Remedies in EU Merger Control – An Essential Guide

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[1] Any views expressed in this chapter are those of the author, not those of any institution. The author is indebted to an excellent prior work on remedies, which served as the point of departure for this guide: Nadia de Souza and Julia Brockhoff, 'Remedies' in Götz Drauz and Christopher Jones (eds), EU Competition Law – Vol. II – Mergers and Acquisitions, Book one (2nd ed., Claeys & Casteels 2012) 647-809. The author expresses his gratitude to Kato Van der Speeten for editorial assistance.

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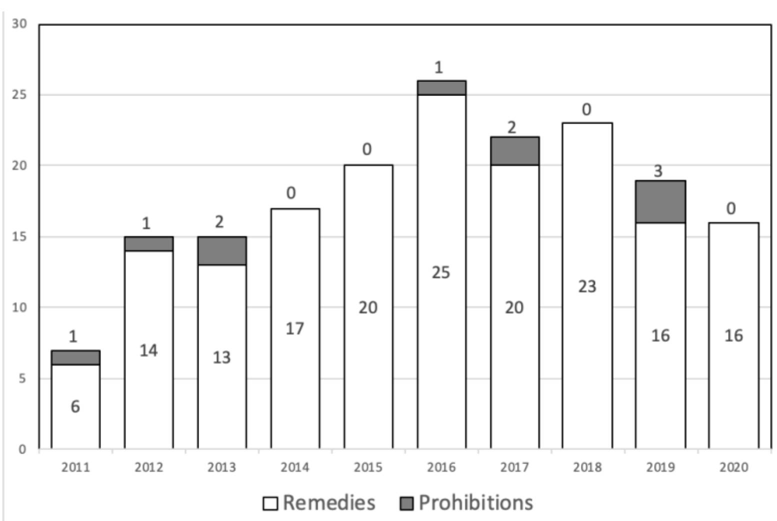
1 Introduction

1.1 The importance of remedies in EU merger control

1.1.1 Merger control's most frequently used tool to protect competition

The goal of EU merger control is to prevent concentrations from causing lasting harm to competition in the EU.[2] Remedies are by far the most common tool by which the European Commission seeks to achieve this. They constitute the Commission's most widely used form of intervention. The only other formal way for the Commission to prevent harm to competition is to prohibit a concentration.[3] Prohibitions are rare. In three decades of EU merger control, the Commission has only prohibited 30 concentrations, an average of one prohibition per year. By contrast, there have been more than 450 cases where remedies were made binding. In short, the vast majority of concentrations that raise competition problems are approved with remedies. Figure 1 illustrates this, by comparing the yearly number of remedies decisions and prohibition decisions in the past decade.

Figure 1 – Number of approvals with remedies vs. prohibitions per year (2011-2020)



[2] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1 (EU Merger Regulation), rec 5: '[I]t should be ensured that the process of reorganisation does not result in lasting damage to competition (…)'.

[3] Apart from formal interventions, merger control also prevents harm to competition by deterring anticompetitive mergers from being planned or 'leaving the boardroom'. In addition, some mergers are abandoned by the parties because competition authorities raise competition concerns, but before the competition authority can issue a formal decision.

Hence, remedies are central to the European Commission's merger control activities. The European Commission is by no means unique in this respect. Competition authorities in other EU Member States, with the exception of Germany[4], also rely mostly on remedies, not prohibitions, to protect competition. Likewise, in the United States, most problematic mergers are not blocked by the courts but cleared with remedies, through 'consent orders' (FTC) and 'consent decrees' (entered by a court at the request of the Department of Justice).[5]

In spite of their importance, remedies are somewhat of a niche topic in the academic literature. Most of the major EU competition law textbooks treat the topic very summarily[6] or skip it altogether.[7] Only a handful address the topic in some depth[8] and even fewer in a comprehensive way.[9] Monographs on the topic are also scarce.[10]

1.1.2 Remedies consume significant resources and have important economic consequences

The importance of remedies within merger control is also reflected in the significant resources that flow into the design, implementation and enforcement of remedies. European Commission staff working on mergers spend considerable time and efforts on remedies,[11] as do undoubtedly the parties themselves and their lawyers.

The steady flow of merger clearances with remedies has also increased the demand for the services of monitoring trustees, the independent third parties that oversee the merging parties'

[4] In Germany, the number of approvals with remedies and the number of prohibition decisions is more balanced. In recent years, prohibitions have even outnumbered remedies decisions. In the ten-year period between 2010 and 2019, the *Bundeskartellamt* prohibited 15 concentrations and approved 11 concentrations with remedies. Own calculation based on 'Wettbewerb 2020, XXIII. Hauptgutachten der Monopolkommission gemäß § 44 Abs. 1 Satz 1 GWB' (*Monopolkommission,* 2020). <www.monopolkommission.de/images/HG23/HGXXIII_Gesamt.pdf> accessed 4 December 2020, 156, Abbildung III.2 (counting 'Untersagungen' (prohibitions) and 'Freigaben mit Nebenbestimmungen' (clearances with remedies)).
[5] John Kwoka, *Mergers, Merger Control and Remedies: A Retrospective Analysis of U.S. Policy* (MIT Press 2015) 10-11.
[6] See, e.g., Richard Whish and David Bailey, Competition Law (9th edn, OUP 2018) 907-913; Alison Jones, Brenda Sufrin and Niamh Dunne, *EU Competition Law: Text, Cases, and Materials* (7th edn, OUP 2019) 1174-1179.
[7] Ioannis Lianos, Valentine Korah, and Paolo Siciliani, *Competition Law: Analysis, Cases, & Materials* (OUP 2019).
[8] See, e.g., Gunnar Niels, Helen Jenkins and James Kavanagh, *Economics for Competition Lawyers* (2nd edn, OUP 2016) ch 8, 359-393.
[9] To the author's knowledge, the most complete account is Nicholas Levy and Christopher Cook, 'European Merger Control Law: A Guide to the Merger Regulation' vol. 1 (LexisNexis, release 16, October 2019), chapter 18, p. 18-1 to 18-154.
[10] To the author's knowledge, two monographs dealing with EU merger remedies were published in the past decade: Damien Gerard and Assimakis Komninos (eds), *Remedies in EU Competition Law: Substance, Process and Policy* (Wolters Kluwer 2020); Dorte Hoeg, *European Merger Remedies – Law and Policy* (Hart Publishing 2014).
[11] Carles Esteva Mosso and Simon Vande Walle, 'EU Merger Control: How to Remove Anticompetitive Effects?' in Damien Gerard and Assimakis Komninos (eds), *Remedies in EU Competition Law: Substance, Process and Policy* (Wolters Kluwer 2020) 41 ('Enforcers of EU merger control devote a sizeable part of their daily work to making sure that remedies are effective').

compliance with remedies.[12] Given that some remedies are in place for a long period of time,[13] the trustee's involvement with a case can last for several years. Only a handful of persons and firms offer trustee services.[14] Some trustees focus solely on providing trustee services in competition cases, while others are part of firms that offer a variety of services, typically consulting, audit, accounting or banking services.

The economic importance of remedies is evidenced by the size of some divestiture transactions. Divestitures – the most common type of remedy in EU merger control – have sometimes constituted very significant transactions in their own right. As the size and geographic reach of mergers has grown, so has the size and complexity of divestitures. In 2018, for instance, Bayer, a German-based multinational, agreed to divest part of its business as a remedy to obtain clearance for its acquisition of U.S. seeds company Monsanto. The resulting deal, which had a value of 7.6 billion euro[15], was one of the largest divestitures in EU and U.S. history.[16] Other recent deals have also resulted in very large divestitures, including cases such as *AB InBev / SAB Miller*,[17] *Dow / DuPont*,[18] *GE / Alstom*,[19] *Holcim / Lafarge*[20], and *Ball / Rexam.*[21]

The large size of these divestitures highlights the impact that remedies can have not just on specific markets but on entire industries. In line with this, some commentators have emphasized the role remedies play in restructuring markets, and argue that they constitute opportunities for government authorities to intervene in markets for an extended period of time, transforming

[12] Thomas Hoehn, 'Challenges in Designing and Implementing Remedies in Innovation Intensive Industries and the Digital Economy' in Damien Gerard and Assimakis Komninos (eds), *Remedies in EU Competition Law: Substance, Process and Policy* (Wolters Kluwer 2020) 121, at 122 (noting the increase in merger remedies in innovation intensive industries which are large and complex, 'requiring more time and resources to ensure effective implementation of any remedies').

[13] See section 5.4 (Duration of remedies).

[14] The name of the person or firm acting as trustee in a particular case can easily be obtained on the website of the European Commission, via the case search tool. In cases with remedies, the tool will display a section 'Other case related information', with an item called 'Trustee details'.

[15] 'BASF closes acquisition of businesses and assets from Bayer' (*BASF*, 1 August 2018) <www.basf.com/global/en/media/news-releases/2018/08/p-18-285.html> accessed 4 December 2020.

[16] Alexandre Bertuzzi and others, 'Bayer / Monsanto - protecting innovation and product competition in seeds, traits and pesticides' [2018] *Competition merger brief*, issue 2/2018, 6, at 11; 'Justice Department Secures Largest Negotiated Merger Divestiture Ever to Preserve Competition Threatened by Bayer's Acquisition of Monsanto' (*U.S. Department of Justice*, 29 May 2018) <www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened> accessed 4 December 2020.

[17] M.7881 – *AB InBev / SABMiller,* Commission decision of 24 May 2016.

[18] M.7932 – *Dow / DuPont*, Commission decision of 27 March 2017.

[19] M.7278 – *General Electric / Alstom (thermal power - renewable power & grid business)*, Commission decision of 8 September 2015.

[20] M.7252 – *Holcim / Lafarge*, Commission decision of 15 December 2014. A commentary on the case mentions that the remedy was 'a structural remedy of an unprecedented size'. See Daniele Calisti and Jean-Christophe Mauger, 'Holcim / Lafarge: paving the way to first phase clearance' [2015] *Competition merger brief*, issue 1/2015, 20.

[21] M.7567 – *Ball / Rexam,* Commission decision of 15 January 2016.

mergers into a trigger for economic regulation.[22] This is probably not a characterization which competition enforcers would embrace. Indeed, in court proceedings, the Commission has stated that remedies 'cannot be instrumentalised by the Commission as a means or opportunity for "engineering markets or economic planning"'.[23] Yet there is no gainsaying that remedies can have important economic consequences. They may raise issues that touch upon economic sovereignty, employment[24], competitiveness and industrial policy.[25] This also explains why a topic that appears technical at first attracts the attention of policymakers, who are interested in the economic and strategic impact of remedies.

1.2 Recent debate and controversy surrounding remedies

1.2.1 Are merger remedies effective?

Given the central role that remedies play in merger enforcement, it is probably not an exaggeration to say that, if remedies are ineffective, merger control is also largely ineffective. Admittedly, the threat of a prohibition – even if prohibitions are rarely actually issued – probably also has an impact. It probably stops many clearly anticompetitive mergers from being pursued.

[22] François Blanc, *Les engagements dans le droit français des concentrations* (LGDJ 2015) 4-6 (writing, in relation to remedies in French competition law: 'Autrement dit, les engagements se transforment en un acte administratif réglementant la concentration ; cette opération devient alors le vecteur d'une configuration nouvelle des marchés, imposée par l'administration et dans laquelle celle-ci interviendra à de multiples reprises. En somme, les engagements mettent la concentration au service d'une organisation administrative de l'économie.').

[23] Commission's pleadings cited in Case C-551/10 P Editions Odile Jacob v Commission, Opinion of AG Mazák of 6 March 2012, EU:C:2012:125, para 74.

[24] See, e.g., Answer by Ms Vestager to parliamentary question P-003845/2019 from Othmar Karas, 6 January 2020 (addressing a question relating to job losses in a plant in Fürstenfeld, Austria; the plant was divested in the context of a remedy and the purchaser decided to discontinue the production of air compressors at the plant). See also Case T-12/93 *Comité Central d'Entreprise de la Société Anonyme Vittel et al. v Commission*, EU:T:1995:78, para. 58. In that case, employee representatives sought the annulment of a divestiture remedy arguing, among others, that the divestiture would entail the loss of collective employee benefits and the loss of jobs. The General Court rejected the action as inadmissible (para. 60), noting that the Commission's decision requiring the divestiture is not, in and of itself, the direct cause of any job losses or a loss of collective benefits (paras 58-59). The General Court did declare the action admissible to the extent that it aimed at ensuring protection of the procedural guarantees of employee representatives, but it found that the Commission had respected those.

[25] See section 4.2.2 (The structural vs. behavioural debate), where the call from some governments for the more frequent use of behavioural remedies is discussed. See also, e.g., Alain Chatillon and Olivier Henno, 'Rapport d'information fait au nom de la commission des affaires économiques et de la commission des affaires européennes sur la modernisation de la politique européenne de concurrence', French Senate, 8 July 2020 (arguing that the Commission's remedies policy should change in order to reconcile it with a European industrial strategy); Inspection générale des finances et Conseil général de l'économie, 'Rapport sur la politique de la concurrence et les intérêts stratégiques de l'UE' (3 June 2019) 14 (reviewing EU competition policy from the perspective of the European Union's strategic interests and arguing that the prevalence of structural remedies in EU merger control leads to 'the risk of compelling European players to withdraw from activities or dispose of strategic assets in favour of competitors from outside Europe').

These are the 'deals that never leave the boardroom'.[26] However, apart from this deterrent effect of prohibitions,[27] effective remedies are crucial in ensuring that merger control fulfils its promise of keeping markets competitive.

The effectiveness of remedies and, by extension, the effectiveness of merger control has been the subject of some controversy in recent years. The debate has been most vigorous in the United States, where it became part of a broader debate about economic concentration and the role of antitrust law.

An important contribution to the debate came in 2015, when John Kwoka published his study on the consequences of mergers in the United States. Kwoka assessed, among others, whether remedies had been effective in preventing price increases from mergers. To do so, he conducted a meta-analysis[28] of previously published *ex post* assessments of mergers, i.e. studies that estimate a merger's impact on prices.[29] His analysis covered 49 mergers,[30] of which 12 had been cleared with remedies by the U.S. antitrust authorities. Kwoka found that those 12 mergers led to significant price increases, in spite of the remedies. On average, the mergers cleared subject to a divestiture remedy led to a price increase of 5.65%.[31] Conduct remedies did even worse: they led to a 13.33% price increase, although that estimate was based on a sample of only two mergers.[32]

On the basis of these figures, Kwoka concluded that 'many challenged mergers are subject to remedies that fail to prevent postmerger price increases.'[33]

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[26] See, e.g., Margrethe Vestager, 'The future of EU merger control' (International Bar Association's 24th Annual Competition Conference, 11 September 2020) <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en> accessed 4 December 2020.

[27] See, e.g., Pedro Pita Barros, Joseph A. Clougherty and Jo Seldeslachts, 'Remedy for Now but Prohibit for Tomorrow: The Deterrence Effects of Merger Policy Tools' (2007) CEPR Discussion Paper No. DP6437, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1138550> accessed 4 December 2020.

[28] A meta-analysis is an analysis of multiple prior studies to develop findings that have greater statistical power than any of the individual studies alone.

[29] John Kwoka, *Mergers, Merger Control and Remedies: A Retrospective Analysis of U.S. Policy* (MIT Press 2015).

[30] To be more precise: 49 transactions, 42 of which were mergers; the others were either joint ventures or airline 'code shares'.

[31] John Kwoka, *Mergers, Merger Control and Remedies: A Retrospective Analysis of U.S. Policy*, 120, table 7.9. The mergers remedied with a divestiture accounted for seven of the 12 remedied mergers.

[32] Initially, Kwoka had found an average price increase of 16%, based on five mergers with conduct remedies. However, Kwoka later had to exclude three of those five mergers (the studies measuring the price increases in those mergers had measured the price increase in years when the remedy was not in force). This led Kwoka to revise the estimate to 13.33%, based on two mergers only. Kwoka acknowledged that this was too few 'for reliable inferences about conduct remedies'. See John Kwoka, 'Mergers, Merger Control, and Remedies: A Response to the FTC Critique' (2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947814> accessed 4 December 2020, 21.

[33] John Kwoka, *Mergers, Merger Control and Remedies: A Retrospective Analysis of U.S. Policy* (MIT Press 2015) 159.

Kwoka's findings sparked a rebuke from FTC officials, who challenged Kwoka's findings on various grounds. They argued that the studies he had analysed covered only a small number of transactions, which had occurred in a small and unrepresentative set of industries. They concluded that '[Kwoka's] evidence cannot support [his] broad conclusions'.[34]

Kwoka's study also stirred up the debate across the Atlantic. His study related to price effects of mergers in U.S. markets, which begged the question: what has the impact of mergers been on prices in Europe? Have remedies in the EU been able to prevent price increases? At first sight, one would expect a similar tendency as in the United States, because the Commission's approach to merger remedies is not fundamentally different from the one of the Department of Justice and the FTC. All these authorities use remedies, not prohibitions, as the primary tool to address anticompetitive effects from mergers. All have a preference for structural remedies, but at the same time accept behavioural remedies in certain cases.

Almost immediately after the publication of Kwoka's book, the European Commission commissioned a similar meta-analysis, but this time of *ex post* assessments of European mergers.[35] The study, published in 2016, found that unconditionally approved mergers led to a price increase of 5% on average[36], suggesting that merger control in Europe had not caught all anticompetitive mergers. Remedied mergers, however, had a more moderate effect. On average, after a remedies merger, prices increased by 1.64%.[37] A subsequent meta-analysis by the same authors, based on a slightly different set of *ex post* studies, suggested that the remedies did even better. That study found that remedied mergers led, on average, to a price decrease of -0.6%.[38]

Does this mean that remedies in the EU have been effective in preventing the harm from mergers, in contrast to remedies in the U.S.? This was not the conclusion which the authors of the two studies drew. On the one hand, they acknowledged that 'a stylized conclusion (…) would be that remedies are effective in eliminating post-merger price increases'.[39] However, they then went on to conclude that the difference between Kwoka's findings and the study's finding was 'likely

[34] Michael Vita and F. David Osinski, 'John Kwoka's *Mergers, Merger Control, and Remedies*: a Critical Review' (2018) 82 *Antitrust Law Journal* 361, 363. This critique in turn triggered a response from John Kwoka, 'Mergers, Merger Control, and Remedies: A Response to the FTC Critique' (2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947814> accessed 4 December 2020.

[35] Peter Ormosi, Franco Mariuzzo and Richard Havell, 'A review of merger decisions in the EU: What can we learn from ex-post evaluations?' (*European Commission*, 2016) <https://ec.europa.eu/competition/publications/reports/kd0115715enn.pdf> accessed 4 December 2020.

[36] Ormosi, Mariuzzo and Havell, 'A review of merger decisions in the EU: What can we learn from ex-post evaluations?' 11.

[37] Ormosi, Mariuzzo and Havell, 'A review of merger decisions in the EU: What can we learn from ex-post evaluations?' 11.

[38] Richard Havell, Franco Mariuzzo and Peter Ormosi, 'A Review of Merger Decisions in the EU' in Fabienne Ilzkovitz and Adriaan Dierx (eds), *Ex Post Economic Evaluation of Competition Policy: The EU Experience* (Wolters Kluwer 2020) 51. For unconditionally approved mergers, the authors arrived at a price increase of 5%, similar to the EU study.

[39] Ormosi, Mariuzzo and Havell, 'A review of merger decisions in the EU: What can we learn from ex-post evaluations?' 12.

to be due to the differences in the way the two samples were selected.'[40] Indeed, the study conducted for the Commission had significant limitations. The sample of mergers was small: 25 mergers, of which seven had been reviewed by the European Commission, while others were reviewed by other European competition authorities. Of these 25 mergers, only eight had been subject to remedies, approved by various competition authorities in the EU. Only one merger had been subject to remedies approved by the European Commission.[41] Hence, it seems difficult to draw any firm conclusions on the effectiveness of remedies in the EU from this study and even less so on the effectiveness of remedies approved by the European Commission.[42]

With no recent study to draw any conclusions from, the question on the effectiveness of remedies in the EU remains open. Anecdotical evidence about specific merger remedies demonstrates that some merger remedies have not been effective or only partly effective,[43] but it is difficult to assess how widespread these problems are.

The only large-scale study is DG COMP's merger remedies study of 2005, which is discussed in section 1.2.3 (The call for *ex post* assessments of remedies).

1.2.2 The structural vs. behavioural debate

Like most competition authorities across the world,[44] the Commission has a policy that favours structural remedies over behavioural remedies. However, this still leaves room for behavioural remedies in some cases. The optimal stance on this issue continues to spark discussions. The debate is also linked to questions about how interventionist the Commission should be in regard

[40] Ormosi, Mariuzzo and Havell, 'A review of merger decisions in the EU: What can we learn from ex-post evaluations?' 12.

[41] Ormosi, Mariuzzo and Havell, 'A review of merger decisions in the EU: What can we learn from ex-post evaluations?' 6, table 1. The case was M.3161 – *CVRD / CAEMI*, a merger cleared subject to a divestiture remedy.

[42] The meta-analysis published in 2020 by Havell, Mariuzzo and Ormosi included three mergers with remedies approved by the European Commission. This number also seems to be too limited to draw any conclusions. The three cases were M.3161 - *CVRD / CAEMI* (divestiture), M.3916 - *T-Mobile / tele.ring* (divestiture of assets), and M.4180 - *GDF / Suez* (divestiture remedy). For the data on M.3916 - *T-Mobile / tele.ring*, the meta-analysis relied on data drawn from European Commission, 'Ex-post evaluation analysis of two mobile telecom mergers: T-Mobile/tele.ring in Austria and T-Mobile/Orange in the Netherlands' (2015).

[43] See, e.g., M.8947 – *Nidec / Whirlpool (Embraco business)*, Commission decision of 12 April 2019. This acquisition was approved subject to Nidec divesting plants in Austria, Slovakia and China. However, the purchaser of these plants subsequently decided to discontinue a manufacturing line in Austria, and Nidec ultimately re-acquired that part of the divestiture, after obtaining a waiver from the Commission. M.7637 – *Liberty Global / BASE Belgium*, Commission decision of 4 February 2016. This acquisition was approved subject to BASE divesting mobile virtual network operators Mobile Vikings and Jim Mobile to a new entrant in the retail mobile market. However, in December 2020, that new entrant announced that it would sell the businesses it had acquired from BASE to Proximus, the number one mobile retail operator in the market. As explained in section 4.4.2 (Telecoms sector), remedies in several telecoms cases have also been criticized as ineffective.

[44] The ICN's Remedies Guide, which embodies a compromise text agreed upon by over 140 competition authorities, states that 'competition authorities generally prefer structural relief in the form of a divestiture to remedy the anticompetitive effects of mergers, particularly horizontal mergers'. 'Merger Remedies Guide' (*International Competition Network*, 2016) <www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RemediesGuide.pdf> accessed 4 December 2020, 9.

to vertical and conglomerate mergers. Those are the type of mergers where the choice between behavioural and structural remedies presents itself most acutely. In that type of mergers, divestitures are sometimes extremely difficult to conceive, leaving the Commission with a choice between prohibiting the transaction or accepting a behavioural remedy.

This topic is explored in greater detail in section 4.2.2.

1.2.3 The call for *ex post* assessments of remedies

Ex post assessments of mergers, also known as merger retrospectives, seek to assess whether a merger had an impact on competition in one or more of the relevant markets. If the merger was accompanied with remedies, such assessments also shed light on the effectiveness of the remedies. If they were effective, the merger should not have any negative impact on competition.

Some *ex post* assessments focus specifically on remedies. The 2005 Merger Remedies Study conducted by DG COMP[45] was a major such study, analysing 96 remedies, imposed in 40 Commission decisions that were issued in the five-year period from 1996 to 2000. It revealed several shortcomings in the remedies accepted in those cases. Those learnings were subsequently reflected in the Commission's Remedies Notice of 2009.

The 2005 study was based on interviews and mainly aimed at identifying issues in the design and implementation of remedies. It did not conduct a detailed *ex post* assessment of the evolution of each market concerned.[46] The study's findings on the effectiveness of remedies were therefore presented as 'a first indication of how effective a remedy might have been in preserving effective competition'.[47] With that caveat in mind, the study found that 57% of all remedies analysed had been effective.[48] 24% of all remedies had been partially effective, while 7% had been ineffective.[49] In 12% of cases, the effectiveness of the remedy could not be determined, for instance because of lack of information.

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[45] European Commission, DG COMP, 'Merger Remedies Study' (October 2005) (Merger Remedies Study).
[46] Merger Remedies Study, 167, para 1.
[47] Merger Remedies Study, 167, para 1.
[48] Merger Remedies Study, 133, chart 26. 'Effective' remedies were defined as remedies that clearly achieved their competition objective.
[49] Merger Remedies Study, 133, chart 26. 'Partially effective' remedies were defined as remedies that experienced design and implementation issues which were not fully resolved three to five years after the divestiture and which may have partially affected the competitiveness of the divested business. For access remedies in this category access was not granted to the extent determined in the Commission's conditional clearance decision and may have led to a situation where the foreclosure concerns were not fully resolved. 'Ineffective' remedies were defined as remedies that failed to restore competition as foreseen in the Commission's conditional clearance decision, either because the divested business was no longer operating or did not even begin competing within three to five years, or because market access was not granted during the evaluation period.

Among different types of remedies, the study found that commitments requiring a party to exit a joint venture had been most effective (77% of such remedies had been effective), while access remedies had been least effective (40% of such remedies had been effective).[50]

Since then, no large-scale *ex post* assessments have been conducted, although two meta-analyses were conducted that included several mergers approved with remedies.[51] However, those analyses included only a very small number of mergers with remedies approved by the European Commission, namely one and three cases. The results of those studies were discussed in section 1.2.1 (Are merger remedies effective?).

The lack of large-scale retrospectives on EU mergers has led to a growing chorus of observers calling for more *ex post* assessments.[52]

In September 2020, Commissioner Vestager announced that the Commission would 'look back at some of [its] recent decisions, to see, for instance, what effect those decisions have had on prices and choice, quality and innovation.'[53] This suggests some *ex post* assessments of mergers will be conducted in the near future.

2 Legal framework and criteria for assessing remedies

2.1 Terminology: remedies, commitments, 'conditions and obligations'

In the context of EU merger control, the terms 'remedies' and 'commitments' are synonyms. This contrasts with the field of Article 101 and 102 TFEU, a field which the European Commission

[50] Merger Remedies Study, 134, charts 28 and 29.

[51] Peter Ormosi, Franco Mariuzzo and Richard Havell, 'A review of merger decisions in the EU: What can we learn from ex-post evaluations?' (*European Commission*, 2016) <https://ec.europa.eu/competition/publications/reports/kd0115715enn.pdf> accessed 4 December 2020; Richard Havell, Franco Mariuzzo and Peter Ormosi, 'A Review of Merger Decisions in the EU' in Fabienne Ilzkovitz and Adriaan Dierx (eds), *Ex Post Economic Evaluation of Competition Policy: The EU Experience* (Wolters Kluwer 2020) 43-78.

[52] See, e.g., Thomas Hoehn, 'Challenges in Designing and Implementing Remedies in Innovation Intensive Industries and the Digital Economy' in Damien Gerard and Assimakis Komninos (eds), *Remedies in EU Competition Law: Substance, Process and Policy* (Wolters Kluwer 2020) 121, at 146; Dorte Hoeg, *European Merger Remedies – Law and Policy* (Hart Publishing 2014) 206 ('Disregarding the exact format, it is considered that the time is ripe for the Commission to undertake further ex-post evaluations, as they are instrumental to the formulation of possible new initiatives and/or change of directions').

[53] Margrethe Vestager, 'The future of EU merger control' (International Bar Association's 24th Annual Competition Conference, 11 September 2020) <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en> accessed 4 December 2020.

sometimes refers to as 'antitrust'[54], where the two terms have distinct meanings. In that field, remedies denote orders imposed by the European Commission to bring an infringement of Article 101 or 102 TFEU to an end.[55] Commitments, by contrast, denote the obligations voluntarily taken up by companies in order to avoid the finding of an infringement by the Commission.[56] The latter concept bears similarities to the merger control concept of commitments (or remedies, as the two are synonymous in the context of merger control). While commitments/remedies in merger control are made binding and avoid a prohibition, commitments in the field of antitrust are made binding and avoid a finding of an infringement.

The EU Merger Regulation only uses the term 'commitments' but the Implementing Regulation and the European Commission's decisions and guidance, use both 'commitments' and 'remedies', sometimes in one and the same text. For instance, the Implementing Regulation explains that, when companies offer 'commitments' to the Commission, they have to be accompanied by a 'form RM relating to remedies'.[57] The Commission's guidance on commitments is known as the 'Remedies Notice' and mostly uses the term 'remedies'.

The term '**conditions and obligations**' refers to the commitments as attached to the Commission decision. For all practical purposes, the term 'conditions and obligations' is interchangeable with the term 'commitments'. However, strictly speaking, there is a subtle difference. The term commitments looks at the process from the viewpoint of the parties: they commit to do certain things. The term 'conditions and obligations' is simply the flipside from the perspective of the Commission. The Commission makes the parties' commitments binding by turning them into 'conditions and obligations' attached to the decision. This slight difference in nuance is borne out by the text of the EU Merger Regulation, which provides that the 'conditions and obligations' are 'intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission'[58].

Together, 'conditions and obligations' constitute the commitments, but the terms 'conditions' and 'obligations' each have a distinct meaning. The difference is relevant for the enforcement of the remedies, namely what happens in case of a breach, and we discuss the exact meaning in that section (section 6.3.1 Distinction between 'conditions' and 'obligations').

Sometimes, the term 'undertakings' is also used as a synonym of commitments, or to denote specific commitments. This happens less frequently, perhaps because of the obvious risk of

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[54] The European Commission frequently uses the term 'antitrust' to refer to enforcement activity in relation to Article 101 TFEU, but excluding cartels, and Article 102 TFEU.
[55] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, art 7(1) (giving the Commission the power to impose 'any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end').
[56] Implementing Regulation, art 9(1).
[57] Implementing Regulation, art 20(1a).
[58] EU Merger Regulation, art 6(2), second sentence and art 8(2), second sentence.

confusion with undertakings in the sense of the economic units that are the subject of competition law.

2.2 Legal framework

2.2.1 Remedies in Phase II

Under the EU Merger Regulation, the Commission must prohibit concentrations that would significantly impede effective competition.[59] The merging parties can avoid such a prohibition by making commitments. These commitments modify the concentration and, if the modified concentration would no longer significantly impede effective competition, the Commission must approve the concentration, subject to compliance with the commitments. Such a decision is known as a 'conditional clearance decision' or an 'approval with remedies'.

The legal basis for such decisions in Phase II is Article 8(2) of the EU Merger Regulation. Article 8(2) essentially provides that the Commission shall approve concentrations which, following modifications by the undertakings concerned, would not significantly impede effective competition. These modifications are in principle brought about by commitments and the Commission makes the commitments binding on the parties by attaching them to the decision as 'conditions and obligations.' [60]

2.2.2 Remedies in Phase I and the requirement of 'clear-cut' remedies

The Commission can also approve a concentration with commitments in Phase I. In that case, the dynamics and legal standard are slightly different. In Phase I, the Commission does not determine whether a concentration would significantly impede effective competition. Instead, it has to determine whether the concentration raises serious doubts as to its compatibility with the internal market. If the concentration does raise serious doubts, the Commission opens an in-depth investigation.

The 'serious doubts' standard is lower than the 'significant impediment to effective competition' standard, meaning the Commission's level of confidence that the merger harms competition need not be as high as when it finds a significant impediment to effective competition in Phase II.

Just as parties can avoid a prohibition decision in Phase II, they can avoid a decision raising serious doubts in Phase I by offering commitments that modify the concentration. If the modified

[59] EU Merger Regulation, art 2(3).

[60] EU Merger Regulation, art 8(2) provides that the Commission *may* attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with their commitments (emphasis added), suggesting that the Commission doesn't have to make the commitments enforceable as conditions and obligations. In practice, the Commission invariably does so.

concentration no longer raises serious doubts, the Commission will approve the concentration subject to remedies. The legal basis for such a conditional clearance decision with commitments in phase I is Article 6(1)(b) combined with Article 6(2). A decision clearing a merger in Phase I with remedies is often referred to as an 'Article 6(1)(b) decision with conditions and obligations' or as a decision based on 'Article 6(1)(b) in conjunction with Article 6(2)'.[61]

Recital 30 of the EU Merger Regulation explains that 'it is also appropriate to accept commitments before the initiation of proceedings [i.e. before the opening of Phase II] where the competition problem is readily identifiable and can easily be remedied'. The General Court has also made clear that commitments in Phase I 'must constitute a direct and sufficient response capable of clearly excluding the serious doubts expressed.'[62]

This implies that remedies in Phase I have to meet a higher standard than in Phase II. That is in any event the position taken in the Commission's Remedies Notice, which explains that, for commitments to be accepted in Phase I, 'the competition problem needs to be so straightforward and the remedies so clear-cut that it is not necessary to enter into an in-depth investigation and that the commitments are sufficient to clearly rule out 'serious doubts'.[63]

2.3 Basic criteria for assessing remedies

This section discusses the basic conditions which remedies must meet in order to be acceptable. In addition to these basic conditions, there are more specific requirements for specific types of remedies. For instance, a divestiture must include all assets to ensure its viability and competitiveness. Those more specific conditions are discussed later, when I discuss each type of remedy.

2.3.1 The remedy must entirely eliminate the competition problem

The Merger Regulation, case law and the Remedies Notice all make clear that the Commission can only accept remedies if they entirely remove the competition concerns raised by the merger.[64] Some court judgments have formulated this in a slightly different manner: the remedy must 'be comprehensive and effective from all points of view'.[65]

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[61] The Commission publishes these decisions on its website with a cover page that mentions 'Article 6(1)(b) in conjunction with Art 6(2)'.

[62] Case T-119/02 *Royal Philips Electronics NV v Commission* [2003] EU:T:2003:101, para 79.

[63] Commission, 'Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004', [2008] OJ C 267/1 (Remedies Notice), para 81.

[64] EU Merger Regulation, rec 30; Case T-282/02 *Cementbouw v Commission* [2006] EU:T:2006:64, para 307 (commitments must not only be proportionate to the competition problem identified but must eliminate it entirely); Remedies Notice, para 9.

[65] Case T-210/01 *General Electric Company v Commission* [2006] EU:T:2005:456, para 52 (commitments must be comprehensive and effective from all points of view); Case T-87/05, *EDP – Energias de Portugal v Commission* [2005] EU:T:2005:333, para 105 (commitments 'must be full and effective from all aspects'). Remedies Notice, para. 9 contains both formulations, stating that remedies 'have to eliminate the competition concerns entirely and have to be comprehensive and effective from all points of view'.

2.3.2 The remedy must be proportionate

The principle of proportionality is one of the general principles of EU law. The EU courts have specified that 'the principle of proportionality requires measures adopted by [EU institutions] not to exceed the limits of what is appropriate and necessary to attain the objectives pursued; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.'[66]

As the principle of proportionality is a general principle of EU law, Commission decisions in EU merger control, including decisions imposing remedies, must respect this principle.[67] However, the precise implications of this principle will depend on the specific context.[68] The question is therefore what the principle specifically implies when the Commission assesses merger remedies. In that context, the proportionality principle implies that 'commitments should be proportionate to the competition problem and entirely eliminate it.'[69]

At first sight, some tension appears to exist between the requirement that remedies are effective, i.e. the requirement that they entirely remove the competition problems, and the requirement that they are proportionate to the competition problem. Imagine, for instance, a merger where competition problems arise on a market for product A. Product A is manufactured in a plant together with products B and C, and it is impossible to extract the production equipment for product A from the plant. To remove the competition concerns, must the entire plant be divested, including the production assets for products B and C? If the requirement of proportionality were to be applied in isolation, that is without also taking into account the requirement of effectiveness, the answer would be yes. By contrast, if remedies first and foremost need to be effective, it is clear that the entire plant must be divested.

[66] Case C-132/19 P Groupe Canal + v Commission [2020] EU:C:2020:1007, para. 104 (repeating the first part of the sentence, but omitting the second part); Case T-177/04 *easyJet v Commission* [2006] EU:T:2006:187, para 133 (rejecting third party easyJet's argument that the Commission should have imposed broader remedies because easyJet did not show that competition would not be maintained by the more narrow remedies); Case T-704/14, *Marine Harvest v Commission* [2020] EU:C:2020:149, para 580 (restating the implications of the principle of proportionality in relation to fines for procedural infringements of the EU Merger Regulation; on appeal this point was not revisited).

[67] Case C-202/06 P *Cementbouw Handel & Industrie v Commission* [2007] EU:C:2007:814, para. 52.

[68] See Case C-441/07 P *Commission v Alrosa* [2010] EU:C:2010:377, para. 38 (finding, in the context of commitments made binding under Article 9 of Regulation 1/2003, that the principle of proportionality 'has a different extent and content', depending on whether it is considered in relation to decisions based on Article 7 (infringement decisions) or Article 9 (commitments decision) of Regulation 1/2003).

[69] EU Merger Regulation, rec 30; Case C-202/06 P *Cementbouw Handel & Industrie v Commission* [2007] EU:C:2007:814, para 54 ('[i]t is necessary, when reviewing the proportionality of conditions or obligations which the commission may (…) impose on the parties to a concentration (…) to be satisfied that those conditions and those obligations are proportionate to and would entirely eliminate the competition problem that has been identified."

The Commission has consistently taken the view that the requirement of effectiveness takes precedence over the requirement of proportionality. Or, perhaps more accurately, the principle of proportionality cannot be used to force the Commission to accept a commitment that would not be effective. This stance finds support in the case law of the General Court, and particularly the *Cementbouw* judgment. That case involved an acquisition of joint control over an entity (CVK), which the Commission approved subject to the admittedly far-reaching commitment that the parties would dissolve CVK. The parties argued before the court that this commitment was disproportionate and that the initial commitments they had offered – an arrangement to end their joint control – were sufficient. The Commission's defence was that the concentration not only gave the parties (Cementbouw and Haniel) joint control over CVK but had also created CVK's dominant position. This was because the concentration consisted of two parts: the acquisition of joint control over CVK and, in an interrelated transaction, the acquisition by CVK of control over several companies that used to be member of CVK but existed independently. The General Court rejected Cementbouw's argument based on proportionality, as the initial commitments would have removed the competition problems arising from joint control but would not have removed CVK's dominant position. In what is perhaps the most well-known paragraph of the judgment, the General Court stated that 'the parties' commitments must not only be proportionate to the competition problem identified by the commission in its decision but must eliminate it entirely'.[70]

On appeal, the Court of Justice confirmed the General Court's analysis, noting that 'when reviewing the proportionality of conditions or obligations which the Commission may, by virtue of Article 8(2) of Regulation No 4064/89, impose on the parties to a concentration it is necessary (...) to be satisfied that those conditions and those obligations are proportionate to and would entirely eliminate the competition problem that has been identified'.[71]

The Commission's position that proportionality cannot be used to justify ineffective remedies is also expressed in the Remedies Notice. It states that, if this is necessary to ensure the viability of the divested business and thus create an effective competitor, 'it may be necessary to include activities which are related to markets where the Commission did not identify competition concerns.'[72]

In line with this, in many cases, commitments have included elements that are not directly related to the competition concerns identified but have nonetheless been included to make the remedy effective.

This is not to say, however, that the proportionality principle is a toothless tiger. Parties regularly invoke the principle, and it can play a role in different constellations.

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[70] Case T-282/02 *Cementbouw v Commission* [2006] EU:T:2006:64, para 307.

[71] Case C-202/06 P *Cementbouw Handel & Industrie v Commission* [2007] EU:C:2007:814, para 54. On this judgment, see: Gudrun Schmidt, Ulrich von Koppenfels and Vincent Verouden, 'ECJ upholds Commission decision in Dutch building materials case CVK' (2008) 1 Competition Policy Newsletter, 70-75.

[72] Remedies Notice, para 23.

First, the principle of proportionality comes into play when two possible remedies exist, each of them effective. In that case, the Commission is obliged to accept the remedy that is less burdensome for the parties. This may result in a remedy that is smaller in scope, for instance a divestiture has to include fewer businesses or product lines. It may also result in a remedy that has a smaller territorial scope. If a territorial limitation does not dampen or undermine the effectiveness or viability of a remedy, this limitation is justified by the principle of proportionality.[73]

Second, the principle of proportionality implies that the commitments have to address the competition problems caused by the merger but no more than that. Here, the principle of proportionality meets the requirement of merger-specificity, i.e. the idea that the Commission can only challenge a merger based on competition problems caused by the merger. Likewise, the remedy must only remove the problems caused by the merger. This use of the principle of proportionality was echoed in Advocate General Mazák's opinion in *Odile Jacob v Commission*.[74]

2.3.3 The remedy must be capable of being implemented in a short period of time

In order to be acceptable, commitments must be 'capable of being implemented effectively within a short period of time.'[75] The remedies notice explains that this is because 'conditions of competition on the market will not be maintained until the commitments have been fulfilled'.[76]

This requirement reflects the fact that, as long as the commitments are not implemented, they are unlikely to have any remedial effect. The word 'implemented' in this context therefore refers to the commitment becoming effective, i.e. starting to have its effect felt on the market. If it takes more than 'a short period of time' for those effects to be felt, the remedies will not prevent a significant impediment to effective competition and will therefore be inadequate. In line with this, the Remedies Notice provides that access commitments aimed at fostering new entry will only be acceptable if they 'actually make the entry of sufficient new competitors timely and likely'.[77]

In practice, the requirement means that commitments whose implementation will depend on an uncertain event or an event that will take considerable time to materialize, may be unacceptable.

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[73] See European Commission, 'OECD Roundtable on the Extraterritorial Reach of Competition Remedies - Note by the European Union', DAF/COMP/WP3/WD(2017), OECD Directorate For Financial And Enterprise Affairs Competition Committee, 4-5 December 2017, 5, para 12-13 (giving the example of M.8124 – *Microsoft / LinkedIn*, Commission decision of 6 December 2016, where the behavioural remedies were limited to the EEA, and M.8258 – *Advent International / Morpho,* Commission decision of 19 April 2017, where the divestiture was limited to France).

[74] Case C-551/10 P *Editions Odile Jacob v Commission* [2012] EU:C:2012:681, Opinion of AG Mazák, para 74 .

[75] Remedies Notice, para 9.

[76] Remedies Notice, para 9.

[77] Remedies Notice, para 63.

In *Siemens / Alstom*, for instance, the Commission rejected Siemens' proposed commitment to offer a software license to address competition concerns in the markets for mainline signalling. In that case, the beneficiary of the licence would have to transfer the software to its own platform, something which would likely take several years.[78] This part of the commitments was therefore considered to fall short of the requirement that remedies must be capable of being implemented in a short period of time.[79]

Likewise, in *Ryanair / Aer Lingus (I)*, the Commission rejected Ryanair's proposed commitment to make available Aer Lingus' slots at Heathrow, in part because some of Aer Lingus' minority shareholders held veto rights over slot transfers.[80] This, the Commission concluded, 'cast serious doubts on Ryanair's capability of delivering this remedy in time'.[81]

The requirement that commitments must be capable of being implemented in a short period of time does not mean that commitments must necessarily be a one-off intervention, i.e. a divestiture. As explained in section 4.2.1 (The Commission's preference for divestitures), in some cases, non-divestiture remedies may be acceptable. It is common for such non-divestiture remedies to be in place for some time. Although this long duration may certainly raise problems in terms of effective implementation – which is why divestitures are preferred – they may nonetheless be considered effective in some circumstances. In line with this, the Commission has accepted commitments with a duration of several years (e.g. eight years[82] or ten years[83]). Up until the 2000s, commitments of unlimited duration were not uncommon,[84] but no such remedies have been approved in recent years.

2.4 The burden to submit remedies is on the parties but the burden of proof is on the Commission

Although the Commission is available to give the parties informal guidance on draft remedies, the onus is ultimately on the parties to submit remedies that are sufficient to remove the

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[78] M.8677 – *Siemens / Alstom*, Commission decision of 6 February 2019, para 1541 and following. The Commission also found that 'very few if any signalling suppliers would be able to complete the migration within the four year period provided for under the commitments' (para 1667).
[79] M.8677 – *Siemens / Alstom*, Commission decision of 6 February 2019, paras 1666-1667.
[80] M.4439 – *Ryanair / Aer Lingus (I)* Commission decision of 27 June 2007, para 1227-1233.
[81] M.4439 – *Ryanair / Aer Lingus (I)* Commission decision of 27 June 2007, para 1232.
[82]E.g., M.7000 – *Liberty Global / Ziggo*, Commission decision of 30 May 2018, para. 57 of the commitments (commitments not to restrict TV broadcasters' ability to offer their content over-the-top (OTT), i.e. via the internet, and to ensure sufficient interconnection capacity).
[83] E.g., M.9064 – *Telia Company / Bonnier Broadcasting Holding*, Commission decision of 12 November 2019, commitments annexed to the decision, para. 80.
[84] E.g. M.3083 – *GE / Instrumentarium,* Commission decision of 2 September 2003; M.4180 – Gaz de France / Suez, Commission decision of 14 November 2006. The remedies in *Gaz de France / Suez* were partly lifted in 2020 based on a request under the review clause; 'Contrôle des concentrations: La Commission lève en partie les engagements pris par Gaz de France pour obtenir l'autorisation de son acquisition de Suez en 2006' (*European Commission Daily News*, 27 October 2020).

competition concerns.[85] They also have a duty to supply the Commission with the information necessary to assess the remedies.[86] Particularly important in this respect is the duty to submit the so-called Form RM and accompanying documents.

On the other hand, the Commission bears the burden of proof, regardless of whether it concludes that the commitments are adequate or not. This flows from the Commission's double-sided burden of proof in merger control: it bears the burden of proof both when prohibiting a concentration[87] and when approving one.[88] These rules on the burden of proof also apply when the parties submit commitments.[89] Indeed, as the General Court has held, 'in so far as the burden of proof is concerned, a concentration modified by commitments is subject to the same criteria as an unmodified concentration'.[90]

In practice, this means that, if the Commission rejects the commitments validly offered by the parties and wants to prohibit the concentration, it must show that those commitments do not render the concentration, as modified, compatible with the internal market.[91] Conversely, if the Commission accepts the commitments it must show that they eliminate the competition concerns raised by the merger.

3 Designing the remedy

3.1 Key documents

Apart from the EU Merger Regulation, the most important document guiding parties and the Commission is undoubtedly the Remedies Notice issued in 2008.

[85] Remedies Notice, para 8; Case T-210/01 *General Electric Company v Commission* [2006] EU:T:2005:456, para 52 ('It was for the parties to the merger to put forward commitments which were comprehensive and effective from all points of view and to do so in principle before 14 June 2001 [the last possible day on which commitments could be proposed]'.

[86] Remedies Notice, para 8.

[87] See, e.g., Case T-342/99 *Airtours v Commission* [2004] EU:T:2004:192, para 63; Case T-87/05, *EDP – Energias de Portugal v Commission* [2005] EU:T:2005:333, para 61; Case T-399/16 *CK Telecoms UK Investments v Commission* [2020] EU:T:2020:217, para 107.

[88] Case T-87/05, *EDP – Energias de Portugal v Commission* [2005] EU:T:2005:333, para 62; Remedies Notice, para 8. See also Case C-413/06 P, *Bertelsmann and Sony Corporation of America v IMPALA* [2008] EU:C:2008:392, para. 48-52 (rejecting the appellants' argument that clearance decisions and prohibition decisions are subject to a different burden and standard of proof, by finding that there is no general presumption that a notified concentration is compatible with, or incompatible with, the internal market).

[89] Case T-87/05, *EDP – Energias de Portugal v Commission* [2005] EU:T:2005:333, para 62, in fine.

[90] Case T-87/05, *EDP – Energias de Portugal v Commission* [2005] EU:T:2005:333, para 65; Case T-342/07, *Ryanair v Commission* [2010] EU:T:2010:280; Case T-175/12, *Deutsche Börse v Commission* [2015] EU:T:2015:148, para 64.

[91] Case T-87/05, *EDP – Energias de Portugal v Commission* [2005] EU:T:2005:333, para 65; Case T-342/07, *Ryanair v Commission* [2010] EU:T:2010:280; Case T-175/12, *Deutsche Börse v Commission* [2015] EU:T:2015:148, para 64.

Also very important in practice is the Commission's Model Text for Divestiture Commitments, last updated in 2013.[92] Although the title of this document suggests that it only serves as a model for divestiture commitments, in practice, it serves as a model for all commitments, *mutatis mutandis*. In case of non-divestiture remedies, the opening paragraphs, most of the definitions, most of the paragraphs regarding the trustee, the review clause and the paragraph regarding the entry into force of the commitments will normally be included.

3.2 Practical aspects of remedies discussions between the Commission and parties

The Commission is keen to point out that the search for an adequate remedy is not a bargaining process.[93] Rather than negotiations, parties can expect a 'constructive dialogue'[94], in which the parties and the Commission explore which remedies could adequately address the competition concerns identified.

It is in the parties' interest to start remedies discussions early. This is because it often takes several iterations before a commitments text stands a chance of being acceptable. In principle, parties could even submit proposals for commitments prior to notification.[95] In some cases where the competition problems were particularly self-evident, parties have done so.[96] This can contribute to making a conditional clearance in Phase I possible but is usually only meaningful if the competition concern is obvious and the remedies are clear-cut structural remedies, since in the prenotification stage the Commission has not yet conducted a market investigation and therefore has a very incomplete understanding of the potential competition problems and how to fix them.[97]

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[92] 'Mergers: Commission cuts red tape for businesses' (*European Commission Press Release*, 5 December 2013).
[93] Alexander Italianer, 'Legal certainty, proportionality, effectiveness: the Commission's practice on remedies' (Charles River Associates Annual Conference, 5 December 2012) <https://ec.europa.eu/competition/speeches/text/sp2012_07_en.pdf> accessed 4 December 2020, p. 2 ('This is why discussions on remedies with the parties are essential, though of course they are not a bargaining process.').
[94] Ibid, p. 2. See also, 'DG Competition Best Practices on the conduct of EC merger control proceedings' (*European Commission*, 20 January 2004) <https://ec.europa.eu/competition/mergers/legislation/proceedings.pdf> accessed 6 December 2020, para 41: 'DG Competition will provide guidance to the parties as to the general appropriateness of their draft proposal in advance of submission.''
[95] Remedies Notice, para 78.
[96] M.7585 – *NXP Semiconductors / Freescale Semiconductor,* Commission decision of 17 September 2015. The remedies disucssions in pre-notification are mentioned in Salvatore De Vita, Luca Manigrassi, Andreea Staicu and Teodora Vateva, 'NXP / Freescale: Global remedies in a 3 to 3 semiconductor merger' [2016] *Competition merger brief*, issue 1/2016, 15, at 16 ('[d]iscussing clear-cut structural remedies during pre-notification helped the merging parties to obtain a quick phase I clearance'). Another example is M.7252 – *Holcim / Lafarge*, Commission decision of 15 December 2014. On this case see Daniele Calisti and Jean-Christophe Mauger, 'Holcim / Lafarge: paving the way to first phase clearance', [2015] *Competition merger brief*, issue 1/2015, 20 (pointing out that the discussion of remedies in pre-notification helped pave the way to a Phase I conditional clearance but also highlighting that this approach is exceptional and was only possible because the remedies were structural and clear-cut). See also M.7499 – *Altice / PT Portugal*, Commission decision of 20 April 2015 (initially set of commitments submitted on the same day as notification of the concentration).
[97] Salvatore De Vita, Luca Manigrassi, Andreea Staicu and Teodora Vateva, 'NXP / Freescale: Global remedies in a 3 to 3 semiconductor merger' [2016] *Competition merger brief*, issue 1/2016, 15, at 16.

3.3 Market test of proposed remedies

The Remedies Notice explains that, when considered appropriate, the Commission will consult third parties on the remedies that have been submitted by the merging parties.[98] This is known as a market test of the proposed remedies.

A market test allows the Commission to obtain information and views from market participants as to whether the proposed remedies will be workable and effective in removing the competition concerns. It is an opportunity for the Commission to hear from those who know the market best. This can partly mitigate the information asymmetry between the parties and the Commission. Competitors, customers and suppliers of the merging parties will often be able to spot shortcomings in a remedy that are hidden for non-insiders. For instance, in *Deutsche Börse / London Stock Exchange*, the market test revealed that the business proposed for divestiture was vitally dependent on the London Stock Exchange's trading platform MTS, which had not been included in the proposed divestiture.[99] This led the Commission to conclude that the proposed divestiture would simply not be viable. The Commission therefore rejected the proposed commitments and prohibited the transaction.

The third parties that are consulted may include competitors, customers, suppliers and other interested parties. The questions can relate to anything that is relevant to assess the proposed remedies. In case of divestitures, questions typically seek to ascertain whether the scope and scale of the proposed divestiture is sufficient, whether the divested business will be viable, whether transitional agreements are needed, and whether specific purchaser requirements are warranted.

In case of a divestiture, another important goal of the market test is to gauge whether the proposed divestiture will attract buyers. For this purpose, potential buyers are usually directly asked whether they would be interested in acquiring the business that is being proposed as divestiture and, if not, which modifications would have to be made to make the business attractive.

To ensure that third parties can comment meaningfully on the commitments, the notifying parties must make available **a non-confidential version of the commitments**.[100] That version must allow third parties to fully assess the workability and effectiveness of the proposed remedies. Excessive redactions will make this impossible, which in turn makes it impossible for the Commission to assess the adequacy of the commitments.[101]

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[98] Remedies Notice, para 80 (for remedies in Phase I) and 92 (for remedies in Phase II).
[99] M.7995 – *Deutsche Börse / London Stock Exchange,* Commision Decision of 29 March 2017, para 954 and following.
[100] Implementing Regulation, art 20(2); Remedies Notice, para. 79(d) and para. 91(d).
[101] See, e.g., M.8677 – *Siemens / Alstom*, Commission decision of 6 February 2019, paras. 1559, 1601, 1695 (non-confidential version did not contain information about the role, expertise and current function of key personnel

The Commission has discretion on **whether to conduct a market test** of merger remedies.[102] If the proposed remedies are clearly inadequate, the Commission will normally refuse to market test them.[103] In such a scenario, there is simply no reason to ask third parties to parse through the often lengthy commitments and reply to questions, only to reach the inevitable conclusion that the remedies are inadequate. Conversely, it is also conceivable that proposed commitments are so clear and comprehensive that the Commission can confidently decide, without market test, that they are suitable. This is, however, exceedingly rare.[104] Remedies submitted after the Phase II deadline will normally not be market tested[105], although exceptionally they are.[106]

The replies to the market test form part of the **evidence** on the basis of which the Commission assesses whether the remedies are adequate. Assessing the replies to the market test is not simply a matter of counting favourable or unfavourable views.[107] It is not a popularity vote on the remedies. Although it is of course relevant if a large number of the respondents point out a

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and personnel, making it impossible for the Commission to test the remedies on this point; the remedies were rejected).

[102] Remedies Notice, para 80 ('when considered appropriate') and para 92 (which refers to para 80). By contrast, in the field of Articles 101 and 102 TFEU, the Commission is obliged to conduct a market test *if it intends to adopt a decision making commitments binding* (own emphasis). Regulation 1/2003, art 27(4).

[103] See, e.g. M.8900 – *Wieland / Aurubis Rolled Products Schwermetall,* Commission decision of 5 February 2019, para 734 (remedies submitted in Phase II (prior to the statement of objections) were not market tested because they 'were not sufficient to eliminate the competition concerns'); M.7932 – *Dow / DuPont*, Commission decision of 27 March 2017, para 17 (remedies submitted in Phase I were not market tested); M.8084 – *Bayer / Monsanto,* Commission decision of 21 March 2018, para 14 (remedies submitted in Phase I were not market tested 'because they did not address all the areas of serious doubts that had been identified by the Commission'); M.7637 – *Liberty Global / BASE Belgium,* Commission decision of 4 February 2016, para 426 (first set of remedies submitted in Phase I were not market tested 'in view of the substantial shortcomings of the commitments, which would not remove the serious doubts); M.8633 – *Lufthansa / Certain Air Berlin Assets,* Commission decision of 21 December 2017, para 293 (remedies initially proposed in Phase I 'were not sufficiently clear to allow for a market test, as respondents would not have been able to sufficiently understand the scope of the proposed commitments'); M.6663 – *Ryanair / Aer Lingus III*, Commission decision of 27 February 2013, para 1702-1705 (Commission refuses to market test remedies submitted in Phase II (but prior to a Statement of Objections) because they did not cover all routes for which serious doubts had been raised).

[104] See, e.g., M.4066 – *CVC / SLEC,* Commission decision of 20 March 2006, para 76 ('Given the scope of the package, it has therefore been considered that there is no need for a market test').

[105] This flows from the requirements for 'late remedies' to be considered by the Commission. See Remedies Notice, para 94 (remedies submitted after the legal deadline are only acceptable if, among others, there is no need for an additional market test). For an example of remedies that were submitted after the legal deadline, not market tested and ultimately rejected, see M.8677 – Siemens / Alstom, Commission decision of 6 February 2019, paras 1306, 1308 and 1487 (a second and third package of proposed commitments in Phase II was submitted after the deadline and was not market tested).

[106] M.9076 – *Novelis / Aleris*, Commission decision of 1 October 2019, para. 1027 (commitments submitted on day 67, two days after the 65 working day deadline, were exceptionally market tested).

[107] Cf., in the context of commitments in the field of Articles 101 and 102 TFEU, Céline Gauer, 'Les tests de marché dans les procédures d'engagements en droit européen des ententes et des abus de position dominante', [2013] Concurrences No. 1-2013, para. 15 ('l'analyse des résultats d'un test de marché ne peut se limiter à un exercise arithméthique visant à établir la position d'une majorité de réponses, mais doit tenir compte du contexte dans lequel elles ont été formulées').

particular flaw in the commitments or consider the divested business viable, numbers alone are not decisive. Instead, the Commission reviews all individual responses, and its assessment of the market test is based on the totality of the replies.[108] In assessing the replies, the Commission weighs them based on elements such as the consistency and relevance of the reply, the expertise of the respondent, how well the reply is substantiated, and the possibility of replies being guided by self-interest.[109] Competitors in particular may have a hidden agenda, either in favour or against the merger. They may also see themselves as a potential buyer of a divestiture.[110] Their replies may therefore be strategic. In those cases, the weight given to their replies will depend on how well their reply is substantiated and whether it is echoed by other respondents.

Apart from consulting market participants through a market test, the Commission also consults the **authorities of the Member States**, who receive a copy of the commitments offered by the notifying party.[111] This allows the Commission to benefit from the experience and expertise of national competition authorities, who may have dealt with the relevant markets or similar commitments in prior cases.[112] The Commission also frequently obtains feedback on commitments from national regulators with expertise in the specific sector in which the merger takes place. For instance, in case of a merger between telecommunications operators, national telecom regulators may be consulted,[113] while in a merger between two train makers, national rail regulators may be consulted.[114]

3.4 Modifying proposed remedies and the issue of 'late remedies'

If the Commission's assessment shows that the proposed remedies are not sufficient to remove the competition concerns raised by the merger, the parties will be informed of this.[115] If time allows, parties can then modify their proposed remedies and submit revised remedies.

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[108] See, e.g. M.8084 – *Bayer / Monsanto*, Commission decision of 21 March 2018, para 3094; M.8444 – *ArcelorMittal / Ilva*, Commission decision of 7 May 2018, para 1329 (assessment of the market test is based on the totality of the replies, with a particular focus on the replies that expressed a substantiated opinion); M.8900 – *Wieland / Aurubis Rolled Products Schwermetall,* Commission decision of 5 February 2019, para. 792 (Commission cannot look at specific opinion – such as those of competitors – in isolation, but must also attach the appropriate weight to all responses to the Commission's questionnaire, including the submissions by industrial customers).
[109] See, e.g., M.8084 – *Bayer / Monsanto,* Commission decision of 21 March 2018, para 3094.
[110] See e.g. M.8900 – *Wieland / Aurubis Rolled Products Schwermetall,* Commission decision of 5 February 2019, para 794 (Commission finds that replies of four competitors – expressing a favourable opinion on the adequacy of the remedy - may have been influenced by their interest in buying the remedy package).
[111] See EU Merger Regulation, art 19(1); Remedies Notice, para 80.
[112] See, e.g., M.7612 – *Hutchison 3G UK / Telefonica UK*, Commission decision of 11 May 2016, paras 3052-3055 (Commission takes into account the comments from various national competition authorities on the proposed commitments).
[113] See, e.g., M.6992 – *Hutchison 3G UK / Telefónica Ireland,* Commission decision of 28 May 2014 (national telecom regulators were consulted on proposed remedies in relation to a merger between mobile network operators in Ireland); M.7612 – *Hutchison 3G UK / Telefonica UK*, Commission decision of 11 May 2016, para 2619 (national telecom regulators were consulted on proposed remedies in relation to a merger between mobile network operators in the UK).
[114] M.8677 – Siemens / Alstom, Commission decision of 6 February 2019 para 1302.
[115] Remedies Notice, para 83 (for Phase I remedies) and para 93 (for Phase II remedies).

However, since in Phase I, the Commission may only accept remedies that 'provide a clear-cut answer to a readily identifiable competition concern,' 'only limited modifications can be accepted to the proposed commitments' [116] and such modifications may only be accepted 'in circumstances where it is ensured that the Commission can carry out a proper assessment of those commitments.'[117] In practice, this means that when submitting remedies in phase I, the parties must make a genuine effort to propose their 'best offer' for a clear cut solution to the competition concerns identified by the Commission, rather than putting forward an 'opening gambit' with the idea that they can always improve the remedies later. The latter is a high risk strategy in view of the limited time and scope available to modify remedies in phase I.

In Phase II, there is in principle no limitation on the type of modifications that can be made, at least prior to the deadline of 65 working days. After that deadline, the merger process is running towards its end and this limits the type of modifications that can be made. Commitments submitted after day 65 are known as 'late commitments' and are subject to a stricter legal standard. The General Court has found, in a case decided under the old Merger Regulation, which also had a deadline for submission of remedies in Phase II, that there is 'no obligation on the Commission to accept commitments submitted after the deadline'.[118] However, in its Remedies Notice, the Commission has voluntarily agreed to examine modified commitments submitted after the deadline under certain circumstances. More specifically, the Commission will accept modified commitments after day 65 'where it can clearly determine - on the basis of its assessment of information already received in the course of the investigation, including the results of prior market testing, and without a need for any other market test - that such commitments, once implemented, fully and unambiguously resolve the competition concerns identified'. [119] In addition, there must still be 'sufficient time to allow for an adequate assessment.'[120]

4 Types of remedies

4.1 Labels and their relevance

4.1.1 Structural and behavioural remedies

Remedies can be categorized in several ways, but the most commonly used distinction is the one between structural and behavioural remedies.[121] This distinction is also the most relevant, since

[116] Remedies Notice, para 83, which also sets out what types of modifications can be accepted.
[117] Remedies Notice, para 83.
[118] Case T-87/05, *EDP – Energias de Portugal v Commission* [2005] EU:T:2005:333, para 161.
[119] Remedies Notice, para 94.
[120] Remedies Notice, para 94.
[121] See, e.g. 'Merger Remedies Guide' (*International Competition Network*, 2016) <www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RemediesGuide.pdf> accessed 4 December 2020, 7. Other classifications are possible. See, for instance, Merger Remedies Study, 17. (classifying

it plays an important role in the Commission's remedies policy. Behavioural remedies are also referred to as conduct remedies or non-structural remedies.

Structural remedies require that the merging parties divest, i.e. sell, a business or assets to a third party. The underlying idea is that the third party will compete with the business or the assets, thereby replacing the competition that is lost because of the merger. The divestiture will either strengthen an existing player or allow a new entrant to compete. Divestitures therefore essentially rely on a third party, independent from the merged entity, to maintain competition in the market, based on that third party's own incentive to maximize its profits.

Structural remedies derive their name from the fact that they have a direct impact on the structure of the market, because a business or assets change hands. In essence, this transfer restructures the market, thereby remedying the harm generated by the merger, which itself is also a structural change in the market.

Behavioural or non-structural remedies, by contrast, require certain conduct by the merging parties (other than divesting a business which is of course also a type of conduct, albeit a very specific type). They either modify or constrain the merged entity's conduct and typically last for some time. Usually, these remedies require medium-term or long-term monitoring.

These two categories are not defined in the EU Merger Regulation, but they nonetheless constitute an important distinction. The Remedies Notice expresses a preference for 'commitments which are structural in nature, such as the commitment to sell a business unit' because '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'.[122]

Although the distinction seems straightforward, semantic discussions occasionally arise.

4.1.2 Structural remedies: only divestitures?

A first question is whether the category of structural remedies coincides exactly with the category of 'divestiture remedies.' Put differently: are there some remedies - other than divestitures – that also qualify as structural remedies?

The easy answer is to reply that the question is irrelevant because the Remedies Notice's preference for structural remedies is, upon closer reading, actually a preference for divestitures. Hence, the most relevant distinction from the perspective of the Remedies' Notice is not the distinction between structural and behavioural remedies but between divestitures and non-

the remedies analysed in the study into four types: (1) commitments to transfer a market position, (2) commitments to exit from a joint venture, (3) commitments to grant access, and (4) other commitments).

[122] Remedies Notice, para 15.

divestiture remedies. The Remedies Notice's preference is explained in greater detail in section 4.2.1 (The Commission's preference for divestitures).

A more thorough answer is to acknowledge that the dividing line between structural remedies and behavioural remedies is less sharp than the one between divestiture remedies and non-divestiture remedies.

The root of the problem lies in the fact that the label 'structural' in structural remedies refers to the *impact* of the remedy (a remedy is structural if it changes the structure of the market), while the label 'behavioural' in behavioural remedies refers to how the remedy is implemented (a remedy is behavioural if it requires behaviour, other than a divestiture, over a certain time period).

Some behavioural remedies are aimed at changing the structure of the market. The main example are access remedies, in which the merging parties grant third parties access to key infrastructure, networks, airport slots, etc.[123] These remedies are aimed at lowering barriers to entry and their goal is often to allow new entrants to come into the market, using the assets to which the remedy ensures access. If successful, such remedies can ultimately change the structure of the market, although clearly the impact on market structure is less direct and certain than in case of a divestiture. However, because these access remedies may impact the structure of the market, they have sometimes been put in the structural box, i.e. they have been qualified as 'structural remedies' or – acknowledging the fact that they remain essentially behavioural – 'behavioural remedies with structural elements' or 'quasi-structural remedies'.

This tendency – to put access remedies in the 'structural' box – may have been triggered by a finding of the General Court in the *ARD* judgment.[124] That case involved a third party challenging the remedies approved by the Commission. The remedies were access remedies. They did not entail a divestiture but required the merged entity to give competitors access to certain assets (programming interface, technology, etc.). The third party argued that the remedies were insufficient, among others, because they were 'mere promises not to abuse dominant positions'.[125] The General Court rejected the third party's challenge and, in doing so, held the following: 'although the commitments appear to be rather behavioural in nature, they are nevertheless structural because they are aimed at resolving a structural problem, namely market access by third parties.'[126] The General Court then found that the commitments would 'consistently provide for and strengthen competition' and, hence, could not be categorized as 'mere behavioural commitments unsuitable for resolving the competition problems identified by the Commission'.[127] In line with this approach, the Remedies Notice mentions, in a single

[123] These remedies are discussed in greater detail in section 4.4.
[124] Case T-158/00 *ARD v Commission* [2008] EU:T:2003:246.
[125] Case T-158/00 *ARD v Commission* [2008] EU:T:2003:246 para 199 (first sentence).
[126] Case T-158/00 *ARD v Commission* [2008] EU:T:2003:246, para 199 (first sentence).
[127] Case T-158/00 *ARD v Commission* [2008] EU:T:2003:246, para 199.

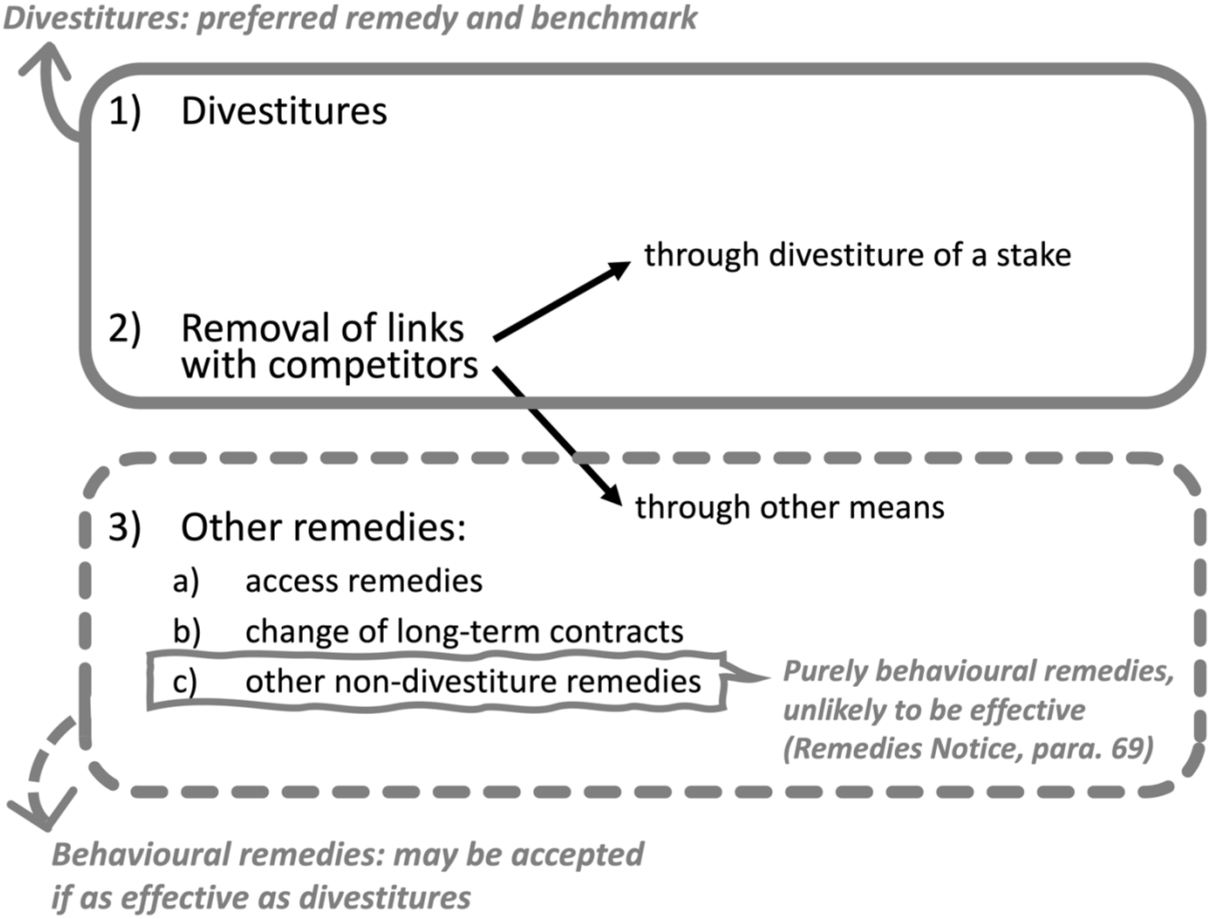
paragraph, 'granting access to key infrastructure or inputs on non-discriminatory terms' as an example of a structural remedy.[128]

In the author's view, it would be clearer to qualify access remedies as behavioural remedies, while acknowledging that, within the category of behavioural remedies, some remedies may have more of a structural impact than others. Ultimately, the reason why competition authorities prefer structural remedies over behavioural remedies is because behavioural remedies (1) are not a durable solution, (2) rely on the merging parties behaving in a way that is at odds with their incentive to maximize profit, and (3) are difficult to monitor and enforce over a long period of time. Access remedies are not free from these challenges. They require one of the merging parties to provide access, although that party usually has no incentive to do so, since the better access they provide, the more competition they will face. In addition, the conditions under which access has to be granted will have to be monitored and enforced over a long period of time. These features put access remedies squarely in the behavioural box. At the same time, third parties who obtain access under an access remedy will have their own incentive to compete in the market. In this sense, access remedies do somewhat harness the incentives of third parties to compete, just as divestitures do. This makes them potentially more effective than other types of behavioural remedies.

The Remedies Notice reflects these subtle distinctions. It distinguishes between divestitures - the gold standard for effective remedies – and non-divestiture remedies. However, within non-divestiture remedies, it again distinguishes between access remedies – which may be suitable if they are as effective as divestitures – and other non-divestiture remedies, such as promises to abstain from certain commercial behaviours (e.g. bundling). The latter type of remedies are arguably the purest form of behavioural remedies and the Remedies Notice reserves its most sceptical language for this type of remedies. It states that such commitments relating to the future behaviour of the merged entity may be acceptable only exceptionally in very specific circumstances.[129] It adds that such commitments will not eliminate horizontal competition concerns,[130] and that 'it may be difficult to achieve the required degree of effectiveness of such a remedy'.[131] Another type of remedy discussed in the Remedies Notice is the 'change of long-term exclusive contracts', which may help in remedying concerns of foreclosure, and which 'will normally only be sufficient as part of a remedies package'.[132] Figure 2 shows the different types of remedies discussed in the Remedies Notice and how they can be classified.

[128] Remedies Notice, para 17.
[129] Remedies Notice, para 17.
[130] Remedies Notice, para 69.
[131] Remedies Notice, para 69.
[132] Remedies Notice, para 68.

Figure 2: Types of remedies – classification used in the Remedies Notice



4.1.3 All divestiture remedies include ancillary behavioural remedies

A second source of confusion is the fact that divestitures will normally be accompanied by some ancillary behavioural remedies, such as the obligation to preserve the business until it has been sold. Arguably, therefore, all remedies are a mix of structural and behavioural elements. However, in practice, the label structural or behavioural is applied based on what is at the core of the remedy. If the remedy entails a divestiture, it will be qualified as a structural remedy, even though ancillary behavioural remedies will normally be included in the remedy.

4.2 Divestiture remedies

4.2.1 The Commission's preference for divestitures

In EU merger control, divestiture remedies are the preferred remedy and also the benchmark against which to assess the effectiveness of other types of remedies.

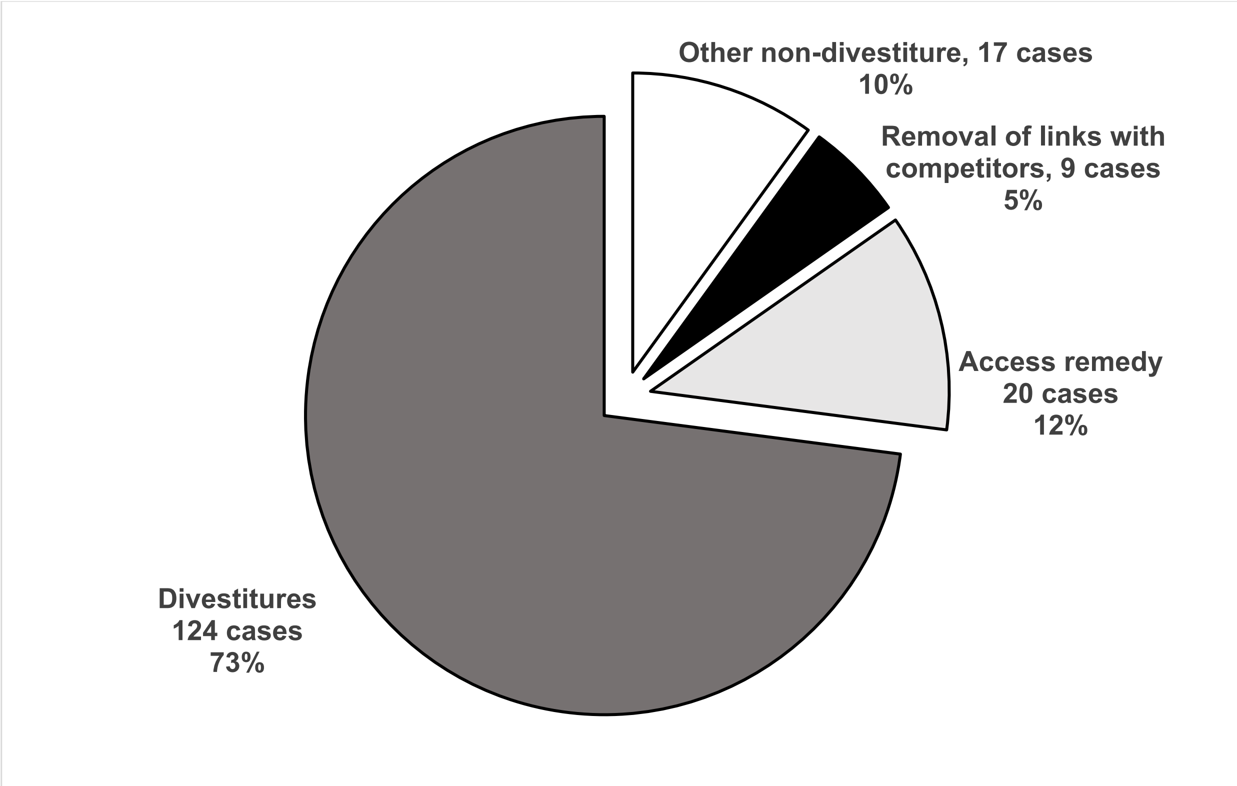
The Remedies Notice explains that divestitures constitute 'the most effective way to maintain effective competition, apart from prohibition', because they 'create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors'.[133] Although other types of remedies may be acceptable in some cases, 'divestitures are the benchmark for other remedies in terms of effectiveness and efficiency.'[134] It follows, according to the Remedies Notice, that the Commission may only accept other types of commitments 'in circumstances where the other remedy proposed is at least equivalent in its effects to a divestiture'. [135]

In short, divestitures are the gold standard of remedies according to the Remedies Notice: 'divestiture commitments are the best way to eliminate competition concerns resulting from horizontal overlaps, and may also be the best means of resolving problems resulting from vertical or conglomerate concerns'.[136]

At the same time, the Remedies Notice makes clear that non-divestiture remedies are not automatically ruled out. Whether a remedy is suitable to eliminate the competition concerns is ultimately examined 'on a case-by-case basis',[137] and the Commission has accepted remedies other than divestitures in a significant number of cases. Figure 3 shows the number of cases where non-divestiture remedies have been accepted.

[133] Remedies Notice, para 22.
[134] Remedies Notice, para 61
[135] Remedies Notice, para 61.
[136] Remedies Notice, 17.
[137] Remedies Notice, para 16.

Figure 3: Types of remedies (2011-2019): type, number of cases, percentage of total



There is a clear correlation between the type of competition concerns and the type of remedies that are accepted. Horizontal competition concerns are almost always addressed through divestitures.[138] Vertical and conglomerate competition concerns are more frequently removed through non-divestiture remedies,[139] although divestitures are also sometimes used.[140]

In the early years of the (old) EU Merger Regulation, the Commission's stance on behavioural remedies was stricter. In *Gencor / Lonrho*, the parties had proposed behavioural remedies to

[138] Carles Esteva Mosso and Simon Vande Walle, 'EU Merger Control: How to Remove Anticompetitive Effects?' in Damien Gerard and Assimakis Komninos (eds), *Remedies in EU Competition Law: Substance, Process and Policy* (Wolters Kluwer 2020) 48; Wei Wang and Matti Rudanko, 'EU Merger Remedies and Competition Concerns: An Empirical Assessment', 2012 *European Law Journal* 555, 575 (on the basis of an analysis of competition concerns and remedies in Phase II). See, also, at the international level, 'Merger Remedies Guide' (*International Competition Network*, 2016), 9 (noting competition authorities' preference fo structural relief in the form of a divestiture, 'particularly for horizontal mergers').

[139] Wei Wang and Matti Rudanko, 'EU Merger Remedies and Competition Concerns: An Empirical Assessment', 2012 *European Law Journal* 555, 575 (on the basis of an analysis of competition concerns and remedies in Phase II). See, at the international level, 'Merger Remedies Guide' (*International Competition Network*, 2016), 9 (noting non-structural remedies can be an effective method to remedy likely anticompetitive effects 'particularly in respect of a vertical merger').

[140] See, e.g., M.7353 – *Airbus / Safran / JV*, Commission decision of 26 November 2014 (to remove input and customer foreclosure concerns, the parties committed to keeping Safran's plasmic propulsion systems business out of the joint venture that they were setting up).

clear the creation of their joint venture in the mining sector. The Commission rejected these, writing in its decision that '[t]he commitment offered is behavioural in nature and cannot therefore be accepted under the Merger Regulation.'[141] Gencor subsequently appealed and, on appeal, the General Court stressed that what mattered was not so much whether the commitments can be categorized as behavioural or structural but whether they were capable of rendering the notified concentration compatible with the common market.[142] While it was true, according to the Court, that structural commitments are, as a rule, preferable, behavioural commitments cannot be automatically ruled out:

> *The categorisation of a proposed commitment as behavioural or structural is therefore immaterial. It is true that commitments which are structural in nature, such as a commitment to reduce the market share of the entity arising from a concentration by the sale of a subsidiary, are, as a rule, preferable from the point of view of the Regulation's objective, inasmuch as they prevent once and for all, or at least for some time, the emergence or strengthening of the dominant position previously identified by the Commission and do not, moreover, require medium or long-term monitoring measures. Nevertheless, the possibility cannot automatically be ruled out that commitments which prima facie are behavioural - for instance, not to use a trade mark for a certain period, or to make part of the production capacity of the entity arising from the concentration available to third-party competitors, or, more generally, to grant access to essential facilities on non-discriminatory terms - may themselves also be capable of preventing the emergence or strengthening of a dominant position*.[143]

The position of the General Court in *Gencor* was later confirmed in several other judgments, including the Court of Justice in *Tetra Laval,*[144] and it was ultimately incorporated in the Remedies Notice as the Commission's policy stance on remedies.[145] It is less strong than an outright rejection of behavioural remedies as such. At the same time, it puts the bar high for behavioural remedies by requiring that they are 'at least equivalent in [their] effects to a divestiture'.[146]

The Commission's preference for structural remedies in merger control is sometimes contrasted with the situation in the field of Articles 101 and 102, where the applicable legal framework is said to impose a preference for behavioural remedies.[147] However, this interpretation of Regulation 1/2003 is not self-evident, and several commentators have argued that Regulation

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[141] IV/M.619 – *Gencor / Lonrho,* Commission decision of 24 April 1996, para 216.
[142] Case T-102/96 *Gencor v Commission* [1999] EU:T:1999:65, paras 318-319.
[143] Case T-102/96 *Gencor v Commission* [1999] EU:T:1999:65, para 319.
[144] Case C-12/03 P *Commission v Tetra Laval* [2005] EU:C:2005:87, para 86; Case T-177/04 *easyJet v Commission* [2006] EU:T:2006:187, para 182; Case T-158/00 *ARD v Commission* [2008] EU:T:2003:246, para 193;
[145] Remedies Notice, para 15.
[146] Remedies Notice, para 61.
[147] Regulation 1/2003, art 7(1), third sentence ('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.'). Some commentators deduce from this provision that there is a preference for behavioural remedies. See, e.g., Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (Hart 2nd ed, 2013), 880 and 887.

1/2003 does not prefer or prioritise behavioural remedies over structural remedies.[148] This being said, it is true that Regulation 1/2003 – unlike the Remedies Notice - certainly does not express a preference for structural remedies. In addition, in reality, structural remedies are much rarer in the field of Articles 101 and 102 than in merger control.[149]

4.2.2 The structural vs. behavioural debate

The Commission's preference for structural remedies reflects a stance that is shared by many competition authorities across the world. In the **United States**, the Department of Justice and the FTC have historically shown a strong preference for structural remedies. In the early 2010s, behavioural remedies (usually referred to as conduct remedies in the U.S.) seemed to gain increased acceptance,[150] especially in vertical mergers,[151] but this revival was short-lived. The Department of Justice's 2020 Merger Remedies Manual states that 'structural remedies are strongly preferred in horizontal and vertical merger cases' [152] and then goes on to severely limit the circumstances in which it may accept a conduct remedy. More specifically, conduct remedies are only acceptable as an ancillary remedy, i.e. to facilitate structural relief, or when all of the following conditions are met:

1) a transaction generates significant efficiencies that cannot be achieved without the merger;

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[148] See, e.g., Cyril Ritter, 'How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements?' (2016) *Journal of European Competition Law & Practice* 587, 596; Benjamin Loertscher and Frank Maier-Rigaud, 'On the Consistency of the European Commission's Remedies Practice' in Damien Gerard and Assimakis Komninos (eds), *Remedies in EU Competition Law: Substance, Process and Policy* (Wolters Kluwer 2020) 53, 58-59; Frank P. Maier-Rigaud, Behavioural versus Structural Remedies in EU Competition Law, in Philip Lowe, Mel Marquis and Giorgio Monti (eds), *European Competition Law Annual 2013, Effective and Legitimate Enforcement of Competition Law* (Hart Publishing 2016) 221 (referring to the 'myth of a subsidiarity of structural measures').

[149] Benjamin Loertscher and Frank Maier-Rigaud, 'On the Consistency of the European Commission's Remedies Practice' in Damien Gerard and Assimakis Komninos (eds), *Remedies in EU Competition Law: Substance, Process and Policy* (Wolters Kluwer 2020) 53, 70.

[150] See 'Antitrust Division Policy Guide to Merger Remedies' (*U.S. Department of Justice, Antitrust Division* June 2011) <www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf> accessed 4 December 2020, 5-6 ('[a]ccordingly, in appropriate vertical merger matters the Division will consider tailored conduct remedies designed to prevent conduct that might harm consumers while still allowing the efficiencies that may come from the merger to be realized.'). This guidance was withdrawn in September 2018, not long after Assistant Attorney General Makan Delrahim was confirmed (September 2017).

[151] Conduct remedies were accepted in three vertical mergers: Comcast/NBCU (consent decree approved in 2011; see Final Judgment, *United States v. Comcast Corp*., No. 1:11-cv-00106-RJL (D.D.C. June 29, 2011)); Ticketmaster Entertainment/Live Nation (consent decree approved in 2010; see Final Judgment, *United States v. Ticketmaster Entm't, Inc.*, No. 1:10-cv-00139- RMC (D.D.C. July 30, 2010))
and Google/ITA (consent decree approved in 2011 see Final Judgment, *United States v. Google, Inc.,* No. 1:11- cv-00688-RLW, (D.D.C. Oct. 5, 2011)).

[152] 'Merger Remedies Manual' (*U.S. Department of Justice, Antitrust Division,* September 2020) <www.justice.gov/atr/page/file/1312416/download> accessed 4 December 2020, 13. The 2020 Merger Remedies Manual followed several speeches by Assistant Attorney General Delrahim expressing strong scepticism towards behavioural remedies. See, e.g., Assistant Attorney General Makan Delrahim, 'Keynote Address' (American Bar Association's Antitrust Fall Forum, 16 November 2017) <www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar> accessed 4 December 2020.

2) a structural remedy is not possible;
3) the conduct remedy will completely cure the anticompetitive harm, and
4) the remedy can be enforced effectively.[153]

In **Germany**, the *Bundeskartellamt* has an ever stricter stance on behavioural remedies than the Commission. Its guidance not only expresses a 'clear preference for divestments' [154] but points out that, under German law, a certain type of behavioural remedies, namely those that 'require a constant control of the merging parties' conduct' is excluded by law.[155] As an example, the *Bundeskartellamt*'s guidance mentions the maintenance of Chinese walls. The **UK**'s Competition & Markets Authority's guidance on merger remedies likewise expresses a preference for structural remedies.[156]

France is a jurisdiction where behavioural remedies are relatively frequently used in merger control. The *Autorité de la Concurrence* nonetheless generally favours structural remedies, albeit with more nuance than many other authorities. In a recent study of its behavioural remedies, the *Autorité* concluded that 'although behavioural remedies are generally not the remedies favoured by the *Autorité* in merger control, they nevertheless play no small role in its decisional practice'[157]

Perhaps the most accurate summary of the global stance on structural remedies is found in the Remedies Guide of the **International Competition Network**, which embodies a compromise text agreed upon by over 140 competition authorities. It states that 'competition authorities generally prefer structural relief in the form of a divestiture to remedy the anticompetitive effects of mergers, particularly horizontal mergers.'[158] At the same time, the guide acknowledges that '[n]on-structural remedies (…) can be an effective method to remedy likely anticompetitive effects, particularly in respect of a vertical merger or in other circumstances where a structural remedy is not appropriate'.[159]

[153] 'Merger Remedies Manual' (*U.S. Department of Justice, Antitrust Division,* June 2011), 16.
[154] 'Guidance on Remedies in Merger Control' (*Bundeskartellamt,* May 2017) <www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidance%20on%20Remedies%20in%20Merger%20Control.pdf?__blob=publicationFile&v=4 para. 23> accessed 4 December 2020, para 23.
[155] 'Guidance on Remedies in Merger Control' (*Bundeskartellamt,* May 2017), para 26.
[156] 'Merger Remedies' (*Competition & Markets Authority*, 13 December 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/764372/Merger_remedies_guidance.pdf> accessed 4 December 2020, 17, para 3.46 (in this context, 'structural remedies' are defined as a divestiture or prohibition).
[157] 'Engagements comportementaux' (*Autorité de la concurrence*, 2019) <www.autoritedelaconcurrence.fr/fr/publications/engagements-comportementaux> accessed 4 December 2020, 100 ('Ainsi, si les engagements comportementaux ne sont généralement pas les remèdes privilégiés par l'Autorité en droit des concentrations, ils tiennent tout de même une place non négligeable dans sa pratique décisionnelle').
[158] 'Merger Remedies Guide' (*International Competition Network*, 2016) 9, section 3.2.1.
[159] 'Merger Remedies Guide' (*International Competition Network*, 2016) 9, section 3.2.1.

Although the preference for structural remedies is widespread, there are also voices calling for more frequent use of behavioural remedies. Some scholars and practitioners have done so[160] but, in recent years, Member State governments have been the most vocal advocates. In 2019, in the wake of the Commission's prohibition of the Siemens / Alstom merger, the French, German and Polish government called on the Commission to encourage behavioural remedies, praising them as 'more flexible than structural ones', although also acknowledging that 'such behavioural remedies should be subject to proper monitoring'.[161] Shortly thereafter, Italy joined these three Member States in calling on the Commission 'to consider, on a case by case approach, the effectiveness and viability of behavioural remedies, especially if competition conditions may change in the short run'.[162]

The call was seen as a direct response to the Commission's prohibition in *Siemens / Alstom*, a deal that had the support of both the French and German governments. In that case, the commitments proposed by the parties had been rejected, in part because they were very complex and behavioural.[163] One of the parties' arguments was that the merger should be cleared because a Chinese train manufacturer (CRRC) would soon enter the market and mitigate any anticompetitive effects of the merger between Siemens and Alstom. However, the Commission found that CRRC's entry in the markets where problems arose, was unlikely to occur in the coming few years, and therefore rejected the argument based on future competition from a Chinese rival. This background may explain why behavioural remedies seemed particularly attractive to the governments who supported the Siemens / Alstom deal. They see them as a way to preserve competition in the interim (i.e. in the case of Siemens / Alstom until competition from China has materialized), while allowing the merging parties' businesses to remain intact.

4.2.3 Divestitures are preferred but not risk-free either

[160] Patrick Rey, 'Economic Analysis and the Choice of Remedies', in François Lévêque and Howard Shelanski, *Merger Remedies in American and European Union Competition Law* (Edward Elgar 2003) 124 (concluding that 'some behavioral remedies, and in particular access remedies, may be more effective tools for preserving competition'); Thomas Wilson, 'Merger remedies – is it time to go more behavioural?' (*Kluwer Competition Law Blog*, 21 February 2020) <http://competitionlawblog.kluwercompetitionlaw.com/2020/02/21/merger-remedies-is-it-time-to-go-more-behavioural/?print=print> accessed 6 December 2020.
[161] 'Modernising EU Competition Policy' (*Bundesministerium für Wirtschaft und Energie, Ministère de l'Économie et des Finances & Ministerstwo Przedsiębiorczości i Technologii,* 4 July 2019) pt 7 ('Encouraging behavioural remedies'). The call followed a French-German proposal calling for EU merger rules to be changed (though not specifically mentioning remedies) in order to allow for the emergence of European champions ('A Franco-German Manifesto for a European industrial policy fit for the 21st Century' (*Bundesministerium für Wirtschaft und Energie and Ministère de l'Économie et des Finances*, 19 February 2019)).
[162] Letter of 4 February 2020 (*Bundesministerium für Wirtschaft und Energie, Ministero delle Sviluppo Economico, Ministère de l'Économie et des Finances & Ministerstwo Przedsiębiorczości i Technologii*, 4 February 2020) <https://www.politico.eu/wp-content/uploads/2020/02/Letter-to-Vestager.pdf> accessed 4 December 2020.
[163] M.8677 – *Siemens / Alstom*, Commission decision of 6 February 2019, para. 1688 (complexity of the OBU (on board unit) commitments) and para. 1705 (complexity of the ETCS Wayside commitments), paras. 1730-1736 (behavioural promises are attached to several important aspects of the ETCS Wayside commitments).

Although the Commission has a preference for structural remedies, because they are generally more effective than behavioural remedies, this is not to say that divestiture remedies are free from problems. On the contrary, 'the potential for things to go wrong is high'[164], as the divested business may lack certain essential assets, it may be sold to the wrong purchaser, or it may deteriorate during the divestiture process.

Some of these issues are inherent in any M&A deal. Any merger or acquisition will indeed face the challenge of post-acquisition integration and there is no shortage of examples of failed M&A deals. However, in the case of divestitures, the risks are exacerbated because the incentives of the three parties involved are fundamentally misaligned.

The competition authority wants the divestiture to restore competition, by creating a new competitive player or strengthening an existing one. By contrast, the merged entity, i.e. the seller in the divestiture process, has exactly the opposite goal, as it will remain a competitor in the market and will benefit if competition is reduced in the market. It therefore has every incentive to divest less than a viable business and divest it to a buyer that will not compete vigorously with the divested business. The buyer, from its side, may at first sight share some of the competition authority's goals. One would indeed expect the buyer to be keen on acquiring a viable business. However, it obtains the divested business as a result of a bargaining process, in which the price it has to pay for the divestiture is negotiated. This allows for a trade-off: the seller can sell a less than competitive business and compensate the buyer by reducing the purchase price.[165]

Complicating matters further are the very significant information asymmetries between the merging parties and competition authorities. While the party divesting the business knows every nook and cranny of the divested business, the competition authority will usually be wholly unfamiliar with the divested business, until the remedy is proposed.

These inherent risks are not merely theoretical but lead to actual issues in actual cases. DG COMPs 2005 Merger Remedies Study analysed the outcome of 68 remedies that had been aimed at transferring a market position, a category which included divestitures of a stand-alone business, divestitures of a stake in a joint venture, divestitures of assets and divestitures or grants of a long-term exclusive licence of IP rights.[166] These 68 remedies led to 59 serious design and/or implementation issues that had remained unresolved.[167] The inadequate scope of the divested business was the most frequent issue, followed by situations where an unsuitable purchaser had

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[164] Carles Esteva Mosso and Simon Vande Walle, 'EU Merger Control: How to Remove Anticompetitive Effects?' in Damien Gerard and Assimakis Komninos (eds), *Remedies in EU Competition Law: Substance, Process and Policy* (Wolters Kluwer 2020) 42.

[165] See, in this sense Joseph Farrell, 'Negotiation and Merger Remedies: Some Problems', in François Lévêque and Howard Shelanski, *Merger Remedies in American and European Union Competition Law* (Edward Elgar 2003) 95, 95-98 (arguing that 'the buyer is a teammate not of the agency but of the merging parties').

[166] Merger Remedies Study, 18.

[167] Merger Remedies Study, 167, para 3.

been approved.[168] Issues with the carve-out of assets and the transfer of the divested business were also frequent.[169]

Notwithstanding these potential and actual problems, it is important not to lose sight of the fact that the few *ex post* assessments of remedies show that most divestiture remedies are in fact effective. The FTC published a study in January 2017, which included an in-depth case study of 50 remedies.[170] That study showed that all divestitures of an ongoing business had been successful. Divestitures of more limited packages of assets fared less well, but still achieved a success rate of 70%. Likewise, DG COMP's Merger Remedies Study, published in 2005, also found that the majority of divestitures had in fact been effective.[171]

4.2.4 Scope of the divested business

4.2.4.1 Divestiture of a viable business

The Remedies Notice requires the divestiture of a 'viable business that, if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis and that is divested as a going concern'.[172] To ensure the viability of the divested business, 'it may also be necessary to include activities which are related to markets where the Commission did not identify competition concerns if this is required to create an effective competitor in the affected markets'.[173]

There are many examples of cases where the divestiture included products or territories in relation to which the Commission did not raise competition concerns, but which had to be included to ensure the viability of the divested business.[174] In *Dow / DuPont*, for instance, the parties ensured the viability of the divestment business by divesting DuPont's entire global crop protection R&D organisation, although the concerns related to a number of specific 'innovation spaces' (early pipeline products and lines of research focused on finding crop protection products for specific crop-pest combinations).[175]

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[168] Merger Remedies Study, 167, chart 34.
[169] Merger Remedies Study, 167, chart 34.
[170] 'The FTC's Merger Remedies 2006-2012, A Report of the Bureaus of Competition and Economics' (*Federal Trade Commission*, January 2017) <www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf> accessed 4 December 2020.
[171] Merger Remedies Study, 134 (56% of remedies transferring a market position were effective; 25% were partially effective; 6% were ineffective and for 13% it was unclear).
[172] Remedies Notice, para 23.
[173] Remedies Notice, para 23.
[174] See, for various constellations, Maurice de Valois Turk, 'Merger Remedies beyond the Competition Concern: When Could You End up Giving More?' (2012) 3 *Journal of European Competition Law & Practice* 495.
[175] M.7932 – *Dow / DuPont*, Commission decision of 27 March 2017, para. 4030-4041.

The Remedies Notice in principle requires the business to be divested to be 'viable as such'[176], meaning the resources of a possible or even presumed future purchaser are not taken into account by the Commission at the stage of assessing the remedy. An exception to this principle applies in case of a fix-it-first remedy, where the parties have already entered into an agreement with a specific buyer before a decision on the merger is issued. In that case, the Commission can take into account the future buyer's assets.[177] For instance, in *Bayer / Monsanto*, the parties had already identified and entered into an agreement with a purchaser (BASF). This allowed the Commission to assess the remedies taking into account BASF's resources and assets.[178]

If later, once a purchaser has been identified after adoption of the Commission decision approving the transaction, it turns out that some of the assets or personnel included in the divested business will not be needed by the proposed purchaser, 'the Commission may, upon request by the parties, approve the divestiture of the business to the proposed purchaser without one or more assets or parts of the personnel', provided that 'this does not affect the viability and competitiveness of the business to be divested'.[179] This is sometimes colloquially referred to as 'giving back assets' or 'waiving assets', as some assets which the merging parties had already committed to transfer ultimately are not needed, and therefore can be kept by the merging parties.

A viable business normally implies that the divestment business is economically profitable or, at the very least, bound to become economically profitable in the near future. In some cases, all or part the proposed divestment business was loss-making and needed investments. Such divestitures entail a risk that the purchaser acquires the divestment business and subsequently shuts it down or lets it languish. In some of those cases, attempts were made to ensure that the necessary investments would be made, for instance through a commitment by the seller to make funds available to the purchaser for investing in a plant.[180] However, it seems doubtful that such techniques can truly remove the risk that the purchaser ultimately abandons what is a loss-making business.[181]

[176] Remedies Notice, para 30.
[177] Remedies Notice, paras 30 and 57.
[178] M.8084 – *Bayer / Monsanto*, Commission decision of 21 March 2018, para 3275.
[179] Remedies Notice, para 31; European Commission Model Text for Divestiture Commitments, 5 December 2013 (Model Text for Divestiture Commitments), para 18, final sentence.
[180] See, e.g., M.8947 – *Nidec / Whirlpool (Embraco business)* Commission decision of 12 April 2019, paras. 339 and 350 (mentioning 'poor financial performance of the Austrian plant' and explaining that, to address concerns about viability, the notifying party 'commits to make available to the purchaser CAPEX funding'); M.7801 – *Wabtec / Faiveley*, Commission decision of 4 October 2016 (commitments included a provision requiring the seller of the divestment business to include an incentive scheme in the sale and purchase agreement, to incentivize the purchaser to carry out the necessary R&D investments). See Réka Bernat and others, *Wabtec / Faiveley* – Braking News: Commission conditionally clears acquisition in train equipment sector, [2017] *Competition merger brief*, issue 1/2017, 7, at 10.
[181] In M.8947 – *Nidec / Whirlpool (Embraco business)*, the purchaser subsequently announced that it would sell a manufacturing line in the Austrian plant and move another manufacturing line to a different plant.

4.2.4.2 Divestiture of a stand-alone business

The Remedies Notice explains that a viable business is normally 'a business that can operate on a stand-alone basis, which means independently of the merging parties as regards the supply of input materials or other forms of cooperation other than during a transitory period.'[182]

From this flows a 'clear preference' for the divestiture an existing stand-alone business, i.e. a pre-existing company or group of companies, or of a business division which was not previously legally incorporated as such.'[183] Many divestitures are of this type.

In most cases, the divestiture of a stand-alone business entails the sale of one or more legal entities. The divestiture of a stand-alone business will therefore normally take the form of a **share deal**. This is usually the cleanest way to transfer a business, as, in most legal systems, the sale of the shares results in the automatic transfer of all rights and obligations (except for rights or obligations subject to a change of control clause).

By contrast, an **asset deal** is by nature less comprehensive, as only the rights and obligations specifically listed will be transferred. In addition, in case of an asset deal, it will typically be more difficult for contracts to be transferred. The Remedies Notice nonetheless acknowledges that, sometimes, a business division within a company that is not legally incorporated as such can be clearly distinguished and constitute a stand-alone business.[184]

In accordance with the principle that the divested business has to be viable as such already at the design stage, the Remedies Notice provides that the divested business must contain 'all the assets which contribute to the operation of the business or which are necessary to ensure its viability and competitiveness.'[185] Likewise, all personnel which is currently employed, or which is necessary to ensure the business' viability and competitiveness will normally have to be transferred.[186]

An issue that often causes some friction with the merging parties is how to deal with **shared assets and employees**. The Remedies Notice tries to reduce the risks to the viability of the divested business by stating clearly that 'personnel and assets which are currently shared between the business to be divested and other businesses of the parties, but which contribute to the operation of the business or which are necessary to ensure its viability and competitiveness, also have to be included'.[187] This implies that personnel and assets owned or allocated to other non-divested business units will also have to be included to some extent. Among others, the 'personnel providing essential functions for the business such as, for instance,

[182] Remedies Notice, para. 32.
[183] Remedies Notice, para 33.
[184] Remedies Notice, para. 33.
[185] Remedies Notice, para 25.
[186] Remedies Notice, para 25.
[187] Remedies Notice, para 26.

group R&D and information technology staff' should be included 'at least in a sufficient proportion to meet the on-going needs of the divested business'.[188]

If the proposed divestiture is dependent on the merged entity for the supply of an input, this affects its independence and, hence, its suitability as a divestiture. In *Novelis / Aleris*, a merger between two producers of rolled aluminium, the parties proposed to divest Aleris' plant in the Belgian town of Duffel.[189] The plant could produce most of its input needs itself, but it did source "a not insignificant part" from other Aleris entities.[190] The Commission concluded that the Duffel plant was not fully independent and rejected an initial remedies proposal partly on this basis. Ultimately, to resolve this issue, the merging parties committed to divest the plant together with the money to fund the capital expenditures that would make Duffel a stand-alone business. These funds were placed on a blocked escrow account, which could only be used for investments to make the plant independent from the merged entity's inputs.[191]

4.2.4.3 Carve-outs and divestitures of assets

Although the divestiture of a stand-alone business is the rule, the Commission has accepted more complex types of divestitures in a number of cases. These divestitures entail the transfer of businesses that have existing strong links or are partially integrated with businesses retained by the parties.[192] They therefore need to be 'carved out'.

Such carve-outs present many risks. Support systems have to be split, employees that are shared between the carved out business and the retained business may not be willing to move with the divested business, IT systems have to be cut off, lines of supply have to be renegotiated, etc.[193]

Carve-outs are therefore usually accompanied by a number of safeguards to mitigate these risks as much as possible. Whenever possible, parties should consider a 'reverse carve-out', meaning a stand-alone business is divested but the parties retain certain assets or employees, carving them out from the business that is divested.[194]

In some cases, the Commission has accepted that parties do not divest a business but mere assets. This is relatively rare because '[s]uch an approach may be accepted by the Commission only if

188 Remedies Notice, para 26.
189 M.9076 – *Novelis / Aleris*, Commission decision of 1 October 2019, para. 1062.
190 M.9076 – *Novelis / Aleris*, Commission decision of 1 October 2019, para. 1062.
191 M.9076 – *Novelis / Aleris*, Commission decision of 1 October 2019, para. 1106. A transitional supply agreement would ensure the viability of the divested business while the investments in the Duffel plant are made.
192 Remedies Notice, para 35.
193 Carles Esteva Mosso and Simon Vande Walle, 'EU Merger Control: How to Remove Anticompetitive Effects?' in Damien Gerard and Assimakis Komninos (eds), *Remedies in EU Competition Law: Substance, Process and Policy* (Wolters Kluwer 2020) 46.
194 Remedies Notice, para 35.

the viability of the business is ensured notwithstanding the fact that the assets did not form a uniform business in the past'.[195]

If the assets come from different entities – typically the acquirer and the target – the divestiture is a so-called 'mix-and-match' divestiture. The Commission is sceptical of such divestitures as 'a combination of certain assets which did not form a uniform and viable business in the past creates risks as to the viability and competitiveness of the resulting business.'[196]

Although a divestiture of assets is disfavoured by the Commission as a remedy, there are nonetheless sectors where they are accepted with some frequency. Mergers in the pharmaceutical sector, for instance, have on several occasions been cleared subject to divestitures that consisted of mostly assets.[197] At the core of these divestitures are usually intellectual property rights related to certain drugs or treatments, such as patents, market authorisations, brands and relevant studies and data.

4.2.5 Third party rights in relation to the divestiture

Sometimes, cooperation of a third party is essential to the success of a divestiture. A third party may have veto rights over the transfer or it may be a particularly important partner of the divested business. The Remedies Notice explicitly mentions 'third party rights in relation to the business' as one of the risks that may accompany a divestiture.[198]

A straightforward way for the parties to deal with this risk is to obtain, during the merger review process, the necessary consent or cooperation from the third party. This will normally remove the uncertainty resulting from the third party rights, in turn allowing the Commission to accept the commitments without excessive risks.[199]

If this is not possible, parties frequently propose to include an upfront buyer clause or a fix-it-first solution in their commitments. The Remedies Notice explicitly mentions this safeguard as a way to deal with third party rights that may constitute a considerable obstacle for a divestiture.[200]

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[195] Remedies Notice, para 37.
[196] Remedies Notice, para 37.
[197] See, e.g., M.9554 - *Elanco Animal Health / Bayer Animal Health Division*, Commission decision of 8 June 2020 (divestiture of intellectual property rights in relation to pharmaceutical products for animals); M.9517 – *Mylan / UpJohn*, Commission decision of 22 April 2020 (divestiture of market authorisations, contracts and brands, coupled with transitory manufacturing and supply agreements); M.7275 – *Novartis / GlaxoSmithKline Oncology Business*, Commission decision of 28 January 2015 (divestiture of the rights to two pipeline cancer treatments of Novartis).
[198] Remedies Notice, para 11.
[199] See, e.g., M.8150 – *Danone / The Whitewave Foods Company*, Commission decision of 16 December 2016, para. 161. In that case, Danone proposed to divest its 'growing-up milk' business in Belgium but this business was dependent on the supply of the product by a third party, which had to agree to the transfer of the supply contract. During the merger review process, Danone obtained the consent of the third party to the transfer of the contract, thereby removing this element of uncertainty.
[200] Remedies Notice, para 54.

The underlying idea is that, since parties cannot close their own deal until the uncertainty surrounding the commitments is lifted, they have a strong incentive to resolve the issue. *HeidelbergCement / Italcementi*[201] is an example of a case where this method was used.

Another alternative mentioned in the Remedies Notice is a so-called 'crown-jewel' commitment, under which the parties commit to a second alternative divestiture that is at least as good as the proposed first divestiture and does not involve any uncertainties. The Remedies Notice sets out a number of conditions for such alternative commitments,[202] and, in recent years, this type of remedy has not been frequently used.

4.2.6 Finding a suitable purchaser of the divestiture

Divestitures need to end up in the hands of a buyer that will compete vigorously with the divested business. In the words of the Remedies Notice, the divested business needs to 'become an active competitive force in the market'.[203] If the buyer does not maintain and develop the divested business, the remedial power of the divestiture is lost, and the remedy does not achieve its purpose.

Various safeguards are aimed at ensuring that the divested business is transferred to a suitable purchaser. Remedies will invariably set certain minimum requirements for the purchaser, known as purchaser criteria. In addition, arrangements such as upfront buyer clauses and fix-it-first remedies are used to decrease the risk that no suitable purchaser is found.

4.2.6.1 Purchaser criteria

The Remedies Notice lays down three 'standard' purchaser requirements, which are also part of the model divestiture text.[204] The precise formulation can be found in the Remedies Notice.

The language of the standard purchaser criteria is relatively broad and therefore a potent tool for the Commission to reject unsuitable purchasers. Among others, the standard criteria require that the purchaser 'have the incentive and ability to maintain and develop the divested business as a viable and active competitive force in competition with the parties and other competitors'.

Although together, these criteria provide for a rather comprehensive set of safeguards, the Remedies Notice acknowledges that these requirements 'may have to be supplemented on a

[201] M.7744 - *HeidelbergCement / Italcementi*, Commission decision of 26 May 2016. In that case, the consent of a third party (LafargeHolcim) was needed in order to include in the remedy package a stake in the joint venture running the Antoing limestone quarry. HeidelbergCement committed not to close its acquisition of Italcementi until an agreement with LafargeHolcim had been reached on this point.
[202] Remedies Notice, paras 44-45.
[203] Remedies Notice, para 47.
[204] Model Text for Divestiture Commitments, section D, para 17.

case-by-case basis.'[205] In fact, many commitments contain additional purchaser criteria. For instance, in *Abbott / Alere*, based on feedback from the market test, the purchaser was required to have 'an established presence, including distribution and sales capabilities, in the In Vitro Diagnostics (IVD) sector in the EEA with a geographic footprint comparable to Alere prior to the concentration'.[206] Likewise, in *Wabtec / Faiveley,* also based on feedback from the market test, the purchaser was required to have the 'ability to sell internationally to railway customers'.[207]

It is also quite common for language to be added to the standard purchaser criteria, to make the broad language in the standard criteria more specific. For instance, the requirement that the purchaser 'possess proven relevant expertise' may be made more specific by requiring relevant expertise in a specific sector or market.[208]

Although one could argue that such additions are not strictly necessary, given the broad scope of the standard criteria, they nonetheless give the Commission additional assurances that only a suitable purchaser will obtain the divested business. They also provide transparency to third parties who may be interested in the divested business.

4.2.7 Standard arrangement, upfront buyer clause, fix-it-first remedy

The Remedies Notice distinguishes between three different ways in which a divestiture can take place. The difference between these three arrangements is not what happens in substance, as in all three scenarios similar steps have to be taken. The difference lies in the order (chronology) in which the steps in the divestiture process are taken.

All mergers cleared with a divestiture remedy will normally result in the following five steps being taken at some point:

1) the Commission clears the main transaction, subject to a divestiture remedy;
2) the parties 'close' their main transaction[209];
3) the parties find a purchaser and sign a divestiture agreement with that purchaser,
4) the Commission approves the purchaser and the divestiture agreements as suitable;
5) the divesting party and the purchaser of the divestiture 'close' the divestiture deal.

[205] Remedies Notice, para 49.
[206] M.7982 – *Abbott / Alere*, Commission decision of 25 January 2017, para 272.
[207] M.7801 – *Wabtec / Faiveley*, Commission decision of 4 October 2016, para. 512 and 523.
[208] See, e.g., M.7567 – *Ball / Rexam*, Commission decision of 15 January 2016 (requiring 'proven expertise in the packaging sector').
[209] Two important moments in the M&A process are the 'signing' and 'closing' of the transaction. The former is the moment when the definitive agreement between buyer and seller (in case of an acquisition) is signed. The latter is the moment when title to the business is transferred, i.e. the shares or assets are actually transferred to the buyer, in return for the price. However, the term 'closing' is not used in the Remedies Notice or in the Model Divestiture Commitments, which instead talk about the concentration 'being implemented' or 'completed' (Remedies Notice, para 53). Sometimes the term 'consummated' is also used.

To understand how the three arrangements (standard, upfront and fix-it-first) differ, it is important to be aware that the parties are usually keen on closing their merger as soon as possible. In other words, they have a strong incentive to accomplish step 2 in the above list. Once step 2 is accomplished, the parties' main goal has been accomplished. In addition, the merger's impact on competition will start to be felt, as the parties have now combined their businesses. A key issue is therefore whether step 2 can take place immediately after step 1 or whether the parties first have to accomplish steps 3 and 4.

In theory, one could also consider postponing the closing of the main deal (step 2) until the divestiture deal has closed (step 5). This is, however, rarely done.

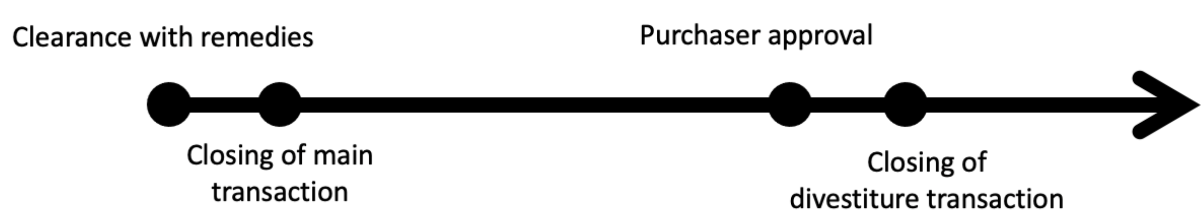
In what follows we first explain what the three different arrangements entail. Next, we discuss how to determine which of these three arrangements is appropriate in a specific case.

4.2.7.1 Standard arrangement

Under the standard arrangement, the parties are allowed to close their merger, i.e. the main transaction, before a suitable purchaser has been identified by the parties and approved by the Commission. The parties are of course not obliged to close their deal before the purchaser approval. Hence, it is possible that the parties close their deal only after the Commission has approved a suitable purchaser. However, in practice, the parties are usually keen on closing their merger quickly and so, under a standard arrangement, they will often close their deal soon after the Commission's conditional clearance decision and prior to the Commission approving a suitable purchaser. Because of this, the standard arrangement is sometimes also referred to as a 'post-closing divestiture', as the divestiture is approved and closed after the main transaction has closed.[210]

In short, under the standard arrangement, the Commission's clearance decision is usually followed by the closure of the main transaction, which is then followed by the Commission's purchaser approval decision. Finally, as last step in the process, the party making the divestiture and the purchaser need to close their divestiture deal.

Figure 4 – Typical timeline in case of a 'standard arrangement'



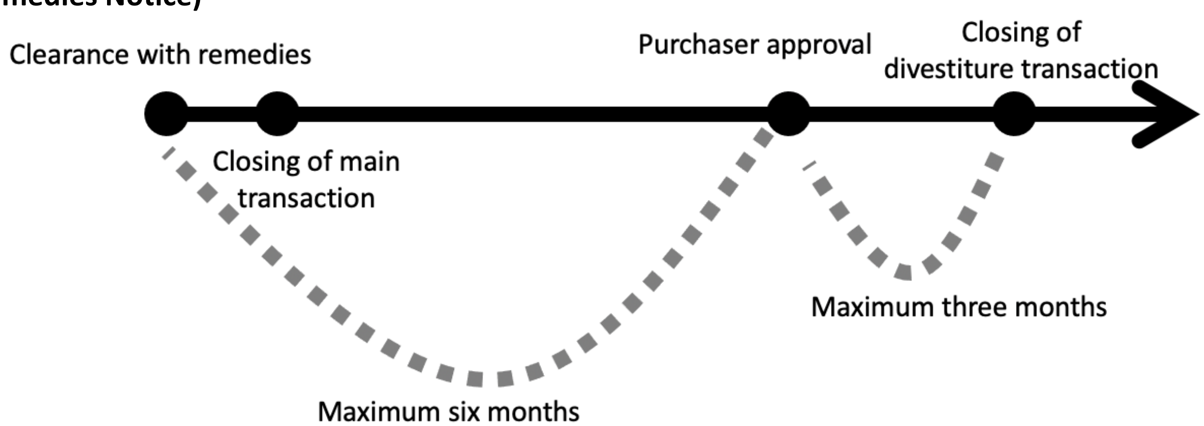
[210] See 'Merger Remedies Guide' (*International Competition Network*, 2016) 13.

This arrangement is the most common arrangement. The Remedies Notice explains that 'this procedure is likely to be appropriate in the majority of cases, provided that a number of purchasers can be envisaged for a viable business and that no specific issues complicate or stand in the way of the divestiture'.[211]

The fact that parties can close their merger prior to having identified a purchaser and this purchaser having been approved, does not mean that parties are not obliged to seek a suitable purchaser as soon as possible. The commitments will set a precise time period within which the parties have to find a suitable purchaser. This time period has to be, in the words of the Remedies Notice, 'as short as feasible', because 'short divestiture periods contribute largely to the success of the divestiture as, otherwise, the business to be divested will be exposed to an extended period of uncertainty.'[212] The Remedies Notice mentions six months as a maximum period that is normally considered appropriate.[213] For the trustee divestiture period, which starts if the parties have not managed to find a suitable purchaser and get the Commission's approval during the initial divestiture period, the Remedies Notice suggests three months.[214]

After the approval of the purchaser, the parties still have to close the divestiture transaction. Here too, the commitments will set a time period, to avoid that parties needlessly drag this period, thereby damaging the divested business and delaying its competitive impact. The Remedies notice explains that this period is normally three months.[215]

Figure 5 - Deadlines for the divestiture process (example based on periods mentioned in the Remedies Notice)



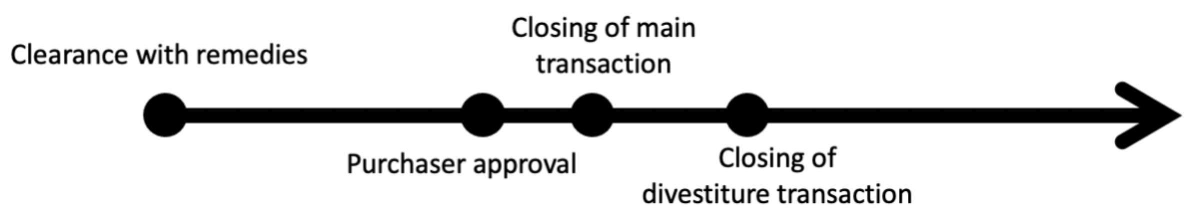
4.2.7.2 Upfront buyer clause

[211] Remedies Notice, para 52.
[212] Remedies Notice, para 98.
[213] Remedies Notice, para 98.
[214] Remedies Notice, para. 98. ; Model Text for Divestiture Commitments, para. 1
[215] Remedies Notice, para 98; Model Text for Divestiture Commitments, para. 1 (definition of 'Closing Period')

The key feature of a divestiture with an upfront buyer arrangement is that the parties are not allowed to close their merger before they have entered into a binding agreement with a purchaser and the Commission has approved this agreement and the purchaser.[216]

In practice, this is accomplished by inserting an upfront buyer clause in the commitments. The Commission's model divestiture text contains a model upfront buyer clause, which provides that 'the proposed concentration shall not be implemented before [the undertaking that will divest its business] or the Divestiture Trustee has entered into a final binding sale and purchase agreement for the sale of the Divestment Business and the Commission has approved the purchaser and the terms of sale (…)'.[217]

Figure 6 – Typical timeline in case of a divestiture with an upfront buyer clause



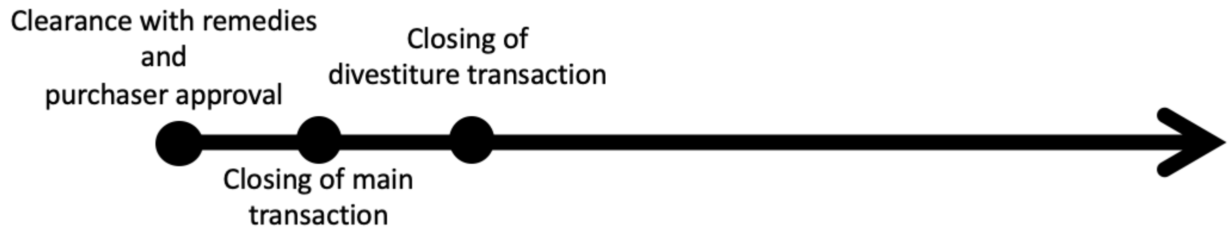
4.2.7.3 Fix-it-first remedy

In case of a 'fix-it-first remedy' the parties find a suitable purchaser for the divested business and sign an agreement with that purchaser even before the Commission's merger review process has ended, i.e. before the Commission issues its conditional clearance decision. They then propose the purchaser and the agreement to the Commission, again before the conditional clearance decision has been issued. If the purchaser and the agreement are suitable (and if sufficient time remains for the Commission to assess this), the Commission can approve the purchaser and the agreement in the same decision that clears the merger.

Since part of the divestiture process – namely the identification and approval of the purchaser – occurs in parallel to the merger review process, a fix-it-first usually results in a more expedited divestiture.

[216] Remedies Notice, para 53.
[217] Model Text for Divestiture Commitments, para 3.

Figure 7 – Typical timeline in case of a fix-it-first divestiture



4.2.7.4 *Which arrangement in which case?*

The different arrangements have an impact on when the parties can close their merger. This is usually an important element for the parties, for instance because delayed closing means financing has to remain in place for longer, leading to higher costs. Parties therefore tend to favour the 'regular arrangement' and disfavour an upfront buyer clause. The Commission, by contrast, is under a duty to reduce the risks that remedies entail and to maximize the chance that remedies are effective. These differing objectives can lead to intense discussions between the parties and the Commission on which arrangement is most appropriate. Ultimately, this will be determined by a number of factors, including the attractiveness of the divested business, the interest expressed by the market in purchasing the divested business, the degree of certainty that the divestment business can be transferred effectively, and the safeguards in place to preserve the divested business.

4.2.7.4.1 Regular vs. upfront/fix-it-first

Upfront buyer remedies and fix-it-first remedies are essentially a method to deal with certain risks. They may allow the Commission to conditionally clear a merger in spite of those risks. The three risks against which upfront buyer remedies and fix-it-first remedies can provide a safeguard are the following:

1) Few buyers appear interested or few buyers appear suitable.[218]
2) Considerable obstacles for the divestiture exist, such as third-party rights, the need to get approval from an authority, etc. [219]

[218] Remedies Notice, para 54. For an example, see M.8947 – *Nidec / Whirlpool (Embraco business)*, Commission decision of 12 April 2019, paras 344-345, 366 (parties include upfront buyer clause after market test reveals limited interest in purchasing the divestment business). But see M.9779 – *Alstom / Bombardier Transportation*, Commission decision of 31 July 2020, paras 1326-1336. In that case, the Commission found that only Hitachi would be a suitable purchaser (para. 1326), yet the commitments do not contain an upfront buyer clause or fix-it-first arrangement. However, see para. 1334, stating that discussions between the parties and Hitachi were well advanced, suggesting a deal was within reach.
[219] Remedies Notice, para 54. For an example, see M.7982 – *Abbott / Alere*, Commission decision of 25 January 2017, para. 251 (upfront buyer clause included 'in view of inter alia the need to get third party consents (…)').

3) The divested business may suffer from degradation while a purchaser is being identified and approved. [220]

In all of these cases, a standard arrangement results in a significant risk to competition. The parties will close their main transaction, thereby effectuating their merger, but it may turn out that no suitable buyer is found (risk 1), that the divested business cannot be properly transferred (risk 2) or that, by the time the business is transferred, it has lost some of its competitive potential (risk 3).

Upfront buyer clauses and fix-it-first remedies guard against these risks by preventing the closing of the main transaction until the Commission is satisfied that a suitable purchaser has been found. This has two important consequences. First, if the parties ultimately do not find a suitable purchaser, the merger will not take place, and the harm to competition will not occur. Put differently, the parties bear the risk. Second, the need to get purchaser approval first will give the parties a strong incentive to find a suitable purchaser quickly, thereby speeding up the divestiture process and reducing the risk of degradation. Once the main transaction is closed, the parties tend to be in less of a hurry and, in fact, they have an incentive to slow down the divestiture process, as this will delay the emergence of a competitor.

Although upfront and fix-it-first remedies may mitigate these risks, this does not mean that they can remove all risks. The Commission still has a duty to assess the risks of the proposed divestiture and must reject a remedy if it is too high. If the Commission's assessment of the remedies has shown that it is unlikely that a suitable buyer can be found or that the obstacles for divestiture are overwhelming, the Commission cannot be forced to approve the merger, even if the parties propose an upfront buyer or fix-it-first solution.

Whether the three above-mentioned risks are present depends in part on what is being divested. Carve-out divestitures are particularly prone to the above-mentioned risks, while divestitures of stand-alone business are less so. A stand-alone business will normally more easily find a suitable purchaser, as it has everything it needs to function within itself. By contrast, for a carve-out divestiture to be successful, the purchaser will need specific assets to complement the carved-out assets it is obtaining. Likewise, a carved-out business is also more prone to degradation during the process, as it is more difficult to keep it intact. Good employees may wish to leave the carved-out business, knowhow may leak from the carved-out business, etc.

4.2.7.4.2 Upfront buyer clause vs. fix-it-first

Upfront buyer clauses and fix-it-first remedies ultimately accomplish the same thing: they shift the risk that no suitable purchaser is found or that the divested business cannot be properly transferred to the parties. However, in case of a fix-it-first remedy, the uncertainty as to whether a suitable purchaser can be found is taken away at an earlier point in time, namely at the time the Commission issues its conditional clearance decision.

[220] Remedies Notice, para 55.

The Remedies Notice states that the Commission welcomes fix-it-first remedies in cases 'where the identity of the purchaser is crucial for the effectiveness of the proposed remedy'.[221] This is the case, for instance, where 'only very few potential purchasers can be considered suitable'. [222] At the same time, the Remedies Notice adds that, 'in these situations, an upfront buyer solution containing specific requirements as to the suitability of a buyer will generally be considered equivalent and acceptable'.[223]

In recent years, a fix-it-first remedy was adopted in *Valeo / FTE Group*,[224] *AB InBev / SABMiller*,[225] *Liberty Global / BASE*,[226] *Boeringher Ingelheim / Sanofi Animal Health*[227] and *Hutchison 3G Italy / Wind / JV*.[228]

In all these cases, the Commission approved the proposed purchaser, as well as the binding agreement with the proposed purchaser, in the decision approving the merger with remedies. This presupposes that the parties entered into a binding agreement with a purchaser at a sufficiently early point in time, with enough time left for the Commission to assess the suitability of the purchaser and review the divestiture agreement, so it can approve the purchaser and the agreements in the decision clearing the merger. Since the assessment of the purchaser and the agreement has to happen in parallel to the substantive review of the merger, it is difficult to imagine a fix-it-first remedy in phase I.[229]

In several cases, the parties already proposed a specific purchaser in the commitments, but the Commission did not yet approve that purchaser and the divestiture agreement in the clearance decision. This was the case in *Bayer / Monsanto*[230] and *GE / Alstom*.[231] The Commission's very first decision with a fix-it-first remedy was also of this type: *T-Mobile Austria / tele.ring*.[232] In these cases, the parties committed to sell to a specific purchaser and only to that specific purchaser, although the Commission withheld its judgment on the suitability of the purchaser.

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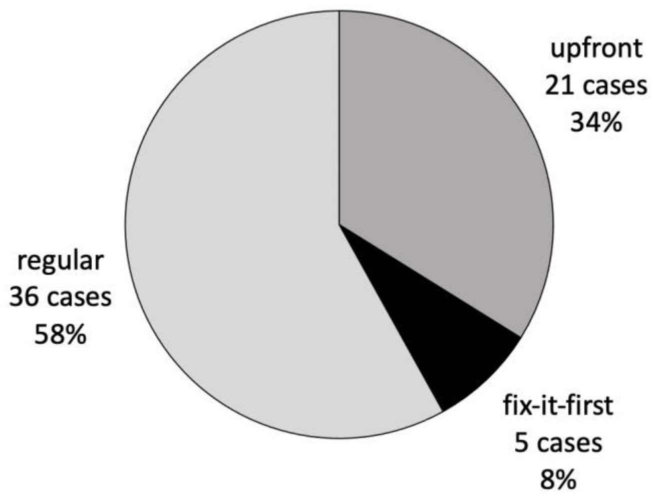
[221] Remedies Notice, para 57.
[222] Remedies Notice, para 57.
[223] Remedies Notice, para 57.
[224] M.8102 – *Valeo / FTE Group,* Commission Decision of 13 October 2017 (fix-it-first in Phase I but after the case had already been notified once, then withdrawn, and notified again).
[225] M.7881 – *AB InBev / SABMiller,* Commission decision of 24 May 2016 (fix-it-first for one of the two divestiture packages, namely the divestment businesses in Western Europe).
[226] M.7637 – *Liberty Global / BASE Belgium*, Commission decision of 4 February 2016. On the fix-it-first remedy in that case, see Fanny Dumont, Luca Manigrassi, Staffan Martinsson and Simon Vande Walle, 'Liberty Global/BASE: Fixing it first in the Belgian mobile market' [2016] *Competition merger brief*, issue 2/2016, 10-12.
[227] M. 7919 - *Boeringher Ingelheim / Sanofi Animal Health Business*, Commission decision of 4 August 2016.
[228] M. 7758 - *Hutchison 3G Italy / Wind / JV*, Commission decision of 1 September 2016.
[229] M.8102 – *Valeo / FTE Group,* Commission Decision of 13 October 2017 was a Phase I case with a fix-it-first remedy but that case had already been notified once, then withdrawn, then notified again.
[230] M.8084 – *Bayer / Monsanto*, Commission decision of 21 March 2018.
[231] M.7278 – *General Electric / Alstom (thermal power - renewable power & grid business)*, Commission decision of 8 September 2015 (commitments define Ansaldo as purchaser but the Commission's clearance decision contains neither a final approval of the purchaser's identity nor of the agreements.
[232] M.3916 – *T-Mobile Austria / tele.ring*, Commission decision of 26 April 2006.

In addition, in these cases, the commitments contained an upfront buyer clause. The commitments therefore combined an element of a fix-it-first remedy, namely the fact that the merging parties had already identified a specific buyer and committed to sell to that buyer, with an upfront buyer clause.[233] Such cases entail a certain risk for the parties but presumably in these cases, it would have been impossible for the Commission to approve the remedy package without taking into account the identify of a specific purchaser.

Although fix-it-first remedies are normally divestiture remedies, a similar 'fix-it-first' technique has also been used in relation to an access commitment. In *Vodafone / Certain Liberty Global Assets*,[234] Vodafone committed to give a competitor access to its cable network. The identity of the access seeker, as well as the access agreement, were approved by the Commission in the decision clearing the acquisition, making this a 'fix-it-first' access remedy.[235]

4.2.7.4.3 Prevalence of each type of remedy.

Figure 8 - Proportion of regular, upfront buyer and fix-it-first remedies as proportion of total divestitures (2016-2019)



In some years, commentators have observed that there is an increase in upfront buyer clauses, suggesting the Commission became stricter.[236] This argument seems to ignore the fact that the

[233] M.8084 – *Bayer / Monsanto*, Commission decision of 21 March 2018, para. 3077 (making this explicit).
[234] M.8864 – *Vodafone / Certain Liberty Global Assets*, Commission decision of 18 July 2019.
[235] M.8864 – *Vodafone / Certain Liberty Global Assets*, Commission decision of 18 July 2019, para 1974 (approval of Telefónica as company that obtains access to the cable network) and para 2006 (approval of the agreement).
[236] See, e.g., Dominic Long, Catherine Wylie and David Weaver, 'Rising tide of 'Fix-it-first' and 'Up-front Buyer' remedies in EU and UK merger cases' (Competition Policy International, 9 October 2016) <www.competitionpolicyinternational.com/rising-tide-of-fix-it-first-and-up-front-buyer-remedies-in-eu-and-uk-merger-cases/> accessed 6 December 2020.

need for an upfront buyer clause is also partly determined by the nature of the divestiture. As mentioned, carve-out remedies generally present greater risk and therefore will more easily warrant an upfront buyer clause. Hence, an increase in the number of upfront buyer remedies may suggest a stricter stance by the Commission, but it could also suggest a more flexible stance of the Commission vis-à-vis carve-out remedies, or an increase in more complex remedies.

4.2.7.4.4 Different terminology in the United States

Somewhat confusingly, the terminology used in the United States relating to purchasers is different from the terms used in the EU.[237] In the United States, when a buyer of the divestiture is already identified in the remedies (or more accurately, the settlement between the authority and the merging parties which includes the remedies), this buyer is referred to as an 'upfront buyer'. This means that what the EU Commission calls a 'fix-it-first buyer' corresponds to an 'upfront buyer' in the United States. In turn, the term 'fix-it-first buyer' in the United States is used for the rather unusual case where the parties restructure their transaction, for instance by already entering into agreement to sell part of the merged entity, and then present a deal to the authorities which – they hope – will not require any remedies.

4.3 Removal of links with competitors

In some cases, the links between the merging parties and competitors contribute to the competition concerns raised by the merger. In those cases, severing those links may constitute a remedy or part of a remedy.

The most straightforward scenario is a case where one of the merging parties holds a non-controlling stake[238] in a competitor. The merging party may remove that link by divesting its shares.

A slightly different scenario occurs when one of the merging parties holds a stake in a joint venture that competes with the merging parties. In such a case, the parties can remove the link with their competitor by divesting their stake in the joint venture[239], resulting in an exit from the joint venture.

[237] For a helpful comparison, see Patricia Brink, Daniel Ducore, Johannes Lübking and Anne Newton McFadden, 'A Visitor's Guide to Navigating US/EU Merger Remedies' (2016) 12 *Competition Law International* 85, 88.
[238] The stake is in principle a non-controlling stake because, if the merging party exercised control over the competitor, it would not be considered a competitor but part of the same undertaking. In that case, a divestiture of the controlling stake would amount to a straightforward divestiture, not a remedy that entails the removal of links with competitors.
[239] See, e.g., M.6541 – *Glencore / Xstrata,* Commission decision of 22 November 2012 (Glencore divested its minority stake in zinc metal producer Nyrstar and terminated its exclusive off-take agreement with Nyrstar, enabling Nyrstar to compete effectively with Glencore); IV/M.942 – *Veba / Degussa,* Commission decision of 3 December 1997, para 55 and following.

Remarkably, among the remedies studied in the Commission's 2005 Merger Remedies Study, exiting a joint venture turned out to be the most effective remedy, with 10 of 13 remedies considered as effective.[240] The study suggested this may be because, unlike some remedies where a business or assets are divested, exiting a joint venture does not raise any scope or carve-out issues. In addition, the purchaser of the stake is often the joint venture partner, who knows the business well and can effectively compete with it immediately.[241]

Although a divestiture of the stake is the cleanest and most effective way to remove a link with a competitor, in some cases, the Commission has accepted that the parties remove their links with competitors in a more behavioural manner, i.e. they keep their minority stake but commit not to use any rights linked to it.[242] The Remedies Notice explains that this will only be possibly 'exceptionally', namely 'where it can be excluded, given the specific circumstances of the case, that the financial gains derived from a minority shareholding in a competitor would in themselves raises competition concerns'.[243]

Sometimes, competition concerns result from **agreements** with companies supplying the same products or providing the same service. In that case, a suitable remedy may be the termination of the respective agreement.[244]

The termination of an agreement with competitors is a common remedy in the shipping sector, where companies are often linked though liner consortia and conferences.[245] The termination of such an agreement by the merging party, i.e. the exit from the liner conference or consortium, has been accepted in several mergers between shipping companies.[246]

4.4 Access remedies

[240] Merger Remedies Study, 133-136 (of the remaining three remedies cases that involved the exit from a JV, one was considered partially effective, and in two cases the effectiveness was unclear).
[241] Merger Remedies Study, 135.
[242] Remedies Notice, para 59.
[243] Remedies Notice, para 59.
[244] Remedies Notice, para 60.
[245] Consortia are cooperation agreements between shipping companies for one or more trade routes for the provision of a joint service. The members jointly agree on the capacity that will be offered by the service, on its schedule and ports of call. Consortia below a 30% market share threshold benefit from a block exemption regulation. Conferences go further and also entail fixing of prices.
[246] E.g., M.7268 – *CSAV / HGV / Kühne Maritime / Hapag-Lloyd AG,* Commission decision of 11 September 2014. Merger between German shipping company Hapag Lloyd and rival Compañia Sud Americana de Vapores S.A. ('CSAV') approved, subject to CSAV withdrawing from consortia that were active on the two routes for which there were competition problems. CSAV was prohibited from re-entering into those consortia for a period of five years. CSAV also committed, for a period of two years, not to enter into a consortium with another competitor (Maersk), which was not a party to the merger but is one of the world's largest container liner shipping companies.

Access remedies require the parties to grant access to certain infrastructure or rights. The Remedies Notice mentions key infrastructure, key technology (including patents), know-how or other intellectual property rights, and essential inputs.[247] According to the Remedies Notice, the parties should normally grant such access to third parties on a non-discriminatory and transparent basis.[248] In many cases, the remedy also requires that the access be given on fair and reasonable terms, resulting in a commitment to grant access under FRAND (fair, reasonable and non-discriminatory) terms.[249]

Access remedies may prevent anticompetitive effects by facilitating market entry by competitors.[250] The Remedies Notice explains that they 'may be acceptable to the Commission in circumstances where it is sufficiently clear that there will be actual entry of new competitors that would eliminate any significant impediment to effective competition.'[251]

If an access remedy can be expected to lead to new competitors entering the market, this is a good start. However, the access remedy must still meet the overarching requirement for all non-divestiture remedies, namely that it must be equivalent in its effects to a divestiture.[252]

In *Croatian cement*, the parties proposed to address the transaction's anticompetitive effects on the market for grey cement by offering to transfer a five-year lease agreement giving access to a cement terminal. [253] This would allow a competitor to start selling cement through the terminal. The Commission rejected this remedy, concluding that it would not have had an effect comparable to the divestiture of a stand-alone business. Instead, the remedy offered a mere opportunity for a company to start its own cement operations from scratch. The merger was ultimately prohibited.

Access remedies are much less frequently used than divestiture remedies but they have nonetheless been accepted in a significant number of cases, particularly in the digital sector, the telecommunications sector, the media sector and in airline mergers, where so-called slot remedies are common.

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[247] Remedies Notice, para 62.
[248] Remedies Notice, para 62.
[249] See, e.g., M.3998 – *Axalto / Gemplus*, Commission decision of 19 May 2006 (FRAND access to a patent portfolio); M.7194 – *Liberty Global / Corelio / W&W / De Vijver Media* Commission decision of 24 February 2015 (FRAND access to TV channels); M.6800 – *PRSfM / GEMA / STIM / JV*, Commission decision of 16 June 2015 (commitment to provide copyright services and back-office services in relation to online music licensing on FRAND terms); M.7873 – *Worldline / Equens / Paysquare*, Commission decision of 16 February 2016 (commitment to grant a license to software on FRAND terms to address concerns in Germany, in addition to a divestiture to address concerns in Belgium); M.8665 – *Discovery / Scripps,* Commission decision of 6 February 2018 (FRAND access to TV channels); M.9064 – *Telia Company / Bonnier Broadcasting Holding*, Commission decision of 12 November 2019 (FRAND access to TV channels).
[250] Remedies Notice, para 63.
[251] Remedies Notice, para 63.
[252] Remedies Notice, para 61
[253] Case M.7878 – *HeidelbergCement / Schwenk / Cemex Hungary / Cemex Croatia*, Commission decision of 5 April 2017. An appeal against the decision was rejected. Case T-380/17 *HeidelbergCement v Commission* [2020] EU:T:2020:471.

4.4.1 Digital sector: interoperability remedies

Mergers in the digital sector have frequently raised conglomerate or vertical concerns. In several cases, the Commission had concerns that the merged entity would degrade the interoperability between its products and those of competitors. Assume company A acquires company B. The concern is that, after the merger, company A will make it more difficult for B's competitors to interact with A's products, while making sure that B's product work seamlessly with A's product. To remove such concerns, a particular type of access remedy – a so-called interoperability remedy – is sometimes used.

An early case imposing an interoperability remedy was *Intel / McAfee*[254], a merger between chip maker Intel and McAfee, known for its anti-virus software. In that case, a commitment ensured the interoperability between the software of McAfee's rivals and computers that incorporate Intel's chips.

In a more recent case, *Microsoft / LinkedIn*,[255] Microsoft committed to ensure the interoperability between social networks competing with LinkedIn and Microsoft's software such as Outlook. In *Qualcomm / NXP Semiconductors*,[256] the Commission was concerned that Qualcomm would degrade the interoperability between its baseband chipsets – found in many smartphones – and the chips of NXP's rivals. NXP was a leading supplier of chips for near field communications (NFC) and secure element (SE), which enable mobile payment applications on mobile phones. In that case, Qualcomm committed that NXP's competitors would benefit from the same level of interoperability between their chips and Qualcomm's baseband chipset as NXP. However, the commitment in question never became effective as Qualcomm ultimately abandoned its acquisition.

Google / Fitbit was another case in which interoperability remedies were a central part of the remedy. The case related to Google's acquisition of wearables manufacturer Fitbit. The Commission was concerned that Google would disadvantage Fitbit's competitors by degrading the interoperability between their devices and smartphones that run on Google's Android operating system. To remedy this, Google committed to continue to license the relevant Android APIs (application programming interfaces) to smartphone makers for free.[257] Another concern was that Google would restrict access to the health and fitness data provided by Fitbit. Some companies providing digital healthcare services had access to this data, with user consent, via a web-based interface. The Commission was worried that Google would restrict that access after

[254] M.5984, *Intel / McAfee*, Commission decision of 26 January 2011.
[255] M.8124 – *Microsoft / LinkedIn*, Commission decision of 6 December 2016.
[256] M.8306 – *Qualcomm / NXP*, Commission decision of 18 January 2018.
[257] M.9660 – *Google / Fitbit*, Commission decision of 17 December 2020, Commitments annexed to the decision, Section A.3 (Android APIs commitments).

the merger. This concern was removed by Google's commitment to maintain access to Fitbit's Web API.[258]

Other cases where an interoperability remedy was part of the remedy package include *Daimler / BMW / Car Sharing JV*[259]*, Broadcom / Brocade*[260] and *ARM / Giesecke & Devrient / Gemalto / JV*.[261]

Crafting interoperability commitments is not a particularly easy task. There are various degrees of interoperability and checking compliance may raise intricate technical questions.[262] In case of interoperability between software applications, the core of the commitment is usually an obligation to provide access to APIs (application programming interfaces), the set of technical specifications that allow different applications to communicate with each other.[263]

4.4.2 Telecoms sector: access to networks

In the telecoms sector, a series of mergers between mobile network operators was cleared with access remedies.[264] In these cases, the merged entity committed to give one or more companies access to its mobile network, so-called wholesale access. In turn, those companies could then use

[258] M.9660 – *Google / Fitbit*, Commission decision of 17 December 2020, Commitments annexed to the decision, Section A.2 (Android APIs commitments).

[259] M.8744 – *Daimler / BMW / Car Sharing JV*, Commission decision of 7 November 2018. The interoperability commitment in this case was twofold. First, the car sharing joint venture created by Daimler and BMW is required to allow other mobility apps to show the joint venture's cars. Second, the mobility app of the joint venture must allow other fleets of cars to be displayed on its app. On this case and its remedies, see Stephan Simon, Kathlynn Hinnekens, Nicolas Listl and Andrea Usai, *Daimler / BMW / Car Sharing JV*: New Mobility and the Platform Economy, (2019) 10(6) Journal of European Competition Law & Practice 361; Andrea Usai, 'The Commission's Merger Practice and New and E-Mobility: A Case Study: the Daimler / BMW / Car Sharing JV merger', in Nicolas Charbit and Sonia Ahmad (eds), *Richard Whish QC (Hon) Liber Amicorum – Taking Competition Law Outside the Box* (Institut de Droit de la Concurrence, 2020) 403.

[260] M.8314 – *Broadcom / Brocade*, Commission decision of 12 May 2017.

[261] M.6564 – *ARM / Giesecke & Devrient / Gemalto / JV*, Commission decision of 6 November 2012.

[262] In the field of antitrust, interoperability remedies imposed on Microsoft led to a number of disputes and ultimately a penalty for non-compliance was imposed on Microsoft. COMP/C 3/37.792, *Microsoft,* Commission Decision of 24 March 2004 relating to a proceeding under Article 82 of the EC Treaty, C(2004)900 final (decision imposing interoperability) and Commission decision of 12 July 2006 fixing the definitive amount of the periodic penalty payment imposed on Microsoft Corporation by Decision C(2005) 4420 final and amending that Decision as regards the amount of the periodic penalty payment (imposing penalties for non-compliance). For a discussion, see Nicholas Economides and Ioannis Lianos, 'A Critical Appraisal of Remedies in the EU Microsoft Cases' (2010) *Columbia Business Law Review* 347, 358.

[263] See, e.g., M.8744 – *Daimler / BMW / Car Sharing JV*, Commission decision of 7 November 2018, commitments, para 3 (commitment to provide API access to mobility apps, to allow them to display information about the joint venture's cars) and para 14 (commitment to provide APIs to allow other car sharing fleets to be listed on the joint venture's app); M.8124 - *Microsoft / LinkedIn*, Commission decision of 6 December 2016, commitments, para 5 (commitment to make available certain Microsoft Office APIs to competitors of LinkedIn).

[264] M.6497 – *Hutchison 3G Austria / Orange Austria,* Commission decision of 12 December 2012 (merger between mobile network operators in Austria); M.6992 – *Hutchison 3G UK / Telefónica Ireland,* Commission decision of 28 May 2014 (merger between mobile network operators in Ireland); M.7018 – *Telefónica Deutschland / E-Plus,* Commission decision of 2 July 2014 (merger between mobile network operators in Germany).

that network to offer services to retail customers, acting as mobile virtual network operators or MVNOs (virtual refers to the fact that these operators do not own a network but use the network of another operator, in this case the merged entity's network). The remedies in these cases been criticized as lacking in effectiveness.[265] In an early case, relating to the mobile market in Austria[266], the actual market entry of the MVNO that was supposed to enter was significantly delayed and only occurred two years after approval of the transaction. In later cases, relating to the Irish[267] and German[268] markets, the Commission tried to avoid such delayed entry by requiring a signed agreement with an MVNO 'upfront', that is before the closing of the main transaction. However, in spite of this additional safeguard, entry took significant time. In addition, in the Irish case, one of the two MVNOs that was supposed to enter the market, soon exited the market. The other MVNO has only gained a negligible market share.[269]

Later decisions seem to have tried to avoid the pitfalls of prior remedies. In a case relating to the Italian mobile market[270], the Commission imposed a more structural remedy, aimed at allowing a new mobile network operator (as opposed to an MVNO) to enter the market.[271] In another decision, relating to a mobile merger in the UK, the Commission rejected an access remedy aimed at fostering the entry of an MVNO.[272] In its decision, it noted that access remedies accepted in prior mobile merger cases had been 'extremely complex in terms of implementation and monitoring'.[273] The Commission decision was later annulled by the General Court, which found that the Commission had erred in finding a significant impediment to effective competition.[274] The court did not rule on the Commission's assessment of the proposed remedies.

Access remedies have also been used in mergers in the fixed telecommunication sector. In *Orange / Jazztel*, the access remedy was combined with a divestiture. The parties divested a fibre-to-the-home network covering some areas in Spain, while committing to provide the purchaser of the divestiture with access to an ADSL network in other areas.[275] In *Vodafone / Certain Liberty Global Assets*, Vodafone committed to give Telefónica access to its cable network in Germany.[276]

4.4.3 Media sector: access to TV content

[265] BEREC Report on Post-Merger Market Developments - Price Effects of Mobile Mergers in Austria, Ireland, and Germany' (BoR (18) 119, *BEREC* 15 June 2015).
[266] M.6497 – *Hutchison 3G Austria / Orange Austria,* Commission decision of 12 December 2012.
[267] M.6992 – *Hutchison 3G UK / Telefónica Ireland,* Commission decision of 28 May 2014.
[268] M.7018 – *Telefónica Deutschland / E-Plus,* Commission decision of 2 July 2014.
[269] Elena Zoido, '*Ex Post* Assessment of Merger Remedies: An Overview of the Recent Practice in the European Union' in Damien Gerard and Assimakis Komninos (eds), *Remedies in EU* Competition *Law: Substance, Process and Policy* (Wolters Kluwer 2020) 249.
[270] M.7758 – *Hutchison 3G Italy / WIND / JV,* Commission decision of 1 September 2016.
[271] M.7758 – *Hutchison 3G Italy / WIND / JV,* Commission decision of 1 September 2016, para 1696 and 1739.
[272] M.7612 – *Hutchison 3G UK / Telefonica UK*, Commission decision of 11 May 2016.
[273] M.7612 – *Hutchison 3G UK / Telefonica UK*, Commission decision of 11 May 2016, para 3051.
[274] Case T-399/16 *CK Telecoms UK v European Commission* [2015] EU:T:2020:217.
[275] M.7421 – *Orange / Jazztel*, Commission decision of 19 May 2015.
[276] M.8864 – *Vodafone / Certain Liberty Global Assets*, Commission decision of 18 July 2019.

In two recent vertical mergers in the media sector, access remedies were imposed to remove concerns of input foreclosure.[277] TV channels are an input for TV distributors, who bundle them and distribute them to their subscribers as a package. In two mergers between TV distributors and owners of popular TV channels, the European Commission was concerned that the merged entity would refuse to supply the TV channels or increase the price for the TV channels, thereby foreclosing TV distributors that compete with the merged entity's downstream TV distribution business. In both cases, these concerns were removed by commitments under which the owner of the TV channels committed to license these channels on fair, reasonable and non-discriminatory terms.[278] The goal was to ensure that TV distributors that compete with the merged entity in the downstream TV distribution market would continue to have access to the merged entity's TV channels.

A similar access remedy, requiring the merged entity to license TV channels 'on reasonable commercial terms', was imposed in a horizontal merger between two US-based media companies.[279] Both owned important TV channels in Poland, and the Commission was concerned that, after the merger, the merged entity would increase the licensing fees it charges to TV distributors.[280]

4.4.4 Airline mergers: slot remedies

In several mergers between competing airlines, the Commission found that they would result in horizontal anticompetitive effects. Most of these problematic mergers were cleared with remedies, although some were prohibited[281] or abandoned.[282] For at least a decade now, the

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[277] M.7194 – *Liberty Global / Corelio / W&W / De Vijver Media* Commission decision of 24 February 2015 (seven-year FRAND access commitment to prevent input foreclosure of TV channels in Belgium); M.9064 – *Telia – Company / Bonnier Broadcasting Holding*, Commission decision of 12 November 2019 (ten-year FRAND access commitment to prevent input foreclosure of TV channels in Sweden and Finland).

[278] In the Swedish case, the commitments have given rise to complaints from rivals that the merged entity is not providing FRAND access. See, Andrew Boyce, 'Telia draws Tele2 complaint to EU regulator over Bonnier deal commitments' (MLex, 28 January 2020); Stuart Thomson, 'EU monitor orders Telia to revise streaming auction after Tele2 complaint' (*Digital TV Europe*, 6 February 2020) <www.digitaltveurope.com/2020/02/06/eu-monitor-orders-telia-to-revise-streaming-auction-after-tele2-complaint/> accessed 4 December 2020. In the Belgian case, a subsequent change of control was reviewed by the Belgian authority, which imposed similar FRAND commitments. See, Simon Vande Walle, 'Sole Control: The Belgian Competition Authority Clears a Vertical Merger in the Audiovisual Sector, Subject to Conditions' [2019] Concurrences Competition Law Review 120.

[279] M.8665 – *Discovery / Scripps,* Commission decision of 6 February 2018 (seven year FRAND access commitment to prevent horizontal unilateral effects).

[280] M.8665 – *Discovery / Scripps,* Commission decision of 6 February 2018, para 75.

[281] M.4439 – *Ryanair / Aer Lingus (I)* Commission decision of 27 June 2007; M.5830 – *Aegean / Olympic I*, Commission decision of 16 January 2011; M.6663 – *Ryanair / Aer Lingus III*, Commission decision of 27 February 2013.

[282] M.9489 – *Air Canada / Transat* (abandoned on 2 April 2021); M.5434 – *Ryanair / Aer Lingus (II)* (withdrawn on 21 January 2009).

most commonly used remedy in these cases has been the slot remedy.[283] At the core of such a remedy is the commitment by the merged entity to make available slots, i.e. the permission to land and take off at a specific time at an airport. The idea is that, by releasing slots at busy airports, competitors will be able to schedule flights on the specific routes where the merger raises competition concerns, thereby preventing any loss of competition. As slots at busy airports are scarce, they constitute a barrier to entry, perhaps the main one.[284] The slot remedy is essentially aimed at lowering that entry barrier, to make entry or expansion by competitors more likely.

In line with the requirements for all access remedies,[285] slot release remedies will only be acceptable where it is sufficiently clear that actual entry by new competitors would eliminate any significant impediment to effective competition.[286]

Crafting effective remedies in airline mergers has been a challenge for competition authorities around the world[287] and this has been no different for the European Commission. Commitments have not always been effective, as the slots that were made available under the commitments have not always attracted competitors. In turn, this has led to changes in the approach and the commitments accepted by the Commission have evolved considerably over the years.[288] It is customary for slot release commitments to include various elements to make the slots more attractive for competitors. Grandfathering rights, for instance, can be considered as a 'reward' for airlines that have used the remedy's slots for some time on the route where competition concerns arose. They allow the competitor who has used the slots on those specific routes for a number of consecutive seasons to finally use the slots at its discretion, i.e. for any route it chooses. Slot commitments also frequently include a commitment to enter into a so-called special pro-rate agreement, which enables other airlines to have access to feed traffic at both ends of the route of concern. This helps to sustain competing non-stop services on that route.[289] Other additions include access to frequent flyer programmes and the possibility to combine fares (e.g. outgoing flight with the new entrant using the slots and return flight with the merged entity).

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[283] Cases were slot remedies were approved include, in reverse chronological order, M.9287 – *Connect Airways / Flybe*, Commission decision of 5 July 2019; M.7541 – *IAG / Aer Lingus*, Commission decision of 14 July 2015; M.7333 – *Alitalia / Etihad*, Commission decision of 14 November 2014; M.6607 – *US Airways / American Airlines*, Commission decision of 5 August 2013; M.6447 – *IAG / bmi*, Commission decision of 30 March 2012; M.5440 – Lufthansa / Austrian Airlines, Commission decision of 22 August 2009; M.5364 – *Iberia / Vueling / Clickair*, Commission decision of 9 January 2009; M.5335 – *Lufthansa / SN Airholding (Brussels Airlines)*, Commission decision of 22 June 2009; M.3940 – *Lufthansa / Eurowings*, Commission decision of 22 December 2005; M.3770 – *Lufthansa / Swiss*, Commission decision of 4 July 2005; M.3280 – *Air France / KLM*, Commission decision of 11 February 2004. Slot remedies have also been used in several antitrust cases,

[284] In this sense, Case T-177/04 *easyJet v Commission* [2006] EU:T:2006:187, para. 166 ('As the Commission has rightly demonstrated (…), the main barrier to entry in the air transport sector is the lack of available slots at the large airports.').

[285] Remedies Notice, para 63, second sentence.

[286] See, e.g., M.9287 – *Connect Airways / FlyBe*, Commission decision of 5 July 2019, para 620.

[287] Jonathan Faull and Ali Nikpay, *The EU Law of Competition* (3d edn, OUP 2014) 1807.

[288] Jonathan Faull and Ali Nikpay, *The EU Law of Competition* (3d edn, OUP 2014) 1807.

[289] See, e.g., M.7541 – *IAG / Aer Lingus*, Commission decision of 14 July 2015.

4.5 Other behavioural remedies

This category of remedies essentially comprises binding promises by the parties to abstain from certain commercial behaviour (e.g. bundling products). The Remedies Notice treats this type of remedies with the greatest scepticism. Such remedies will 'generally not eliminate the competition concerns resulting from horizontal overlaps'.[290] Hence, it would seem that the Commission can only contemplate them as a remedy for vertical or conglomerate anticompetitive effects. The Remedies Notice also highlights the difficulty in effectively monitoring this type of remedies, as 'it may be impossible for the Commission to verify whether or not the commitment is complied with and even other market participants, such as competitors, may not be able to establish at all or with the requisite degree of certainty whether the parties meet the conditions of the commitment in practice.'[291]

Although the Remedies Notice views this type of remedies with great scepticism it does not contain an outright ban on these remedies. Such a position would be difficult to reconcile with the Court of Justice's ruling in *Tetra Laval*. In that case, the Commission had rejected behavioural remedies 'as a matter of principle'.[292] The Commission's theory of harm was that, although the market structure would not have been immediately and directly affected by the merger, some abusive conduct (leveraging) would take place, which could in turn affect the market structure.[293] In that context, the Court of Justice held that the Commission was wrong in rejecting the behavioural remedies offered by Tetra Laval outright and should have treated them as 'a factor which the Commission had to take into account when assessing the likelihood that the merged entity would act in such a way as to make it possible to create a dominant position on one of the relevant markets'.[294]

[290] Remedies Notice, para 69.
[291] Remedies Notice, para 69.
[292] Case C-12/03 P- *Commission v Tetra Laval* [2005] EU:C:2005:87, para 88.
[293] Case C-12/03 P- *Commission v Tetra Laval* [2005] EU:C:2005:87, para 83.
[294] Case C-12/03 P *Commission v Tetra Laval* [2005] EU:C:2005:87, para 85; see also para. 89: 'the Commission ought to have taken a count of the commitments submitted by Tetra with regard to that entity's future conduct'. On the precise implications of this judgment, see Götz Drauz, 'Conglomerate and vertical mergers in the light of the Tetra Judgement' [2015] Competition Policy Newsletter, 35-39.

Purely behavioural remedies are rare but have sometimes been accepted, either as part of a package with other commitments, or on their own. Examples include *ASL / Arianespace*[295], *PRSfM / GEMA / STIM / JV*[296] and *Chiquita / Fyffes*.[297]

5 Implementing the remedy

5.1 Interpretation of the remedy

Implementing a remedy often requires some degree of interpretation of the commitments text. When interpreting the commitments, the normal rules regarding the interpretation of EU acts apply. This means commitments must be interpreted based on their text (textual interpretation), their context (systematic interpretation) and objectives (teleological interpretation).[298]

The Commission's model commitments text contains a provision designed to assist the Commission and the parties in interpreting the commitments text. It specifies three sources that should guide the Commission and the parties in interpreting the text of the remedy.

First and foremost, the commitments have to be interpreted in light of the Commission's clearance decision. That decision may indeed shed light on the precise meaning of the terms and phrases used in the commitments. In addition, and perhaps most importantly, the decision will normally shed light on the purpose of the commitments. This, in turn, allows for a purpose-driven or teleological interpretation of the commitments.

The Commission tends to put great weight on the purpose of the commitments in interpreting the commitments.[299] Sometimes a literal interpretation of the commitments' text would make

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[295] M.7724 – *ASL / Arianespace*, Commission decision of 20 July 2016 (commitment to implement firewall measures and put in place measures restricting the mobility of employees between companies). But see, European Commission, 'Remedies in Merger Cases', Submission to OECD Working Party No. 3 on Co-operation and Enforcement, 28 June 2011, DAF/COMP/WP3/WD(2011)59, 6 ('We have also found that firewalls are virtually impossible to monitor').

[296] M.6800 – *PRSfM / GEMA / STIM / JV*, Commission decision of 16 June 2015. The concentration in that case was a joint venture set up by three collecting societies to license music for online use. The Commission accepted a commitment by one of the parties, with a particularly valuable collection of copyrights, not to bundle the granting of a mandate to license those rights to other services. The commitment also included a commitment to provide services on FRAND terms.

[297] M.7220 – *Chiquita / Fyffes*, Commission decision of 3 October 2014 (commitment to release the shipping company Maersk from an exclusivity clause and to refrain from agreeing similar exclusivity provisions with shipping companies or incentivising shipping companies to refuse to provide services for other banana companies).

[298] See, on the methods of interpretation of EU law: Koen Lenaerts and José A. Guttiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice', (2014) 20 *Columbia Journal of European Law* 3.

[299] See also, Remedies Notice, para 102: 'In assessing any proposed purchaser, the commission will interpret the purchase requirements in the light of the purpose of the commitments, to immediately maintain effective competition in the market where competition concerns had been found, and of the market circumstances as set out in the decision'.

the commitments ineffective, and such an interpretation will understandably be resisted by the Commission. The weight attached to a teleological interpretation appears justified in light of the great asymmetry of information between the Commission and the parties. If a literal interpretation were always to prevail, it would be very easy for the parties to craft the text of their commitments in a way that ultimately makes them ineffective.

The parties may of course resist a teleological interpretation, arguing that they have no control over how the Commission describes the purpose of the commitments in the body of the decision[300] and should only be bound by the text they have submitted as part of the commitments. However, such argument seems to clash with the fact that the parties have accepted, in the commitments, that they will be interpreted in light of the Commission's decision.

A purpose-based or teleological interpretation also accords with a method of interpretation frequently used in EU law generally, as the EU courts' interpretation is often inspired by the need to give *effet utile*.[301] In the same way, commitments should be interpreted in a way that will achieve their purpose. In line with this, the General Court, in a case relating to the interpretation of the purchaser criteria in the commitments, interpreted these criteria in light of the purpose of the commitments.[302]

The model commitments also provide that the commitments have to be interpreted in light of 'the general framework of European Union law, in particular in light of the Merger Regulation' and in light of the Commission Remedies Notice.

5.2 Appointment of a monitoring trustee

The Implementing Regulation provides that commitments may require the parties to appoint a monitoring trustee to assist the Commission in overseeing the compliance and implementation of their commitments.[303] In practice, the Commission virtually always requires the appointment of a monitoring trustee, as his or her assistance is considered essential to 'guarantee the effectiveness of commitments.'[304] Very exceptionally a commitment may be so simple that it is not necessary for a monitoring trustee to be appointed.[305]

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[300] Perhaps to pre-empt that argument, in some cases, the commitments text itself also specifies the purpose of the commitments.
[301] Koen Lenaerts and José A. Guttiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice', (2014) 20 *Columbia Journal of European Law* 3, 31.
[302] Case T-342/00 *Petrolessence and SG2R v Commission* [2003] EU:T:2003:97, para 118; see also paras 61-66; paras 104-121. This point is now explicitly included in the Remedies Notice, para 102.
[303] Implementing Regulation, art 20a(1).
[304] Remedies Notice, para 117.
[305] See, e.g., M.8633 – *Lufthansa / Certain Air Berlin Assets,* Commission decision of 21 December 2017, in which Lufthansa committed to amend its share purchase agreement, within 10 days of the Commission decision, so as to acquire fewer slots. In these commitments, no monitoring trustee was appointed.

The monitoring trustee functions as the Commission's 'eyes and ears' and, in case of divestiture commitments, also serves as the 'guardian that the business [that will be divested] is managed and kept properly on a stand-alone basis in the interim period'.[306] Its main tasks are set out in the Remedies Notice[307] and in the model commitments text. These tasks are further specified in the trustee mandate that is entered into between the merging parties and the monitoring trustee, and for which the Commission has provided a model.[308]

The monitoring trustee is normally appointed by the merging parties, after its identity has been approved by the Commission, although in theory the Commission may also appoint the trustee.[309] The procedure for appointment is explained in the Remedies Notice [310] and set out in the commitments. [311] The Commission has discretion to approve or reject one or more of the proposed candidates.[312]

It is of the essence that the monitoring trustee starts his work immediately after the Commission's conditional clearance decision.[313] The model commitments text provides that the notifying party shall propose one or more trustees 'no later than two weeks' after the decision is rendered[314] but, in practice, a trustee is often proposed and approved by the Commission more quickly. As the merger review process draws to a close, parties may already prepare the implementation of a – at that point still hypothetical - conditional clearance decision and discuss possible trustees with the Commission's case team.[315]

In *Bayer / Monsanto*, an exceptionally complex case involving a fix-it-first remedy, a trustee-like party (called 'independent adviser')[316] was even appointed during the merger review process, i.e. before the Commission issued its decision.[317] The parties had appointed the 'independent adviser' after approval by the Commission and his or her role was to provide advice and assistance to the Commission regarding the suitability of the proposed purchaser and the adequacy of the commitments to restore effective competition. Normally, the proposed purchaser is assessed

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306 Remedies Notice, para 118.
307 Remedies Notice, para 119.
308 European Commission Model Text for Trustee Mandate, 5 December 2013 (Model Text for Trustee Mandate). This is part of 'Best Practice Guidelines: The Commission's Model Texts for Divestiture Commitments and the Trustee Mandate under the EC Merger Regulation' (*European Commission*, 5 December 2013).
309 Implementing regulation, art 20a(1): 'The trustee may be appointed by the parties, after the Commission has approved its identity, or by the Commission.'
310 Remedies Notice, para 123-126.
311 Model Text for Divestiture Commitments, para 19-26.
312 Remedies Notice, para 124; Model Text for Divestiture Commitments, para 24.
313 Remedies Notice, para 123.
314 Model Text for Divestiture Commitments, para 23.
315 See, e.g., M.8444, *ArcelorMittal / Ilva*, Commission decision of 17 April 2019 (purchaser approval decision), para. 10. The decision states that ArcelorMittal proposed a monitoring trustee on 4 May 2018. This was three days prior to the Commission's conditional clearance decision of 7 May 2018. The Commission approved the trustee on 8 May 2018.
316 Although not a trustee, the independent adviser was subject to substantially similar safeguards as a monitoring trustee (independence, conflicts of interest, remuneration, etc.).
317 M.8084 – *Bayer / Monsanto*, Commission decision of 21 March 2018, para. 3086-3089

after the Commission's conditional clearance decision, with the assistance of a trustee, but in case of a fix-it-first remedy, the purchaser is proposed during the merger review process, when no trustee has been appointed yet. By appointing an independent adviser, the parties expedited the Commission's assessment, as the independent adviser could assist the Commission in assessing the purchaser, in the same way as the trustee does in a regular post-decision purchaser assessment.

The trustee must be independent of the parties, possess the necessary qualification to carry out its mandate and shall not be, or become, exposed to a conflict of interests.[318]

The trustee's fees are paid by the merging parties.[319] The fee structure, i.e. the way the fees will be calculated, has to be specified in the trustee mandate.[320] Although it is up to the parties and the trustee to agree on the fees, the Commission will review the fee structure, together with the other provisions in the trustee mandate.[321] The remuneration structure must be such as to not impede the trustee's independence and effectiveness in fulfilling the mandate.[322] A common fee structure is an hourly fee, which means the total fee will depend on the number of hours worked. If a trustee mandate were to cap the trustee's fees at a certain level, this would jeopardize the trustee's effectiveness. In such a case, the trustee could be expected to work less zealously once the fee cap comes near or has been reached, as any additional work would no longer generate any fees.

5.3 Approval of a suitable purchaser

The procedure to approve a purchaser is described in paragraphs 101 to 106 of the Remedies Notice. The corresponding paragraph in the Commission's model commitments text is paragraph 18.

5.3.1 The parties' search for and negotiations with a purchaser

The merging parties must identify a suitable purchaser and negotiate a divestiture agreement with that purchaser. In this phase, the parties are in the driving seat, but the Commission and the trustee follow the process closely. The parties therefore have an obligation to keep the Commission and monitoring trustee informed of all steps in the process. Among others, they have to inform the Commission and trustee of all potential purchasers that have expressed an interest in acquiring the divestment business, and forward offers made by potential purchasers.[323] They also have to demonstrate to the trustee and Commission that potential purchasers are receiving sufficient and correct information relating to the divestment business,

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[318] Remedies Notice, para 124.
[319] Implementing regulation, art 20a(1); Remedies Notice, para 126.
[320] Model Text for Trustee Mandate, para 30.
[321] Remedies Notice, para 124 and para 126; Model Text for Divestiture Commitments, para 24.
[322] Remedies Notice, para 126.
[323] Model Text for Divestiture Commitments, para 15.

for instance by sharing the information memorandum that is sent to prospective buyers to make them interested in the divestment business.[324]

It is the parties' prerogative to select a purchaser and propose it to the Commission. However, it is the Commission's obligation to assess the suitability of that purchaser and, if it does not meet the purchaser criteria, to reject it. This gives rise to a subtle dynamic between the parties and the Commission when it comes to selecting a purchaser. Parties will often seek informal guidance from the Commission as to whether a particular purchaser would meet the purchaser criteria. This avoids that they ultimately reach agreement with and propose a purchaser that is rejected by the Commission. The latter scenario is usually disfavoured by the parties as it will often lead to a situation where not enough time is left for the parties to find a new purchaser in the first divestiture period (a period of a few months[325] during which the parties have responsibility for finding a suitable purchaser). Once the first divestiture period has ended, the so-called trustee divestiture period starts. During this period, a divestiture trustee will be in charge of the divestiture process and sell the divestment business at no minimum price.[326]

The parties are obliged to provide potential purchasers with the necessary information for them to conduct a due diligence, as well as access to the personnel.[327]

5.3.2 Submission of the purchaser proposal

When the parties have reached a final agreement with a purchaser, they have to submit a reasoned and documented proposal to the Commission and the monitoring trustee.[328] The model commitments text specifies that this has to happen within one week of the agreement.[329]

The parties also have to submit all ancillary agreements.[330] Any agreement entered into between the parties and the proposed purchaser, including transitory agreements, will have to be submitted.[331] The idea is to provide the Commission with an accurate and complete picture of what has been agreed with the proposed purchaser of the divestiture, in all its aspects.

The parties normally submit a fully documented and reasoned memorandum in support of their proposed candidate to expedite the assessment of the proposed purchaser by the Commission and the trustee. The reasoned memorandum will explain why the proposed purchaser meets the

[324] Model Text for Divestiture Commitments, para 28(iv) (listing the review of the information memorandum as one of the tasks of the monitoring trustee).
[325] On the duration of the first divestiture period, see Section 4.2.7.1 (Standard arrangement).
[326] See, among others, Remedies Notice, para 97; Model Text for Divestiture Commitments, para 20 (appointment of divestiture trustee) and para 30 (duty of divestiture trustee is to sell at no minimum price).
[327] Model Text for Divestiture Commitments, para 14.
[328] Remedies Notice, para 101.
[329] Model Text for Divestiture Commitments, para 18.
[330] Model Text for Divestiture Commitments, para 18.
[331] See, Remedies Notice, para 105 (stating that the Commission also needs to approve all the other agreements).

purchaser criteria and why the agreement reached is consistent with the text of the commitments, including their objective to bring about a lasting structural change in the market.

The monitoring trustee will then issue a reasoned opinion on the proposed purchaser and the manner in which the divestment business is sold.[332] The opinion must address the suitability and independence of the proposed purchaser and the viability of the divestment business after the sale, as well as whether the business is sold in a manner consistent with the commitments.[333] The model text provides that this opinion should be issued within one week after receipt of the documented proposal.[334] This is a challenging timeline, given that an analysis of the suitability of the proposed purchaser will require an analysis of the purchaser's financial situation, business strategy, independence, and the ever increasing number of documents that are generated by M&A deals.[335]

One of the lessons from the 2005 Merger Remedies Study was that, in order to properly assess the suitability of the purchaser, the trustee should be in contact with the purchaser.[336]

5.3.3 Assessment of the purchaser proposal

5.3.3.1 Does the purchaser meet the purchaser requirements?

To be approved, the purchaser must satisfy the purchaser criteria set out in the commitments. In what follows, we discuss the three standard purchaser criteria.

5.3.3.1.1 The purchaser must be independent from and unconnected to the parties

This is an essential requirement without which it is unlikely or less likely that the proposed purchaser will have the incentive and ability to develop the divested business actively in competition with the parties. Subsisting ownership interests, be they legal or equitable, actual or contingent, in the divested business or the proposed purchaser are *ipso facto* incompatible with this requirement, because of the structural links, potential for contacts and coordination of competitive behaviour that they would create.

However, not all links between the parties and the proposed purchaser will compromise the purchaser's independence. What may constitute a compromising link will have to be assessed in the light of the characteristics of the industry or sector in question. In certain industries and

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[332] Remedies Notice, para 119 (third hyphen).
[333] Model Text for Divestiture Commitments, para 28(viii).
[334] Model Text for Divestiture Commitments, para 28(viii).
[335] It has been suggested that this one week period is overly ambitious. See Thomas Hoehn, 'Challenges in Designing and Implementing Remedies in Innovation Intensive Industries and the Digital Economy' in Damien Gerard and Assimakis Komninos (eds), *Remedies in EU Competition Law: Substance, Process and Policy* (Wolters Kluwer 2020) 121, at 130.
[336] Merger Remedies Study, 97, Part II.H.3.c) at para 35.

sectors, certain commercial relationships between competitors are common business practice. The types of links with which the Commission will be most concerned are those which render the divested business reliant on the parties for essential inputs or distribution channels without which it cannot compete effectively with the parties.

Nevertheless, this requirement is applied pragmatically. Thus, commercial links which are designed to ensure that the divested business receives start-up support from the parties for an interim period in order to give the purchaser time to seek alternative sources of inputs or outlets are acceptable. In some cases, such arrangements may even have to continue on a more long-term or permanent basis. This is particularly the case, where the divested business is too small to sustain its own sources of inputs or outlets independently of the parties, which may arise where the divested business operates in a small Member State or a local market within a Member State. In such cases, the Commission will seek to ensure, insofar as possible, that the terms of the relationship necessarily created between the parties and the purchaser are not such as to render the purchaser so overly reliant on the parties, that the purchaser's ability and incentives to compete actively with the parties are hampered.

A more difficult issue is whether and when common ownership may affect the independence of a purchaser. Institutional investors (banks, pension funds, investment funds such Blackrock, Vanguard, etc.) may own shares in both the merged entity and the purchaser of the divestiture. Usually, they hold small minority shareholdings of 5% or less, but recent studies have raised concerns that such common shareholdings may blunt the competition between firms.[337]

5.3.3.1.2 The purchaser must have the financial resources required to maintain and develop the divested business viably in active competition with the parties and others

The purchaser must have access to sufficient financial resources to operate and develop the divested business viably. According to the Remedies' Notice, this has certain implications for the way the acquisition is financed by the proposed purchaser. More specifically, the Commission will normally not accept any financing of the divestiture by the seller and, in particular, any arrangement under which the seller gets a share in the profits of the divested business in the future.[338] It is indeed easy to imagine that a share in the profits would blunt the incentive for the seller and the purchaser of the divestiture to compete, which is precisely the opposite of what the commitments try to achieve.

By the same token, it would seem problematic for the seller and the purchaser to agree on a purchase price for the divestiture that varies depending on the performance of the divested

[337] 'Common Ownership by Institutional Investors and its Impact on Competition, Background Note by the Secretariat' (DAF/COMP(2017)10, OECD Directorate for Financial and Enterprise Affairs Competition Committee, 5-6 December 2017); Thomas Hoehn, 'Challenges in Designing and Implementing Remedies in Innovation Intensive Industries and the Digital Economy' in Damien Gerard and Assimakis Komninos (eds), *Remedies in EU Competition Law: Substance, Process and Policy* (Wolters Kluwer 2020) 121, at 132-134.
[338] Remedies Notice, para 103.

business. Although such variable component is common in regular M&A transactions, it may blunt the incentives of the seller and purchaser to compete.

ArcelorMittal / Ilva is an example of a case where the Commission objected to a specific financing arrangement.[339] The seller of the divestment business (ArcelorMittal) and the purchaser (Liberty House Group) had initially agreed on a financing structure that relied primarily on borrowed money. In addition, part of this money would be provided by the seller itself through so-called vendor loan notes.[340] The purchase price had also been made partly contingent on the performance of the divestiture business.[341] The Commission rejected this financing arrangement. The parties subsequently modified their agreement, by removing the seller financing and the performance-related purchase price, paving the way for a purchaser approval decision.[342]

5.3.3.1.3 The purchaser must have the proven relevant expertise and have the incentive and ability to maintain and develop the divested business viably in active competition with the parties and others

The purchaser's ability to compete may be evidenced by its past track record in the relevant industry or sector. This track record may have been acquired in the same or another geographic market. Where the experience of the purchaser is acquired in another geographic market, there is always the risk that it may not be able to apply it to the business environment prevailing in another geographic market. However, when assessing the proposed purchaser, this risk will have to be balanced against the risk that a potential purchaser from the same geographic market may either not be available or pose *prima facie* competition concerns.

Where the purchaser is a completely new entrant in the industry or sector concerned, it will have to demonstrate to the Commission that it is able to procure the relevant expertise from another source. In case of a financial investor, the investor could meet the requirement of 'proven expertise' by financing a management buy-out.[343]

In *Petrolessence and SG2R v Commission*, the General Court found that the Commission, when assessing whether a candidate is capable of maintaining or developing effective competition on the market in question, 'could rightly, and even should, take into account the fact that an

[339] M.8444, *ArcelorMittal / Ilva*, Commission decision of 17 April 2019 (purchaser approval decision).
[340] M.8444, *ArcelorMittal / Ilva*, Commission decision of 17 April 2019 (purchaser approval decision), para. 51(a).
[341] M.8444, *ArcelorMittal / Ilva*, Commission decision of 17 April 2019 (purchaser approval decision), para. 52(a).
[342] M.8444, *ArcelorMittal / Ilva*, Commission decision of 17 April 2019 (purchaser approval decision), para. 59(a) (on the vendor loan notes) and para. 69 (on the performance-related part of the purchase price). See also 'Mergers: Commission approves Liberty House Group purchase of ArcelorMittal's divestment businesses' (*European Commission Press Release*, 17 April 2019).
[343] Explanatory note accompanying 'Best Practice Guidelines: The Commission's Model Texts for Divestiture Commitments and the Trustee Mandate under the EC Merger Regulation' (*European Commission*, 5 December 2013), para 27.

applicant was a newcomer to the market for the retail sale of fuels, in spite of the fact that activity in the petroleum sector is not expressly required by the commitments.'[344]

The proposed purchaser's incentives are closely linked to the other purchaser criteria. A prospective purchaser that is independent of the parties, with ample financial resources and a proven track record in the same industry or sector as the divested business, may be expected to have the requisite incentives to maintain and develop the divested business.

To establish this, the Commission may assess, together with the monitoring trustee, the proposed purchaser's business plan.[345] Among others, the Commission will 'analyse whether the underlying assumptions of the purchaser appear plausible according to the market circumstances'.[346] Business plans are never binding nor irreversible, and may turn out to be misguided with the benefit of hindsight. However, at the time of the divestment, they provide the best available indication of the proposed purchaser's intentions vis-à-vis the divested business.

5.3.3.1.4 The acquisition by the purchaser should not create *prima facie* competition concerns nor give rise to a risk that the implementation of the commitments will be delayed

5.3.3.1.4.1 *Prima facie* competition concerns

The purpose of this criterion is to ensure that when accepting remedies to address the Commission's competition concerns in the case at hand, the Commission does not inadvertently create some other competition problem through the divestiture. Such other competition problems may not be apparent when the remedy was accepted by the Commission, since the identity of the purchaser is normally unknown at that stage.

The divestiture arising from the remedy may well be subject to review under EU or national merger control. Indeed, the divestiture deal may be a very large transaction in its own right. This has been the case in several divestitures generated by exceptionally large global deals such as AB InBev / SABMiller,[347] Holcim / Lafarge[348], Dow/ DuPont[349] and Bayer/Monsanto.[350]

The requirement that the acquisition by the purchaser does not create *prima facie* competition concerns means that, based on the information available to the Commission and without the

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[344] Case T-342/00 *Petrolessence and SG2R v Commission* [2003] EU:T:2003:97, para 65.
[345] Remedies Notice, para 102.
[346] Remedies Notice, para 102.
[347] M.7881 – *AB InBev / SABMiller,* Commission decision of 24 May 2016.
[348] M.7252 – *Holcim / Lafarge*, Commission decision of 15 December 2014. A commentary on the case mentions that the remedy was 'a structural remedy of an unprecedented size'. See Daniele Calisti and Jean-Christophe Mauger, 'Holcim / Lafarge: paving the way to first phase clearance' [2015] *Competition merger brief*, issue 1/2015, 20, at 20.
[349] M.7932 – *Dow / DuPont*, Commission decision of 27 March 2017.
[350] M.8084 – *Bayer / Monsanto*, Commission decision of 21 March 2018.

need to conduct a market investigation, it can already be safely concluded that the acquisition will not raise competition concerns. In other words, it is quite obvious that there are no competition concerns. Even so, the Commission's assessment of possible competition concerns in the context of a purchaser approval decision will be 'without prejudice' to the merger control jurisdiction of national authorities, meaning national authorities will conduct their own assessment, without being bound by the Commission's *prima facie* assessment in the context of its purchaser approval decision.

The Remedies Notice states that the Commission will normally reject the proposed purchaser '[w]here it can be foreseen, in the light of the information available to [it], that difficulties in obtaining merger control clearance or other approval may unduly delay the timely implementation of the commitment'.[351]

It is extremely rare for a divestiture to raise competition problems, as it is far from ideal if a transaction that was meant to remedy a competition concern in turn needs to be remedied. However, in the recent past, two exceptionally large deals in the agrochemical sectors entailed exceptionally large divestitures which, in turn, required remedies. These two cases were *Dow / DuPont*[352] and *Bayer / Monsanto*.[353] In these cases, the Commission approved the purchaser only after the divestiture transaction had been cleared (albeit with remedies), and in both cases, the parties were prevented from closing the main transaction before the Commission had approved the purchaser.[354]

5.3.3.1.4.2 Other regulatory concerns

Apart from competition concerns, divestiture deals may also raise other regulatory concerns and be subject to various approvals. An increasing number of deals are subject to reviews based on national security. The national security screening process in the United States, conducted by the Committee on Foreign Investment (CFIUS), is well known but an increasing number of EU Member States also have screening mechanisms.[355] Such screening may make a divestiture to a specific purchaser deal impossible or unduly delay the implementation of the divestiture. In such a case, the proposed purchaser would not meet the requirement that the purchaser should not give rise to a risk that the implementation of the commitments will be delayed.[356]

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351 Remedies Notice, para 104.

352 M.7932 – *Dow / DuPont*, Commission decision of 27 March 2017. The divestiture deal cleared with remedies was M.8453 – *FMC / DuPont Divestment Business*, Commission decision of 17 July 2017.

353 M.8084 – *Bayer / Monsanto*, Commission decision of 21 March 2018. The divestiture deal cleared with remedies was M. 8851 - *BASF / Bayer Divestment Business*, Commission decision of 30 April 2018.

354 M.8084 – *Bayer / Monsanto*, Commission decision of 21 March 2018, commitments annexed to the decision, Section B, para. 3; M.7932 – *Dow / DuPont*, Commission decision of 27 March 2017, paras 4044, 4061.

355 On 11 October 2020, a regulation which created a cooperation mechanism between Member States and the Commission for screening foreign direct investments became applicable. Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union [2019] OJ L 79I/1.

356 Cf. Remedies Notice, para 104.

In *NXP/ Freescale*, the notifying party had identified Jianguang Asset Management Co., a subsidiary of a Chinese State-owned enterprise, as the purchaser of the divestment business.[357] However, the acquisition of the divestment business by the Chinese purchaser was subject to CFIUS approval in the U.S. Given the uncertainty surrounding the outcome of that process and since possible remedial measures imposed by CFIUS (e.g. a ban on selling in the United States) could affect the viability of the divested business, the Commission rejected a fix-it-first remedy, in which the merging parties would have committed to divest to Jianguang.[358] Instead, an upfront buyer clause was included in the commitments, meaning the merging parties had to identify a suitable buyer before they were allowed to close their deal. Ultimately, the Chinese purchaser obtained CFIUS approval quickly after the Commission's conditional clearance decision and, with the CFIUS uncertainty lifted, was subsequently approved as purchaser.[359]

5.3.3.2 The divestiture agreement: is the business being sold in a manner consistent with the commitments?

The parties or the divestiture trustee not only need to demonstrate that the proposed purchaser meets the purchaser requirements but also that the business is sold in a manner consistent with the commitments.[360]

This requirement entails that the monitoring trustee and the Commission review the substance and impact of the bargain struck between the parties and their proposed purchaser, to ensure that the transfer of the divested business will allow the purchaser to compete effectively. The necessity of this review is confirmed by the findings of DG COMP's Merger Remedies Study. The study found that sellers had engaged in strategic behaviour to reduce the competitiveness of the purchaser.[361] From their side, purchasers may be prepared to trade off some of their future ability to run the divested business in active competition with the parties, in return for a reduced price.[362]

Even if the purchaser is not unsuitable *per se*, the terms of the sales agreement may render it unsuitable or weaken the conditions of effective competition post-divestment by creating on-going links between the purchaser and the parties, or by rendering one side (or indeed both sides) reliant on the other, or by obliging them to disclose certain commercially sensitive information to one another. Therefore, the Commission must examine the sales agreement for anything that

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357 M.7585 – *NXP Semiconductors / Freescale Semiconductor*, Commission decision of 17 September 2015, para 233.

358 M.7585 – *NXP Semiconductors / Freescale Semiconductor*, Commission decision of 17 September 2015, para. 238.

359 Salvatore De Vita, Luca Manigrassi, Andreea Staicu and Teodora Vateva, 'NXP / Freescale: Global remedies in a 3 to 3 semiconductor merger', [2016] *Competition merger brief*, issue 1/2016, 15, at 17.

360 Remedies Notice, para 105; Model Text for Divestiture Commitments, para 18.

361 European Commission, DG COMP, 'Merger Remedies Study' (October 2005), Part II.E.2, 70-72.

362 Merger Remedies Study, Part II.I.4, 103-104, paras 20-21 (discussing cases where the purchaser had obtained the divested business for free or at a negative price).

may be inconsistent either with the purchaser requirements or with the objective of a divestiture to bring about a lasting structural change in the market.

5.3.4 The Commission's decision on the suitability of the purchaser

The Commission will communicate its view as to the suitability of the proposed purchase to the parties.[363] This is particularly relevant in case the Commission intends to reject the proposed purchaser, as it allows the merging parties to be heard and possibly to withdraw their proposal.

In the vast majority of cases, the Commission approves the purchaser proposed by the Commission. This is mostly due to the fact that, throughout the purchaser selection process, the parties communicate closely with the Commission and the trustee about possible purchasers and their likely suitability. Parties therefore have some insight into which purchasers will likely be approved.

If the Commission concludes that the proposed purchaser does not meet the purchaser requirements, it will adopt a decision rejecting the proposed purchaser.[364] By contrast, if the Commission considers the purchaser suitable but identifies a problem in the transaction documents, the parties will normally be given a chance to resolve this problem.[365]

Purchaser approval decisions are notified to the parties. The trustee and Member States also receive a copy.

In recent years, the Commission has made the purchaser approval decisions publicly available for the sake of transparency.[366] They also constitute a separate category in the case search tool on DG COMP's website, allowing quick retrieval of all published purchaser approval decisions.

5.4 Duration of remedies

5.4.1 Divestiture remedies

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[363] Remedies Notice, para 106.

[364] Remedies Notice, para 106 (mentioning, as example, M.1628 – *TotalFina / Elf*, Commission decision of 13 September 2000, rejecting the proposed purchaser). Another example in the public domain is M.5355 – *BASF / Ciba*, Commission decision of 18 December 2009, rejecting the proposed purchaser. See Case T-105/10, *BASF v Commission* [2010] EU:T:2010:490 (this action for annulment initiated by BASF against the rejection decision was discontinued by BASF so there is no judgment in this case).

[365] Remedies Notice, para 106.

[366] For a critical view on this, see Deirdre Carroll, 'Purchaser Approval Decisions: A Practitioner's Guide to 'Phase III' Merger Control in Europe' [2017] *The Antitrust Report* 13, 19.

Divestiture remedies are implemented in a short period of time, usually a matter of months.[367] The parties will have implemented the remedies once the divestment business has been sold to a suitable purchaser, approved by the Commission, and the divestiture deal has closed, all within the short periods fixed by the remedies.[368] Once the parties have implemented the remedy in this way, the monitoring trustee can be discharged, although the Commission may at any time require the reappointment of the monitoring trustee if it subsequently appears that the remedies might not have been fully and properly implemented.[369] In addition, the parties remain bound by several long-tail commitments that typically accompany divestiture remedies, such as a prohibition to reacquire the divested business during a ten-year period,[370] and a commitment not to solicit the key personnel that was transferred with the divested business.[371]

5.4.2 Access and behavioural commitments

Access commitments and other behavioural commitments often remain in place for a long period of time. The Commission has accepted commitments with a duration of several years (e.g. eight years[372] or ten years[373]).

Up until the 2000s, commitments of unlimited duration were not uncommon.[374] However, in recent years, remedies have always been put in place for a limited duration. It is no easy task to set the right duration for access and behavioural commitments. In some cases, the duration can be based on a prediction as to when a specific technology at the core of the remedy will have lost its relevance for competition. For instance, a remedy requiring a TV broadcaster to give FRAND access to linear TV channels (TV channels which require viewers to sit in front of their TVs at a specific time to watch a specific program), may be put in place for the period during which linear TV – as opposed to on-demand or non-linear viewing - is expected to remain relevant.

In some recent cases, the remedies were put in place for a fixed time, but with the possibility of an extension. In *Daimler / BMW / Car Sharing JV*, [375] a case where the parties committed to

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[367] As explained in section 4.2.7.1 (Standard arrangement), the parties usually have a fixed period during which to find a suitable buyer (around six months, suggests the Remedies Notice), followed by a short period in which they have to close the divestiture deal (typically three months).

[368] Model Text for Divestiture Commitments, para. 4.

[369] Model Text for Divestiture Commitments, para. 42.

[370] Model Text for Divestiture Commitments, para. 5.

[371] Model Text for Divestiture Commitments, para. 13.

[372]E.g., M.7000 – *Liberty Global / Ziggo*, Commission decision of 30 May 2018, para. 57 of the commitments (commitments not to restrict TV broadcasters' ability to offer their content over-the-top (OTT), i.e. via the internet, and to ensure sufficient interconnection capacity).

[373] E.g., M.9064 – *Telia Company / Bonnier Broadcasting Holding*, Commission decision of 12 November 2019, commitments annexed to the decision, para. 80.

[374] E.g. M.3083 – *GE / Instrumentarium,* Commission decision of 2 September 2003; M.4180 – *Gaz de France / Suez*, Commission decision of 14 November 2006. The remedies in *Gaz de France / Suez* were partly lifted in 2020 based on a request under the review clause; 'Contrôle des concentrations: La Commission lève en partie les engagements pris par Gaz de France pour obtenir l'autorisation de son acquisition de Suez en 2006' (*European Commission Daily News*, 27 October 2020).

[375] M.8744 – *Daimler / BMW / Car Sharing JV*, Commission decision of 7 November 2018.

ensure interoperability with both their car sharing app and their car sharing fleet, the remedies have a duration of three years, but the Commission can extend that period with two years if no meaningful entry has taken place in the relevant markets.[376]

In *Google / Fitbit*, the Commission accepted behavioural commitments with a duration of ten years. However, for some of the commitments (Google's commitment not to use Fitbit's data for advertising), the Commission reserved the right to extend that period by up to another ten years, after 'having justified the necessity for such an extension.'[377]

5.5 Modifying the remedies

Commitments usually include a general review clause, allowing for changes to the commitments.[378] The Commission's practice for at least a decade has been to systematically include such a clause. Older commitments sometimes lack a review clause but even those commitments can be modified or waived.[379]

The standard review clause distinguishes between two types of modifications: (1) extensions of the deadlines in the commitments, and (2) waivers, modifications or substitutions of the commitments on the other.

The procedure and conditions for **extending deadlines** are set out in paragraph 72 of the Remedies Notice. The parties must show 'good cause'. For an extension of the deadline of the first divestiture period, this means parties must show that they were not able to meet the deadline for reasons outside their responsibility and that it can be expected that the parties subsequently will succeed in divesting the business within a short time-frame.

Waivers, modifications or substitutions of the commitments will only be accepted 'in exceptional circumstances.'[380] Given the large variety of market situations and unforeseeable developments that can take place, it is probably impossible to delineate the concept of 'exceptional circumstances' with great precision.

The Remedies Notice explains that 'exceptional circumstances' may be accepted if market circumstances may have changed significantly and permanently. To show this, a sufficiently long time-span, 'normally at least several years' must have elapsed between the Commission decision

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[376] M.8744 – *Daimler / BMW / Car Sharing JV*, Commission decision of 7 November 2018, para. 339; Commitments annexed to the decision, para. 39.
[377] M.9660 – *Google / Fitbit*, Commission decision of 17 December 2020, Commitments annexed to the decision, paras 37-38.
[378] Model Text for Divestiture Commitments, Section F, paras 43-44.
[379] E.g. M.950 – *Hoffmann-La Roche / Boehringer Mannheim*, Commission decision of 3 May 2011, *OJ C 189/31* (Commission waives commitments of unlimited duration after conducting a market investigation in a case where the commitments 'did not include any time framework, deadline or review clause').
[380] Remedies Notice, para 73.

and the request for modification.[381] Second, exceptional circumstances may be present if the parties can show that the experience gained in the application of the remedy demonstrates that the objective pursued by the commitments can be better achieved if the modalities of the commitments are changed.[382]

The Commission has also accepted exceptional circumstances in other situations. In 2019, it suggested that Brexit could constitute an exceptional circumstance justifying a waiver, modification or substitution of commitments that exclusively address competition issues in UK markets. This was made clear in a notice dealing with the competition law related issues raised by Brexit, issued for stakeholders.[383]

In *Vivendi / Telecom Italia* the Commission waived a divestiture commitment.[384] The facts underlying the case were rather exceptional. The Commission had cleared an acquisition of *de facto* control by Vivendi, subject to a divestiture commitment.[385] However, as a result of unforeseen circumstances, Vivendi lost *de facto* control not long after the clearance decision. It therefore sought a full waiver of its commitment to divest. The Commission granted the waiver, finding that a 'significant, stable and unforeseeable change in market circumstances' had occurred and that the competition concerns laid out in the decision no longer arose.[386]

In *Takeda / Shire*, the Commission also waived a divestiture commitment.[387] In that case, Takeda had committed to divest one of Shire's pipeline drugs. However, both Takeda and a divestiture trustee were unable to sell the drug, in part because tests on animals were showing abnormal death rates in infants born from animals receiving the drug. Takeda then requested a full waiver from its commitments. After conducting a market investigation, the Commission found that (1) market conditions had changed significantly and permanently, (2) the changes could not have been foreseen at the time of the decision, and (3) the commitments are no longer required to address the competition concerns.[388]

These cases illustrate that, although the Remedies Notice explains that a waiver of commitments will 'very rarely' be relevant for divestiture commitments,[389] exceptionally, divestiture commitments may also be waived.

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[381] Remedies Notice, para 74.
[382] Remedies Notice, para 74.
[383] 'Notice to Stakeholders, Withdrawal of The United Kingdom and EU Competition Law' (*European Commission, DG for Competition,* 25 March 2019) (after several extensions, Brexit ultimately took place on 31 January 2020, followed by a transition period during which EU competition law continued to apply in the UK until 31 December 2021).
[384] M.8465 – *Vivendi / Telecom Italia*, Commission decision of 4 September 2018.
[385] M.8465 – *Vivendi / Telecom Italia*, Commission decision of 30 May 2017.
[386] M.8465 – *Vivendi / Telecom Italia*, Commission decision of 4 September 2018, paras 20-25.
[387] M.8955 – *Takeda / Shire*, Commission decision of 28 May 2020.
[388] M.8955 – *Takeda / Shire* Commission decision of 28 May 2020, paras 43, 100.
[389] Remedies Notice, para 73.

In *Bayer / Monsanto*, the Commission modified the remedies to ensure consistency with the remedies accepted by the U.S. Department of Justice.[390]

Although the Commission has a certain discretion in the assessment of a waiver request, it must nonetheless conduct a careful examination of the request and, if necessary, carry out an investigation.[391] In *Deutsche Lufthansa AG v Commission*, the General Court faulted the Commission for failing to conduct such a careful examination and it therefore partially annulled the Commission decision rejecting Lufthansa's waiver request.[392]

Apart from the general review clause in commitments, which requires 'exceptional circumstances', a more **specific review clause** exists in relation to the non-reacquisition clause in commitments, i.e. the ban on the notifying party to acquire influence over the divested business during a ten year period.[393] In *Nidec / Whirlpool (Embraco business*), Nidec requested and obtained a partial waiver of the non-reacquisition clause on the basis of this specific review clause.[394] This allowed Nidec to re-acquire a plant that it had divested pursuant to the commitments.

6 Enforcing the remedy

6.1 Commission's powers to investigate compliance

The Commission can use all of its normal fact-finding and investigative powers to investigate the parties' compliance with their commitments.[395] Non-compliance could be detected *ex officio*, via the monitoring trustee, or based on complaints from third parties.

6.2 Complaints from third parties

Complaints from third parties are a frequent channel through which the Commission becomes aware of possible non-compliance.[396] This is particularly true in case of access commitments. Third parties are the beneficiaries of such commitments and they may for instance complain about the terms and conditions of access offered by the merged entity. In divestiture cases,

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[390] M.8084 – *Bayer / Monsanto,* Commission decision of 21 March 2018.
[391] Case T-712/16, *Deutsche Lufthansa v Commission* [2018] EU:T:2018:269, paras 38, 41.
[392] Case T-712/16, *Deutsche Lufthansa v Commission* [2018] EU:T:2018:269, paras 136-139.
[393] Model Text for Divestiture Commitments, para 5, in fine; Remedies Notice, para. 43.
[394] M.8947 – *Nidec / Whirlpool (Embraco business)*, Commission decision of 15 May 2020. A third party subsequently appealed the Commission's waiver decision: Case T-583/20: Action brought on 23 September 2020 — *Italia Wanbao-ACC v Commission* [2020] OJ C 378/41.
[395] These include requests for information (EU Merger Regulation, art 11) and on-the-spot investigations (EU Merger Regulation, art 13).
[396] Complaints rarely become public, although some do. See, e.g., Andrew Boyce, 'Telia draws Tele2 complaint to EU regulator over Bonnier deal commitments' (MLex, 28 January 2020) (reporting on a complaint that Telia violated the FRAND commitments in M.9064 – *Telia Company / Bonnier Broadcasting Holding*).

complaints may come from the purchaser, for instance because certain assets or personnel that should have been included in the divestiture have not been transferred.

Third parties will typically first address their grievances to the monitoring trustee, who is specifically appointed to monitor compliance with the commitments and acts as a contact point for any requests by third parties.[397] In case of a possible breach of the commitments, the trustee will consult with the Commission's case team on how to deal with the complaint. Complaints from third parties differ greatly in level of seriousness, urgency, and technicality, so there is no 'one-size-fits-all' procedure to deal with complaints. In many cases, queries or requests by the monitoring trustee to the merging parties, supported by the Commission's case team, are sufficient to ensure the parties comply.

The General Court has held that third parties do not have a right to lodge a formal complaint with the Commission for breach of commitments.[398] They may of course complain to the Commission about what they consider to be a violation of the commitments, but they cannot force the Commission to take a formal decision on the complaint, which could then be challenged in court.[399] The position of third parties in merger control is therefore different from the position of complainants in cases relating to Articles 101 and 102 and State aid cases, where the Commission has a legal duty to take a decision on formal complaints that meet certain conditions.[400]

The General Court's holding originated in a case brought by a third party in relation to the commitments in *Telefónica Deutschland / E-Plus*.[401] The third party had complained to the Commission and the monitoring trustee about an alleged breach of commitments by the merged entity. The Commission's case team had examined the complaint but found no breach.[402] That position – expressed in an e-mail - was challenged by the third party before the General Court. The Court held that the third party did not have an individual right to force the Commission to adopt a decision in which it finds a breach of commitments and takes remedial action.[403] Hence, the Court concluded, the Commission is not under a duty to respond to complaints from third parties with a formal decision that is subject to an action for annulment.

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[397] See the definition of 'Monitoring Trustee' (a person 'who has the duty to monitor [X's] compliance with the conditions and obligations attached to the Decision'), Model Text for Divestiture Commitments, para 27. See also, Remedies Notice, para 119 ('the monitoring trustee shall act as a contact point for any requests by third parties, in particular potential purchasers, in relation to the commitments').

[398] Case T-884/16, *Multiconnect v Commission* [2018] EU:T:2018:665, para 38.

[399] Case T-884/16, *Multiconnect v Commission* [2018] EU:T:2018:665, para 39.

[400] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/18, art 7(2); Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L248/9, art 12(1).

[401] M.7018 – *Telefónica Deutschland / E-Plus,* Commission decision of 2 July 2014.

[402] Case T-884/16, *Multiconnect v Commission* [2018] EU:T:2018:665, para 10-11 (citing the precise reply from the Commission's case team).

[403] Case T-884/16, *Multiconnect v Commission* [2018] EU:T:2018:665, *Multiconnect v Commission*, para 37.

6.3 Breach of the remedies

6.3.1 Distinction between 'conditions' and 'obligations'

The consequences of breaching commitments vary depending on whether the part of the commitments that is breached constitute a 'condition' or an 'obligation.' The Merger Regulation itself makes this distinction, but it does not define the two terms. The Remedies Notice provides some guidance, although the formulation used is somewhat cryptic. A condition is defined as 'the requirement for achievement of the structural change of the market.'[404] In Commission decisions, this is often rephrased as 'the fulfilment of a measure that gives rise to a structural change of the market'.[405] This denotes the parts of the commitments that gives rise to the structural change of the market, such as the obligation to divest the business in a given timeframe, and the prohibition to re-acquire it.[406] Obligations are 'the implementing steps that are necessary to achieve this result [the structural change]'.[407] As an example of an obligation, the Remedies Notice mentions the appointment of a divestiture trustee with an irrevocable mandate to sell the business.

Commission decisions accompanied by commitments will normally specify which paragraphs in the commitments constitute obligations and which constitute conditions. The exact parts of the commitments that 'give rise to the structural change of the market' will indeed vary from case to case, and, hence, the parts to which the labels 'condition' and 'obligation' are attributed, will also vary from case to case.

In case of a divestiture, the paragraphs that contain the commitment to divest are normally qualified as conditions. This corresponds to Section B in the Model Text. The relevant schedules – which typically describe the divestment business in greater detail - are usually considered to be intrinsically linked to this part of the commitments. Hence, they are usually also qualified as conditions.[408] All other paragraphs of the commitments are qualified as obligations.

In case of access commitments, the part of the commitments that may give rise to a structural change in the market is the part in which a commitment to provide access is made, as the access commitment is usually aimed at lowering entry barriers which, in turn, may impact the structure of the market. Hence, the access commitment at the core of the commitments will normally be qualified as a condition.[409] In case of behavioural remedies, with no or a limited impact on market

[404] Remedies Notice, para 19.
[405] See, e.g., M.8444 – *ArcelorMittal / Ilva*, Commission decision of 7 May 2018, para 1442; M.8084 – *Bayer / Monsanto*, Commission decision of 21 March 2018, para 3324.
[406] These examples are found in the Remedies Notice, para 20.
[407] Remedies Notice, para 19.
[408] See, e.g., M.7567 – *Ball / Rexam,* Commission decision of 15 January 2016, para. 1026.
[409] See, e.g., M.9064 – *Telia – Company / Bonnier Broadcasting Holding*, Commission decision of 12 November 2019, para 1522 (qualifying as conditions Section B (various commitments to license content, TV channels and related commitments) and parts of Section A (definitions), namely to the extent that the definitions contain operative provisions); M.8665 – *Discovery / Scripps,* Commission decision of 6 February 2018, para. 141 (qualifying as conditions Section B (the commitment to provide access to various TV channels)).

structure, it is not always clear which parts of the commitments should be qualified as conditions and which parts as obligations. Arguably, the core part of the behavioural commitment should be qualified as a condition, while other paragraphs should be obligations. Alternatively, one could argue that, in those cases, all paragraphs should be qualified as 'obligations', as none of them give rise to a structural change of the market. This approach has indeed been taken in some decisions.[410]

6.3.2 Breach of an obligation

If the merged entity breaches an obligation contained in the commitments, the Commission may – but is not required to – revoke the conditional clearance decision.[411] If the Commission does revoke the decision, it may replace the revoked decision either with a new decision on the basis of Article 6(1) or, in case the revoked decision is a Phase II decision, a new decision on the basis of Articles 8(1) to (8)(3). In doing so, it will not be bound by any time limits.[412]

The Commission may also impose fines of up to 10% of the undertakings' worldwide turnover, when the failure to comply with the remedies is either negligent or intentional.[413] It can also impose periodic penalty payments of up to 5% of the undertaking's average daily worldwide turnover.[414]

6.3.3 Breach of a condition

In case of a breach of a condition, the 'compatibility decision is no longer applicable'.[415] In other words, it is as if there was never a Commission decision authorising the merger. This happens automatically. The merger is therefore treated 'in the same way as a non-notified concentration implemented without authorisation.'[416] The Commission does not need to revoke the authorisation decision, as it would have to do in case of breach of an obligation. This principle was applied in *Novelis / Aleris.* The notifying party (Novelis) had committed to divest a plant. It found a purchaser, which was approved by the Commission, but subsequently failed to close the divestiture deal within the deadline specified in the commitments. This resulted in a breach of a condition and, as a result, the clearance decision became inapplicable, prompting the Commission to issue interim measures and, after the plant was finally divested, final measures

[410] See, e.g., *M.8314 – Broadcom / Brocade*, Commission decision of 12 May 2017, para 283; M.8242 – *Rolls-Royce / ITP,* Commission decision of 18 April 2017, para 283; M.6800 – *PRSfM / GEMA / STIM / JV*, Commission decision of 16 June 2015, para 390.
[411] EU Merger Regulation, art 8(6)(b) and art 6(3)(b).
[412] EU Merger Regulation, art 6(4) and art 8(7(b).
[413] EU Merger Regulation, art 14(2)(d).
[414] EU Merger Regulation, art 15(1)(c).
[415] Remedies Notice, para 20.
[416] EU Merger Regulation, recital 31.

to ensure the safeguards for the divesture, originally laid down in commitments, would remain applicable.[417]

When a condition is breached, the Commission can take interim measures to maintain conditions of effective competition,[418] followed by appropriate measures to ensure that the merging parties dissolve the concentration or take other restorative measures.[419] In addition, the Commission may impose fines of up to 10% of the undertakings' worldwide turnover when the breach is negligent or intentional.[420]

6.3.4 Examples

Until present, the Commission has never issued a formal decision finding a breach of commitments. One possible explanation for this is that breaches are either detected when they are still in their incipiency and then rectified or, alternatively, never detected at all. For instance, if the merged entity tries to block a third party's access to an input, in violation of an access remedy, the third party will likely complain to the monitoring trustee. The merged entity will subsequently have a strong incentive to modify its terms and thereby avoid that a breach actually occurs. This incentive to comply stems from the formidable sanctions in case of breach and the prospect of possibly having to dissolve the merger.[421]

In 2019, the Commission issued a statement of objections for breach of the commitments in *Telefónica Deutschland / E-Plus*.[422] The alleged breach related to a behavioural component of the commitments, under which Telefónica committed to offer wholesale 4G services to all interested players at 'best prices under benchmark conditions', [423] a commitment which had been qualified as an obligation in the decision. The Commission ultimately closed the proceedings without finding a breach of the commitments, after Telefónica amended its wholesale 4G offer.

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[417] European Commission, Press release of 18 February 2021, 'Commission adopts final measures to preserve the divestment of former Aleris plant in Belgium following Novelis' acquisition of Aleris.'

[418] EU Merger Regulation, art 8(5)(b). The Commission issued a decision on this basis in M.9076 – *Novelis / Aleris*, Commission decision of after Novelis failed to divest a plant within the timeframe set by the commitments. The measures were 'aimed at preserving competition as well as the plant's viability and competitiveness.'

[419] EU Merger Regulation, art 8(4)(b). The Commission issued a decision on this basis in M.9076 – *Novelis / Aleris*, Commission decision of 18 February 2021 (not yet published). According to the Commission's press release, the decision contained a number of measures to ensure that the divestiture, which Novelis had ultimately but belatedly made, would remain effective (ban on re-acquisition) and that the plant's viability and competiveness are protected (appointment of a monitoring trustee, transitional agreements, and other parts of the commitments which had become inapplicable because the clearance decision itself had become inapplicable as a result of the breach of a condition.

[420] EU Merger Regulation, art 14(2)(d).

[421] See, e.g., Stuart Thomson, 'EU monitor orders Telia to revise streaming auction after Tele2 complaint' (*Digital TV Europe*, 6 February 2020) <www.digitaltveurope.com/2020/02/06/eu-monitor-orders-telia-to-revise-streaming-auction-after-tele2-complaint/> accessed 4 December 2020.

[422] M.7018 – *Telefónica Deutschland / E-Plus,* Commission decision of 2 July 2014.

[423] 'Mergers: Commission alleges Telefónica breached commitments given to secure clearance of E-Plus acquisition' (*European Commission Press Release*, 22 February 2019).

6.4 Arbitration and expert determination as a parallel enforcement mechanism

6.4.1 Arbitration

Non-divestiture remedies often remain in place for several years and can be quite complex. This makes it more difficult to effectively monitor and enforce these remedies. They often require the monitoring trustee and the Commission to engage in detailed fact-finding in relation to the day-to-day operation of the merged entity's business, which in turn may tie up significant Commission resources.

To mitigate these issues, the Commission often requires parties to include an arbitration mechanism in their remedies. This allows third parties to enforce the remedies through arbitration, the essential rules of which are specified in the remedies. The underlying idea is to allow third parties to enforce the remedies themselves, with minimal intervention of the Commission.[424] The fact that an arbitration mechanism has been included in remedies does not, however, deprive the Commission of its powers to enforce the remedies. Arbitration therefore provides third parties with a means of enforcing the remedies, on top of the enforcement by the Commission and the monitoring trustee.[425]

The Remedies Notice explain that the Commission 'will often require (…) the establishment of a fast-track arbitration procedure in order to provide for a dispute resolution mechanism and to render the commitments enforceable by the market participants themselves.'[426]

Arbitration clauses are often included in remedies where the merged entity commits to grant **access** to important infrastructure or assets.[427] They are also frequently used in remedies that

[424] Johannes Lübking, 'The European Commission's View on Arbitrating Competition Law Issues' (2008) 19 European Business Law Review 77, 78 (under Role of Arbitration in Access commitments).

[425] In this sense, see, e.g. M.8084 – *Bayer / Monsanto,* Commission decision of 21 March 2018, para 3180 ('The Commission notes that the fast track dispute resolution procedure provides the purchaser with an additional mechanism to address non-compliance with the commitments, but it does not remove the Commission's power to monitor and sanction compliance with the commitments.'); M.9064 – *Telia Company / Bonnier Broadcasting Holding,* Commission decision of 12 November 2019, para. 1466. In the latter case, the commitments clarify – after this issue was raised in the market test - that the fast track dispute resolution mechanism is an additional option, but not an obligation, for a third party seeking to enforce the commitments. In fact, there is no doubt that, even without such clarification, the inclusion of an arbitration mechanism does not deprive the Commission of its powers to enforce the remedies.

[426] Remedies Notice, para 130.

[427] See Remedies Notice, para 66 (describing arbitration commitments in the context of access commitments). Recent examples include M.9064 – *Telia Company / Bonnier Broadcasting Holding,* Commission decision of 12 November 2019; M.8665 – *Discovery / Scripps*, Commission decision of 6 February 2018; M.7194 – *Liberty Global / Corelio / W&W / De Vijver Media*, Commission decision of 24 February 2015; M.7421 – *Orange / Jazztel*, Commission decision of 19 May 2015.

require the parties to license IP or provide **interoperability** information.[428] Remedies involving the release of **airline slots** have also occasionally included arbitration clauses.[429]

In recent years, even a couple of **divestiture remedies** have included arbitration clauses.[430] In those cases, the remedies gave the purchaser of the divested business the possibility to initiate arbitration against the notifying party for breach of the commitments and, in one case, also for breach of any of the agreements implementing the commitments.[431] Those clauses add a layer of complexity to divestiture commitments[432] and one can question whether the benefits outweigh the costs.[433] In any event, arbitration clauses have only rarely been included in divestiture commitments.

The first remedies that included an arbitration mechanism date back to 1992[434] but the practice only became more widespread in the 2000s. By now, arbitration clauses have been included in commitments in over eighty cases.[435] However, as will be explained (see section 6.4.5), actual

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[428] See, e.g., M.8124 – *Microsoft / LinkedIn*, Commission decision of 6 December 2016, Commitments annexed to the decision, Annex 1.

[429] See, e.g., M.9287 – *Connect Airways / FlyBe*, Commission decision of 5 July 2019, Commitments annexed to the Commission decision, Section 5.

[430] E.g, M.8084 – *Bayer / Monsanto,* Commission decision of 21 March 2018, Annex 3, Section H; M.9779 – *Alstom / Bombardier Transportation*, Commission decision of 31 July 2020, commitments annexed to the decision (first annex), Section F, para. 44. The commitments in this case include both a structural part (the divestiture of a train manufacturing platform called the Zefiro V300 divestment business) and a behavioural part (a commitment to ensure that Bombardier's joint bid with Hitachi in the UK's HS2 tender could continue), and both are subject to the arbitration mechanism in this clause.

[431] M.9779 – *Alstom / Bombardier Transportation*, Commission decision of 31 July 2020.

[432] This layer of complexity is not without costs. First, the review of the clause by the Commission's case team and by stakeholders in the market test will require time and resources, which can accordingly not be spent on other, more important, aspects of the commitments, such as whether the proposed divestiture contains all the assets and employees to be competitive. Given the compressed timeframe of merger proceedings, especially in Phase I, this is a significant drawback. Second, the divestiture agreements itself will normally also contain a dispute resolution clause, agreed upon by the notifying party and the purchaser of the divestment business, and reviewed by the Commission at the purchaser approval stage. Would this clause not require the third party to use that particular dispute mechanism? Can the notifying party file a counterclaim against the third party in the arbitration based on the remedies?

[433] The benefits of including an additional clause in the commitments would seem to be twofold. First, it provides the purchaser with an additional mechanism to ensure that he gets the full benefit of the divestiture commitment, which in turn may help to make the divested business viable and competitive. Second, the arbitration provided for by the commitments allows the Commission and the trustee to play a role in the dispute, which may help ensure that the dispute is resolved in a manner that is in line with the commitments' text and its objective to bring about a lasting structural change in the market. Of course, if the purchaser really wanted to collude with the notifying party – for instance by foregoing assets that are essential for the competitiveness of the divestiture in return for a lower purchase price – it could easily do so even if an arbitration clause is in place in the commitments.

[434] Case IV/M.235 – *Elf Aquitaine – Thyssen / Minol AG,* Commission decision of 4 September 1992. Until 2000, there were less than a handful of cases but, from 2000 onwards, remedies including arbitration have become more frequent.

[435] Own count, partly relying on Gordon Blanke and Phillip Landolt, *EU and US Antitrust Arbitration: A Handbook for Practitioners* (Kluwer Law International 2011), Annex II: Table on Conditional EU Merger Clearance Decisions Incorporating Arbitration Commitments Over the Period 1992–2009.

arbitration cases have been extremely rare, i.e. third parties have very rarely used arbitration as a mechanism to seek compliance.

In many cases, the arbitration mechanism in the remedies can be used by an open-ended group of third parties. For instance, the remedies may provide that arbitration can be used by any third party seeking access to the network to which the remedies guarantee access. Such arbitration clauses have sometimes been qualified as an *erga omnes* offer to arbitrate or, perhaps more fashionably, as 'arbitration without privity', reflecting the fact that third parties can initiate arbitration even though they have never entered into an arbitration agreement with the notifying party. [436] In other cases, the remedies provide for an arbitration mechanism in a specific relation, i.e. the relationship between the merged entity and a specific third party, for instance the specific company that obtains certain assets or access.[437] In those cases too, the clause can best be qualified as an *offer* to arbitrate, not as an arbitration agreement, as the commitments do not bind third parties.

Although doubts were initially expressed about the validity of arbitration in merger remedies,[438] the EU courts seem to have approved arbitration as a mechanism to monitor merger remedies. In *ARD v Commission*, a third party argued that the access commitments in that case 'required permanent monitoring' and that this ran counter to the Remedies Notice applicable at the time.[439] The General Court rejected the argument because of the possibility for third parties to rely on arbitration.

> (295) As to the applicant's argument that the commitment at issue entails permanent monitoring of conduct, which would run counter to the Notice on remedies, it is sufficient to observe that all disputes concerning compliance with commitment must be subject to arbitration, which guarantees sufficient monitoring. Moreover, third parties who are not satisfied with the implementation of the commitment may make use of an arbitration procedure under which the burden of proof is placed on the Kirch group. Thus, although compliance with the commitment is subject to monitoring, it is not the Commission which is responsible for that monitoring.

[436] See, e.g., Arbitral Award of 14 March 2017, 1&1 Telecom GmbH v Telefónica Deutschland Holding AG, DiS-SV-KR-665/16, paras. 73-79; Manuel Penadés Fons, 'Beyond the prima facie effectiveness of arbitration commitments in EU merger control', (2012) *Common Market Law Review* 1915, 1917, fn 12. The term 'arbitration without privity' was originally used in relation to investor-State arbitration. See Jan Paulsson, 'Arbitration Without Privity', (1995) 10 *ICSID Review – Foreign Investment Law Journal*, 232.

[437] E.g., M.7421 – *Orange / Jazztel*, Commission decision of 19 May 2015 (arbitration can be used by the single company that obtains access to Jazztel's ADSL network, which will also purchase the network which Orange divests).

[438] Laurence Idot, 'Une innovation surprenante : l'introduction de l'arbitrage dans le contrôle communautaire des concentrations', (2000) *Revue de l'arbitrage* 591, 597-598, 603 (expressing doubts about whether any legal basis exists for the Commission to 'delegate powers' in this way).

[439] Case T-158/00 ARD v Commission [2008] EU:T:2003:246, paras 286-287.

The joint venture leading to *ARD v Commission* dates back 20 years[440] and, in that case, the commitments did not provide for a monitoring trustee. Arbitration was the only mechanism to monitor the commitments. The General Court nonetheless accepted this as sufficient, noting that, in the specific type of arbitration provided for by the commitments, the burden of proof was placed on the merging parties to show compliance.[441]

Additional confirmation regarding the validity of arbitration in merger remedies came in *easyJet v Commission*.[442] In that case, easyJet challenged the slot release remedies (a type of access remedy) that had been approved in *Air France / KLM*. Before the General Court, it argued that those remedies would not be effective, among others because they did not provide for the revocation of the clearance decision in case of non-compliance. The court rejected that challenge, because 'the contested decision lays down a fast-track procedure for resolving disputes' in case the third party relying on the commitments 'has reason to believe that the merged entity is not complying with the terms of the commitments made vis-à-vis that party'.[443]

6.4.2 Expert determination

Although arbitration is by far the most frequently used mechanism, some remedies provide for expert determination, or a combination of expert determination and arbitration.[444] Expert determination is a dispute resolution mechanism in which an independent expert – not arbitrators – makes a determination on a dispute or issue.[445] Unlike arbitration, it does not result in an arbitral award that can be enforced via the national courts. Parties can agree to be bound by the expert's determination, but the expert's opinion cannot be declared enforceable by

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[440] Case No COMP/JV.37 – *B Sky B / Kirch Pay TV*, Commission decision of 21 March 2000.
[441] Case T-158/00 *ARD v Commission* [2008] EU:T:2003:246, paras 203, 295.
[442] Case T-177/04 *easyJet v Commission* [2006] EU:T:2006:187.
[443] Case T-177/04 *easyJet v Commission* [2006] EU:T:2006:187, para. 186.
[444] M.9779 – *Alstom / Bombardier Transportation*, Commission decision of 31 July 2020. The commitments in that case consist of two sets of commitments – commitments relating to rolling stock and the OBU commitments - both of which provide for expert determination. See, Commitments relating to rolling stock, Schedule 1, Annex 3 (providing for 'fast-track dispute resolution' by an expert to resolve issues relating to a specific part of the commitments (the HS2 very high speed commitment)) and OBU commitments, Section F (providing for a 'fast track expert dispute resolution mechanism' to resolve issues relating to the OBU commitments); M.9674 – *Vodafone Italia / TIM / INWIT JV*, Commission decision of 6 March 2020 (providing for 'fast track expert dispute resolution' as a mechanism to resolve disputes in relation to a specific part of the commitments, while providing for arbitration in relation to other parts of the commitments; the commitments oblige the joint venture created through the concentration to rent out space on its telecommunication towers); M.6497 – *Hutchison 3G Austria / Orange Austria,* Commission decision of 12 December 2012, Annex III, Section F (providing for a fast-track dispute resolution mechanism by a panel of three experts for disputes arising between the notifying party (H3G) and a party requesting wholesale access to H3G's mobile network); M.5650 – *T-Mobile / Orange*, Commission decision of 1 March 2010, paras. (expert determination process specified in the commitments to resolve disputes between the merged entity and a competitor (H3G UK) in relation to a network integration plan); M.5655 - *SNCF/LCR/Eurostar*, Commission decision of 17 June 2010, Commitments annexed to the decision, Section D . (expert determination for disputes raised by railway operators with the trustee as expert decision-maker and the possibility of an appeal to the national rail regulator or the Commission).
[445] Gary B. Born, *International Commercial Arbitration – Volume I International Arbitration Agreements* (2nd ed., Wolters Kluwer, 2014) 261

national courts and subsequently enforced as if it were a court judgment. In business settings, this is sometimes considered a drawback of expert determination but, in the context of merger commitments, this appears to be less of an issue, as the Commission can ensure that the notifying party abides by the expert's determination using its powers to enforce the commitments.

Expert determination is particularly well-suited for resolving technical issues or specific questions which require expert knowledge. This type of issues is often at the core of disputes relating to access remedies. Rather than legal issues, disputes may arise over whether specific conditions are 'in line with market practice', whether a fee is 'fair and reasonable', whether the interoperability information provided by the notifying party is 'complete and accurate', whether the notifying party is justified in refusing interoperability based on security concerns, etc. In such cases, expert determination by specialists with technical knowledge may indeed be more appropriate than arbitration. In some jurisdictions, it may even be problematic to provide for arbitration over such narrow issues, as it may raise doubts about the arbitrability of the matter.[446]

Moreover, if the issue at the heart of the dispute is technical, arbitrators would have to rely on a technical expert in any event or witness a 'battle of experts', fielded by the parties. In those cases, it is more effective to directly rely on a technical expert as decisionmaker. Expert determination will normally also be faster, less expensive and less formal than full-fledged arbitration. Indeed, the key difference between arbitration and expert determination is that arbitration must use adjudicatory procedures to resolve the dispute, i.e. it is a quasi-judicial process, typically with the exchange of pleadings, evidence, an oral hearing where each side is represented by counsel, and a reasoned decision at the end.[447] Although expert determination may also adopt some of these features, this is not required.

On the other hand, a drawback may be that the remedies will have to contain a rather comprehensive set of rules governing the expert determination, as it will otherwise be unclear how certain issues should be dealt with. In the case of arbitration, the reference to an arbitral institution automatically incorporates the rules of that institution, and these rules deal with a large number of issues that may come up.[448]

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[446] Perhaps to avoid any issue on this point, merger remedies that include an arbitration mechanism (not expert determination) usually define the scope of disputes that will be subject to arbitration rather broadly, for instance as 'any dispute with any third party relating to the compliance by the notifying party with the commitments'. This issue will depend on the particular jurisdiction in which the arbitration has its seat. See, section 6.4.4., where the importance of the seat of the arbitration is discussed.
[447] See Gary B. Born, *International Commercial Arbitration – Volume I International Arbitration Agreements* (2nd ed., Wolters Kluwer, 2014) 265-268.

[448] Many arbitral institutions have enacted separate sets of rules governing expert determination and administer such procedures. See, e.g., ICC Rules for Expertise (last revised in 2003). However, including a reference to such rules and – this follows automatically – entrusting the arbitral institution with the administration of the expert determination could take away from the advantages of expert determination, by making the process more formal, expensive and slower. In the merger remedies that provide for expert determination, no reference to an institution has been included so far.

In the few cases where expert determination has been included in the remedies, the expert determination is an optional mechanism for the third party relying on the commitments. The expert determination clause in the commitments serves as an offer. However, if the third party does opt to trigger the mechanism, it accepts this offer, including the rules stipulated in the commitments. This means it will be bound by the result of the expert determination, in the same way as the notifying party. An appeal is only possible based on manifest error or fraud, and will be dealt with through arbitration, also provided for by the remedies.

A difficult issue is the selection of the expert. In two recent cases, the expert is to be selected by the monitoring trustee, but from a list of experts which the notifying party has drawn up and submitted shortly after the closing of the merger.[449] This may make expert determination less attractive to third parties, as they may fear – rightfully or not – that the experts listed by the notifying party will be favourably disposed towards the notifying party.

6.4.3 Safeguards to protect third parties relying on arbitration

The arbitration provisions incorporated in merger remedies differ from standard practice in commercial arbitration in several respects. They usually include a number of provisions aimed at making it easier for the claimants, for instance the third parties seeking access under the commitments, to prevail. This is to enhance the effectiveness and enforceability of commitments. These provisions compensate for the inherent advantages which the merging parties have in these proceedings. The merging parties have superior information, as most of the information relevant to the dispute will typically be under their control. They are also repeat players in the sense that they will already have faced other third parties, giving them superior insight in how the commitments can be applied, how to calculate the access fee and set the terms offered to third parties.

The most important feature to facilitate the use of arbitration for third parties is a provision on the **burden and standard of proof**, which is included in most arbitration commitments.[450]

The commitments usually specify that it suffices for the third party to produce evidence of a *prima facie* case. If the third party does so, the arbitrator must find in favour of the third party,

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[449] M.9674 – *Vodafone Italia / TIM / INWIT JV*, Commission decision of 6 March 2020, Commitments annexed to the decision, para. 26; M.9779 – *Alstom / Bombardier Transportation*, Commission decision of 31 July 2020, rolling stock commitments annexed to the decision, Schedule 1, Annex 3, paras. 4-5 and OBU commitments annexed to the decision, para. 40. In an earlier case, M.5655 - *SNCF/LCR/Eurostar*, Commission decision of 17 June 2010, the monitoring trustee itself was to act as expert.

[450] The burden of proof determines which party has to prove something or – this comes down to the same thing - which party bears the risk of losing the case if something is not proven. The standard of proof denotes the level of confidence or persuasion necessary to demonstrate a fact. See Fernando Castillo de la Torre and Eric Gippini Fournier, *Evidence, Proof and Judicial Review in EU Competition Law* (Edward Elgar, 2017), 26, para. 2.002.

unless the merging party can produce evidence to the contrary.[451] This clause puts the burden of proof on the third party initiating arbitration, in line with the general principle of *actori incumbit probatio*. However, by only requiring a *prima facie* case, it sets a standard of proof that is lower than the 'balance of probabilities' or 'more likely than not' standard which is normally applied in commercial arbitration.[452]

Commentators have welcomed this feature and argue it makes arbitration attractive for third parties.[453] At the same time, one must acknowledge that concepts such as *prima facie* case and 'balance of probabilities' do not lend themselves to mathematical precision. One can therefore wonder whether the *prima facie* language in the commitments would actually make much difference in practice. Commentators have also suggested a more far-reaching alternative, namely a reversal of the burden of proof.[454] Such a reversal of the burden of proof was provided for in the remedies in *B Sky B / Kirch Pay TV*, [455] the case that led to the *ARD* judgment, in which the General Court appears to have affirmed the validity of such a clause.[456]

6.4.4 Other features of merger arbitration

To ensure timely implementation, the commitments usually provide that the arbitration proceedings must be '**fast-track**'. The arbitration clause also typically includes several ambitious deadlines, in the hope that the arbitral tribunal and parties will abide by them. For instance, it may provide that 'the final award shall be rendered within six months after confirmation of the arbitral tribunal.'

Another notable feature of arbitration in the context of merger remedies is the possibility for the **monitoring trustee and the Commission** to **play a role** in the dispute. The Commission may intervene as *amicus curiae* and attend any oral hearings. It is entitled to receive all written submissions and documents exchanged between the Arbitral Tribunal and the parties. The arbitral tribunal may also ask the Commission for an interpretation of the Commitments, in which case it will be bound by this interpretation.

Another peculiar feature of arbitration clauses in merger remedies is the applicable law. The remedies normally provide that the arbitral tribunal must decide the dispute 'on the basis of the

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[451] See, e.g., M.9660 – *Google / Fitbit*, Commission decision of 17 December 2020, Commitments annexed to the decision, Annex 5 to the commitments, para. 15; M.9064 – *Telia – Company / Bonnier Broadcasting Holding*, Commission decision of 12 November 2019, para 72; M.8864 – *Vodafone / Certain Liberty Global Assets*, Commission decision of 18 July 2019, Commitments annexed to the decision (Annex II), para. 71.
[452] Gary B. Born, *International Commercial Arbitration – Volume II International Arbitral Procedures* (2nd ed., Wolters Kluwer, 2014) 2314 ('In general, although there is little discussion of the issue, the burden of proof appears to be (or assumed to be) a "balance of probabilities" or "more likely than not" standard').
[453] Gordon Blanke, 'Chapter 46: International Arbitration and ADR in Conditional EU Merger Clearance Decisions', in Gordon Blanke and Phillip Landolt (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners* (2011 Kluwer Law International) 1689, para. 46-139.
[454] Id, 1689-1690.
[455] Case No COMP/JV.37 – *B Sky B / Kirch Pay TV*, Commission decision of 21 March 2000.
[456] Case T-158/00 *ARD v Commission* [2008] EU:T:2003:246, 295.

commitments and the Commission decision.' There may of course be issues that are not covered by the commitments and the decision. For those, the arbitration clause normally refers to the Merger Regulation, EU law, and, if neither of these deals with the issue, as last resort, either the law of a particular Member State or the 'general principles of law common to the legal orders of the Member States.'

It is good practice for arbitration clauses to specify the seat of the arbitration. The seat or 'legal place' determines the jurisdiction in which the arbitration is legally based. This may be different from the physical location where the actual arbitral hearings take place (seat versus venue for hearings). The seat of the arbitration is important. It determines which courts have supervisory powers over the arbitration, for instance to assist the arbitral tribunal in ensuring that the interim measures they have issued are enforced. It also has an impact on the enforceability of the award and it determines the country where proceedings to set aside the award can be initiated.

The seat of the arbitration should normally be in an EU Member State. A party dissatisfied with an arbitral award can challenge it in the country where the arbitration has its seat by instituting proceedings to annul or set aside the award. In such annulment proceedings, the court reviews, among others, whether the award is compatible with that particular country's public policy. Since EU competition law is a matter of public policy in EU Member States, it follows that an arbitral award that disregards EU competition law will be set aside.[457] Courts outside of the EU are not bound by the European Court of Justice's case law affirming the public policy nature of competition law and may have a notion of public policy that does not include competition law, or its competition law may differ on significant points.

Most merger remedies specify the seat of the arbitration. Some do so by explicitly using the term seat ('the seat of the arbitration shall be…'),[458] while others refer to 'the place of arbitration'.[459] In many cases, the arbitration clause simply provides that 'the arbitral proceedings shall be conducted in…'. Although one could possibly argue that such phrase refers to the venue of the hearings, not the seat of the arbitration, this seems to be a rather implausible interpretation. One can therefore expect most arbitral tribunals to interpret the phrase as a reference to the seat of the arbitration.

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[457] Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV*, EU:C:1999:269, para 37-39. The court held that Art. 101 TFEU is a matter of public policy for the purposes of the enforcement of an arbitral award. Although the judgment related only to Article 101 TFEU, subsequent case law suggests that competition law as a whole pertains to public policy. Case T-128/98 *Aéroports de Paris v Commission*, [2000] EU:T:2000:290, para 241.

[458] E.g. M.9064 – *Telia – Company / Bonnier Broadcasting Holding*, Commission decision of 12 November 2019, commitments annexed to the decision, para. 69; M.9674 – *Vodafone Italia / TIM / INWIT JV*, Commitments annexed to the decision, para. 41.

[459] E.g., M.7421 – *Orange / Jazztel*, Commission decision of 19 May 2015, Commitments annexed to the decision as Annex B, para 75.

6.4.5 Actual arbitration cases

Although arbitration is frequently included in commitments as a dispute resolution mechanism, it is seldomly used. One can only speculate about the reasons for this. Possibly, third parties perceive the monitoring trustee and the Commission as a more effective or in any event less costly alternative. Indeed, the cost of arbitration, particularly international arbitration, can be very significant, and 'cost' has long been considered as arbitration's worst feature.[460] Another possible explanation is that the hurdles for prevailing in arbitration against the merged entity – often well-resourced and with an enormous information advantage – are perceived as too high, in spite of the Commission's efforts to facilitate access.

For a long time, the only known case of arbitration under merger commitments was an award under the rules of the International Chamber of Commerce (ICC) in relation to commitments in *Newscorp / Telepiù*.[461]

More recently, three additional arbitration proceedings have become public, all relating to the commitments in *Telefónica Deutschland / E-Plus*,[462] a merger between two mobile network operators in Germany. The behavioural and access commitments in that case allowed third parties to initiate fast-track arbitration to enforce the commitments. Several third parties used this mechanism and initiated arbitration, administered by the German Arbitration Institute. The disputes related to a price review mechanism in the commitments, and the price which Telefónica could charge for a so-called wholesale contract, which, pursuant to the commitments, had been extended to 2025. The Commission intervened as *amicus curiae* in two of the three proceedings[463] and all three awards were published on the website of DG Competition.[464]

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[460] See, e.g., Queen Mary, University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration* (2018) 2 ('"Cost" continues to be seen as arbitration's worst feature, followed by "lack of effective sanctions during the arbitral process", "lack of power in relation to third parties" and "lack of speed"'); Laurence Idot, 'Arbitration and competition, Note submitted to the OECD', DAF/COMP(2010)40 ('arbitration in the strict sense is expensive, especially international arbitration (…)'). The Commission's merger remedies often provide for arbitration under the rules of the International Chamber of Commerce (ICC), which automatically makes the ICC's International Court of Arbitration the institution that administers and supervises the arbitration. It is a well-respected arbitration institution, but ICC arbitration is also considered as expensive. See, Queen Mary, University of London, *2010 International Arbitration Survey: Choices in International Arbitration* (2010), 21 ('Cost remains an extremely important issue: amongst a majority of interviewees there was a perception that ICC arbitration is too expensive (especially beyond a certain monetary threshold of the amount in dispute) and that arbitration institutions in general are costly.').

[461] M.2876 – *Newscorp / Telepiù,* Commission decision of 2 April 2003. The award in that case, rendered in 2012, is analysed in Luca G. Radicati Di Brozola, 'EU Merger Control Commitments and Arbitration: *Reti Televisive Italiane v. Sky Italia'* (2013) 29 Arbitration International 223.

[462] M.7018 – *Telefónica Deutschland / E-Plus,* Commission decision of 2 July 2014.

[463] Commission decision of 28.9.2018 to submit observations pursuant to Commitments given in Case M.7018 Telefónica Deutschland / E-Plus, in two sets of proceedings for arbitration before the Deutsche Institution für Schiedsgeritsbarkeit E.V. (DIS) between Drillisch v. Telefónica Deutschland (DIS-SV-KR-849-18) and mobilcom-debital v. Telefónica Deutschland (DIS-SV-KR-833-18), C(2018) 6408 final, recital 7.

[464] The awards were published by DG Competition as part of the documents available in case M.7018 Telefónica Deutschland / E-Plus. They are accessible via the "case search" tool on the website of DG Competition.

6.5 Enforcing the remedy in national courts

There seems to be no reason why third parties could not turn to the national courts to enforce the rights that they derive from commitments.[465] After all, commitments, once they have been made binding in the Commission's decision, become part of EU law.

The General Court has confirmed that commitments may have *erga omnes* effects and can be enforced in the national courts in *Multiconnect / Commission*.[466] The case related to behavioural commitments accepted in *Telefónica Deutschland / E-Plus*.[467] The commitments in that case required the merged entity, among others, to provide wholesale 4G services to interested parties. The General Court held that those commitments indirectly created legal effects to the benefit of third parties, and that these rights could be enforced before national courts.[468] The Court added that this right is without prejudice to the Commission's power to find a breach of the commitments and take remedial measures itself. National courts therefore constitute an additional enforcement method.

In practice, enforcement of commitments in national courts has been extremely rare until present. Possibly, third parties were not aware of this possibility. The General Court issued its ruling in *Multiconnect / Commission* in October 2018. Prior to that, this possibility had rarely been discussed in the academic literature and some authors had opined that no such possibility existed.[469] Another possibility is that, as is the case with arbitration, the parties seem to perceive the Commission and the monitoring trustee as a more effective or less costly avenue of enforcement.

[465] See, in this sense, Luca G. Radicati Di Brozola, 'EU Merger Control Commitments and Arbitration: *Reti Televisive Italiane v. Sky Italia*' (2013) 29 Arbitration International 223, 226.
[466] Case T-884/16 *Multiconnect v Commission* [2019] EU:T:2018:665.
[467] M.7018 – *Telefónica Deutschland / E-Plus,* Commission decision of 2 July 2014.
[468] Case T-884/16 *Multiconnect v Commission* [2019] EU:T:2018:665, para. 57.
[469] See, e.g., Lennart Ritter and W. David Braun, *European Competition Law: A Practitioner's Guide* (3d ed. Kluwer Law International 2004), p. 663 (arguing that 'commitments do not create rights which may be enforced before the national courts with the means of national civil law').