



## Lunchtalk series merger control

# Post mortem: Pitfalls for remedies and their implementation

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24 October 2016

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### DISCLAIMER

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.

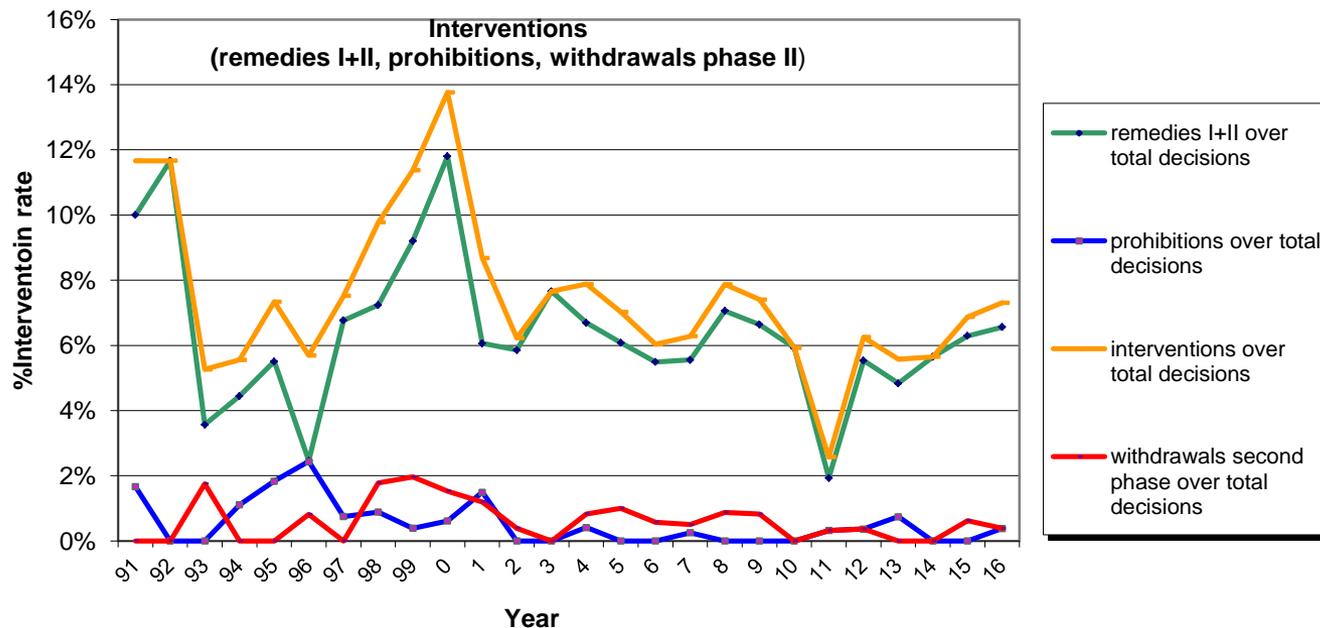
# Introduction

## 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)

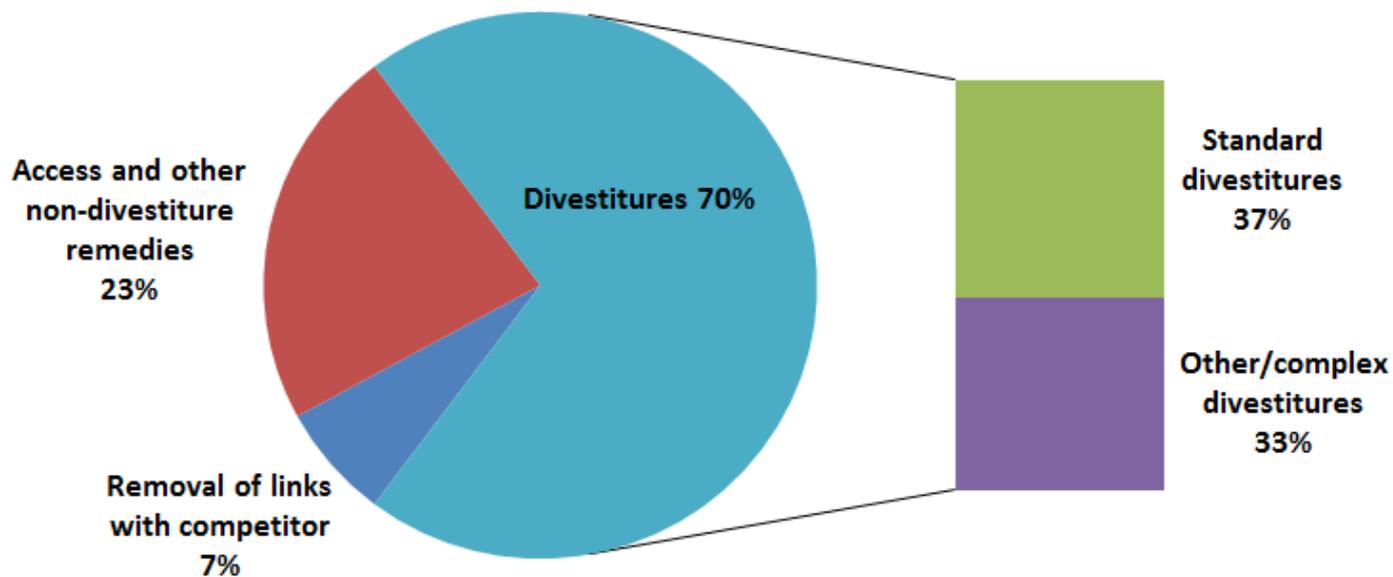
# Interventions

	Intervention Cases	Phase I w/ remedies	Phase II w/ remedies	Prohibitions	Abandoned in Phase II	Notified
<b>2015</b>	<b>22 (7%)</b>	13	7	0	2	337
<b>2016 YTD</b>	<b>19 (7%)</b>	12	5	1	1	276



# Preference for structural remedies

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



## 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