>
<th>Phase II</th>
<th>Total</th>
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<tr>
<td>Nov 2004 - Jan 2010</td>
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<td>21</td>
<td>99</td>
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<td>Feb 2010 - Oct 2014</td>
<td>50</td>
<td>15</td>
<td>65</td>
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<td>Nov 2014 - Dec 2018</td>
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<th>Art. 9</th>
<th>Art. 101</th>
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<td>Feb 2010 - Oct 2014</td>
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<td><strong>23</strong></td>
<td><strong>37</strong></td>
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</table>
The EC’s remedies practice

Types of remedies in merger remedies packages

Phase I

- Structural
- Access
- Behavioural

Phase II

- Structural
- Access
- Behavioural
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Types of remedies in Art. 9 remedies packages

Art. 101

Structural

Access

Behavioural

Art. 102

Structural

Access

Behavioural

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The EC’s remedies practice

Types of remedies contained in remedies packages

**Mergers**

**Structural**

- Nov 2004 - Jan 2010
- Feb 2010 - Oct 2014
- Nov 2014 - Dec 2018

**Access**

- Nov 2004 - Jan 2010
- Feb 2010 - Oct 2014
- Nov 2014 - Dec 2018

**Behavioural**

- Nov 2004 - Jan 2010
- Feb 2010 - Oct 2014
- Nov 2014 - Dec 2018

**Art. 9**

**Structural**

- Nov 2004 - Jan 2010
- Feb 2010 - Oct 2014
- Nov 2014 - Dec 2018

**Access**

- Nov 2004 - Jan 2010
- Feb 2010 - Oct 2014
- Nov 2014 - Dec 2018

**Behavioural**

- Nov 2004 - Jan 2010
- Feb 2010 - Oct 2014
- Nov 2014 - Dec 2018

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Tensions

- If behavioural remedies are “as effective” as structural remedies in Article 101/Article 102 cases, why not use them more widely in merger cases?
- If structural remedies are “more effective” than behavioural remedies in merger cases, why not use them more widely in Article 101/Article 102 cases?
- Can access remedies be “as effective” as a divestment if no third party requests access under the terms offered?


Hoehn, Thomas, Rab, Suzanne and Sagger, Grant (2009) Retail Therapy: A Cross-Country Comparison of Merger Control Remedies Practice and Experience in the Wholesaling and Retailing Sectors of France, Germany, Italy, the Netherlands, Spain and the United Kingdom, European Competition Law Review, 30(4).

Hoehn, Thomas, Rab, Suzanne and Sagger, Grant (2009) 'Breaking up is hard to do': National merger remedies in the information and communication industries, European Competition Law Review, 30(5).
