Lunchtalk series merger control

Post mortem: Pitfalls for remedies and their implementation

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The views expressed are purely those of the speaker and may not in any circumstances be regarded as stating an official position of the European Commission.
Introduction

Remedies in merger cases

• Proportionate solution to address competition concerns
  ➢ Main intervention tool
• Requirements:
  ➢ Remove competition concerns entirely
  ➢ Focus on viability
• Necessary to address risks
  ➢ Composition risk, purchaser risk, asset risk
• Consequences for design and implementation of remedies
• Legal basis and Commission guidance
  • Articles 6(2) and 8(2) EUMR
  • Commission Notice on remedies (2008)
  • Standard model texts for divestiture commitments (revised 2013)
## Interventions

<table>
<thead>
<tr>
<th>Year</th>
<th>Intervention Cases</th>
<th>Phase I w/ remedies</th>
<th>Phase II w/ remedies</th>
<th>Prohibitions</th>
<th>Abandoned in Phase II</th>
<th>Notified</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015</td>
<td>22 (7%)</td>
<td>13</td>
<td>7</td>
<td>0</td>
<td>2</td>
<td>337</td>
</tr>
<tr>
<td>2016 YTD</td>
<td>19 (7%)</td>
<td>12</td>
<td>5</td>
<td>1</td>
<td>1</td>
<td>276</td>
</tr>
</tbody>
</table>

![Interventions graph](chart.png)

**Interventions**

- Remedies I+II over total decisions
- Prohibitions over total decisions
- Interventions over total decisions
- Withdrawals second phase over total decisions

**Graph Note:**

- **Interventions (remedies I+II, prohibitions, withdrawals phase II)**

**Year轴:**

- 2004
- 2005
- 2006
- 2007
- 2008
- 2009
- 2010
- 2011
- 2012
- 2013
- 2014
- 2015
- 2016

**Notified轴:**

- 0%
- 2%
- 4%
- 6%
- 8%
- 10%
- 12%
- 14%
- 16%
Preference for structural remedies

Types of remedies: 2011-16 (88 cases until 15/10/2016)

- Divestitures 70%
- Standard divestitures 37%
- Other/complex divestitures 33%
- Access and other non-divestiture remedies 23%
- Removal of links with competitor 7%
Avoiding pitfalls in divestitures: remedy design

Remove competition concerns entirely

- General rule: divestiture of the whole overlap (if horizontal concern)

Viability:

- Purchaser criteria
  - General criteria (see standard model text): independence, financial resources, expertise, incentives
  - Specific purchaser criteria (e.g. sector experience, existing production facilities, geographic footprint – ex. Mylan/Abott, Zimmer/Biomet, SFR/Dansk Fuel)

- If necessary: Upfront buyer (65% of Phase II remedies and 15% of Phase I remedies 2013-3/2016 – ex. Ball/Rexam) or "fix-it-first" (very exceptionally – ex. GE/Alstom)

- Divestiture of "going concern"/carve-out/reverse carve-out
  - Need to include additional assets to create viable entity (ex. Ball/Rexam)

- 3rd-party rights (e.g. brands, real estate, JV stakes)
  - To be sorted out before the remedy is accepted (ex. SFR/Dansk Fuel)
Avoiding pitfalls in divestitures: remedy design (cont’d)

Process:

- Market test
  - Identify potential weaknesses
  - Test 3rd party interest
  - Factual questions - conscious that replies may be self-serving

- Align with other reviewing antitrust agencies (ex. Ball/Rexam)
  - EU/US Best practices on cooperation in merger cases
Avoiding pitfalls in divestitures: implementation

- Interim preservation and hold-separate obligation
  - Hold-separate manager, ring-fencing
  - Monitoring trustee

- Short divestiture deadline
  - Extension possible when justified

- Purchaser approval
  - Check of candidate and draft SPA
  - Information gathering: RFI, meetings with candidates, trustee report

- Review clause
  - Waiver or modification of commitments (in exceptional cases)

- Non-reacquisition clause (typically 10 years)
Avoiding pitfalls: Non-divestiture remedies

- Clear definition of access terms

- Require continuous monitoring
  - Preference for self-monitoring:
    - arbitration/fast-track dispute resolution (ex. Telefónica/E-Plus), complaints
  - Role of trustee

- Time limit, review clause (ex. NewsCorp/Telepiù)
Outlook: Ex-post evaluation of remedies

- Remedies Study (2005)
  - Large sample of cases (40) from a 5-year period (1996-2000)
  - Focus on effective implementation (rather than effect on competition)
  - Valuable insights in shortcomings of earlier practice
  - Experience fed into Remedies Notice and standard model texts

- Study on telecoms cases (2015)
  - Carried out in cooperation with national regulators
  - Focus on effect on competition
  - Targeted on 1 sector and 2 cases
    - T-Mobile/tele.ring (AT, cleared with remedies): no significant price increase
    - T-Mobile/Orange (NL, cleared without remedies): significant price increase post-merger