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**Legal certainty, proportionality, effectiveness: the  
Commission's practice on remedies**

Check Against Delivery  
Seul le texte prononcé fait foi  
Es gilt das gesprochene Wort

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Ladies and Gentlemen,

It is always a pleasure to be back at the CRA conference and I would like to thank Cristina Caffarra for inviting me again.

Today, I will speak about the Commission's practice on remedies, and more precisely about the convergence that exists between merger control and antitrust in this area.

We seldom refer to our approach on remedies across instruments and I thought this would be of interest to you.

Remedies lie at the core of competition law enforcement. To give you some figures, between 2004 and October 2012, we cleared 147 mergers subject to commitments, of which 115 in Phase I and 32 in Phase II. In the same period we took 26 antitrust commitment decisions.

In mergers, the right remedies allow companies to get on with their business plans, after a relatively quick interaction with the Commission. In antitrust, we may either impose remedies based on Article 7 of Regulation 1/2003, or receive them from parties and make them binding under Article 9. When companies voluntarily offer the right commitments, they can avoid costly procedures and possible sanctions with associated reputational risks.

The Commission's practice with merger remedies is now long-established. In antitrust, our experience has grown since the introduction of Article 9 commitments. We have drawn on the practical lessons learned from mergers and convergence has also been brought forward by applying the same guiding principles in both instruments.

I believe that this convergence has led to increased predictability for companies and practitioners and has strengthened our remedy policy overall.

I will first speak about designing good remedies, then about the Commission's recent practice and converging trends, and I will finish with issues related to implementation.

## **1. The search for the right remedy: guiding principles**

Defining adequate remedies is a complex exercise for all sides.

When companies propose remedies upfront, they will primarily have in mind the impact on business. For the Commission on the other hand, what matters most is the suitability of the remedies to fully address a particular competition concern or distortion. We also have to think about the practical implementation of the envisaged remedies from the outset.

So these two objectives may not coincide.

This is why discussions on remedies with the parties are essential, though of course they are not a bargaining process. A constructive dialogue allows the Commission to endorse

remedies which effectively eliminate competition concerns, are proportionate and provide legal certainty.

Effectiveness, proportionality and legal certainty are the guiding principles in all our remedies cases.

**A.** I consider that the most important "innovation" in our remedies these last years has been a simplification push on our side for both mergers and antitrust, leading to greater effectiveness.

Our case experience had taught us that if remedies are too specific, they are not practical and the risk of circumvention is higher.

So we are encouraging remedies that are simple, workable and easy to implement. Let me give you some illustrations:

1. In terms of antitrust cases for example, the structural remedies in the RWE, E.ON electricity or ENI antitrust cases - about which I will talk later - were swiftly implemented. They ensured that the abuse could not be repeated and created the conditions for undistorted competition on energy markets. Similarly, in the Deutsche Bahn/Arriva merger, the divestiture of Arriva's German subsidiary clearly removed the concerns arising from the parties' overlap in the German rail and bus passenger transport markets.

2. In terms of process, our search for effectiveness and proportionality is apparent in the increased number and quality of our market tests in mergers and antitrust. Market testing is a key tool which allows us to tailor the remedies to the competition concerns.

Effectiveness is also guiding more specific process elements – such as for instance buyer approval by the Commission in mergers. In oligopolistic markets for example, this implies that significant competitors of the merging parties are unlikely to be accepted as suitable purchasers of divested assets.

**B.** As to proportionality, the Commission has made it clear that a remedy cannot be made binding if it does not adequately address competition concerns. Also, if equally effective, the Commission will prefer the less burdensome remedy for companies.

Such a situation arose in the acquisition by Kinnevik of Billerud, two Swedish packaging paper companies, cleared last week. We realised that the divestiture of a whole paper mill would have been disproportionate, so following a market test, we considered that the carve-out and divestiture of a single paper machine would be sufficient to effectively remove our concerns. The machine will remain in a mill

owned by the merged entity, and the purchaser will operate it at the same site, whilst being an independent competitor.

Designing good remedies means effectively removing competition concerns, through workable and proportionate solutions for businesses.

C. Through these solutions, we offer legal certainty to the businesses concerned by telling them that they can carry-on with their plans. We assure other market players that competition will remain undistorted or be restored. And we set useful precedents for businesses to know, in general, the kind of remedies we are likely to adopt in future occasions.

Let me turn to our recent practice.

## **2. Remedies and convergence in practice**

Legally speaking, a discussion on remedies starts from different premises in mergers and antitrust:

Merger transactions bring about a lasting change in the structure of the firms competing in the market. There is thus an inherent link between structural remedies and the very scope of our merger assessment.

In antitrust, on the other hand, anti-competitive agreements or abuses of market power are normally of a behavioural nature. When the Commission wishes to bring an infringement to an end according to Art 7 of Reg. 1/2003, it may impose on the companies concerned either behavioural or structural remedies, depending on the conduct at hand. Structural remedies can however only be used in antitrust where there is no equally effective behavioural remedy or where such behavioural remedy would be more burdensome for companies. This may explain why behavioural remedies have classically been more frequent in antitrust.

Despite these differences, there are many similarities in the types of remedies we use. Let me explain.

### **A. Structural remedies**

In **mergers**, divestitures are an effective way to address concerns resulting from horizontal overlaps, and may also be the best means to respond to vertical or conglomerate concerns. For instance in phase I cases, they frequently allow us to reach the standard of being "clear-cut" so that we can rule-out any serious doubts.

The benchmark for the acceptance of any other remedies in mergers is that they should be as effective as divestitures.

We have had many such structural merger remedies recently:

In UTC/ Goodrich, the business of Goodrich in aircraft electrical power generation and distribution was divested. The package included offering a competing engine supplier, Rolls-Royce, an option to acquire one of Goodrich's R&D projects.

In Universal/ EMI, the remedies entailed a significant structural part through the divestment by Universal of iconic artists, labels and local EMI entities. The behavioural aspects of the commitments related to the removal of Most Favoured Nation clauses as a complement to the main structural remedies. This behavioural commitment will allow competitors to negotiate more freely with digital customers and ensure a level-playing field. We considered this effective as the ban of Most Favoured Nation clauses was straight-forward and could be easily monitored, in particular by other market players.

In Glencore/Xstrata, we accepted the termination of a long-term exclusive off-take agreement that Glencore held with the largest zinc smelter in Europe, which had a de-facto structural impact on the market. This contract termination ensures that competition in the European zinc metal market is preserved.

These examples demonstrate the Commission's proportionate approach when faced with mergers raising serious competition concerns. Even such mergers can be cleared if parties offer adequate remedies. In all these cases, the remedies effectively removed our concerns and also entailed proportionate commitments from the companies.

In **antitrust** too, structural remedies have increased because they are simpler and easier to implement, and our merger experience inspired us in this sense.

Once the mandated divestiture has taken place, the change in the market structure will solve the antitrust concerns if behavioural commitments cannot do the job. There will be virtually no way to circumvent the remedy or alter its effectiveness.

Many cases have dealt with major structural problems calling for structural solutions. Typical examples are the ENI and RWE cases. We had concerns that the vertically integrated gas incumbents had foreclosed the downstream supply markets by refusing indispensable access to transmission capacity. The abusive conduct stemmed from the very structure of the undertakings: the concern was that they were favouring the interests of their group and leveraging their control of the network to maintain their dominance downstream.

We made the structural remedies binding because in our view only structural remedies could effectively address our concerns. RWE divested its transmission grid and ENI its share in certain international pipelines. This ensured that the abuse could never be repeated and created the conditions for undistorted competition downstream.

Here the lessons learnt from merger divestitures also served us well.

The remedies contributed to effectively opening-up energy markets to competition in addition to the regulatory provisions fostering liberalisation.

Let me turn to behavioural remedies.

## **B. Behavioural remedies**

In **mergers**, non-divestiture remedies are to be assessed on a case-by-case basis. They can be difficult to monitor and there are risks related to their effectiveness post-merger.

For example, the use of price caps involves a heavy degree of market intervention which we regard as generally outside the mission of a competition authority. We have also found that firewalls are virtually impossible to monitor.

Commitments relating to the future behaviour of the merged entity are thus only acceptable if their workability is fully ensured by effective implementation and if they do not cause distortive effects.

And we normally do not endorse behavioural commitments if they are just a “declaration of intent” from parties not to abuse their market power.

This is why the Commission has rather limited merger experience in this regard.

In **antitrust** too, we tend to only accept behavioural remedies when they bring about a positive change on the market, recognising that behavioural remedies may in certain circumstances be the only solution to effectively remove our concerns.

We've had such examples in the financial sector with the cases concerning Standard & Poor's and Visa MIFs.

In the Visa MIFs case we accepted commitments that capped interchange fees relating to debit cards. The commitments increased the transparency of applicable interchange fees for the participants and users of the Visa card scheme and removed other limitations on merchants.

In the S&P case, we accepted that S&P abolished licensing fees that financial institutions had to pay for the mere use of US International Securities Identification Numbers (ISINs) in Europe. The fees for the distribution of these numbers were also reduced.

In both cases, the behavioural commitments tackled overpricing issues and improved the efficiency of the financial markets. Strong behavioural commitments were the only option to address our concerns and restore a level-playing field.

Let me now refer to a third type of commitments: access commitments.

### C. Access commitments

Where appropriate, and by virtue of the principle of proportionality, in some cases we consider merger remedies short of a divestiture. These can be remedies to give access to a critical technology or infrastructure or to ensure interoperability. Such remedies can lower entry barriers for new competitors, without requiring more far reaching remedies such as the complete divestiture of technology or infrastructure.

What is sensitive here is that access terms, in particular access fees, can rarely be defined in advance; they have to leave room for the particular situation of potential beneficiaries. In other instances – such as access to technical interfaces - the release of technical information is critical, so a monitoring mechanism is often required.

In general, access-type remedies need to contain straight-forward obligations that can be monitored effectively. They should usually provide for a dispute settlement mechanism, including a fast track arbitration procedure.

Over the last years the Commission has cleared several airline **mergers** on the basis of slot release remedies, a type of access remedy. The legal standard is that such remedies must lead to actual, sufficient and timely entry of new competitors. Where such conditions were not met, a prohibition unfortunately remained the only option, such as in Ryanair/Aer Lingus or Olympic/Aegean.

Similar remedies were used in our **antitrust** practice. For example in the Oneworld case, we endorsed quasi-structural remedies under the form of slot releases at relevant airports. Some slots have been taken-up by competitors, which shows that the remedies were effective in opening up the market to competition.

We also accepted similar remedies ensuring interoperability between technologies in both instruments.

In Intel/ McAfee, the commitments offered by Intel ensure that vendors of rival products have access to the necessary information to use Intel's processing units and chipsets. These were straight-forward obligations, monitored by a trustee. This was an effective solution to the problems identified, and we preserved the efficiencies of the merger. It is worth mentioning that in this case we drew inspiration from the interoperability requirements in the Microsoft 2004 antitrust case. This shows that the experience we gain with remedies in one area often helps us reach better remedies in the other instrument.

A comparable example is that of the mobile security joint-venture between ARM, Giesecke & Devrient and Gemalto approved last month in the field of trusted execution environments for consumer electronics. Our concerns related to ARM's very strong position upstream as a supplier of intellectual property. We accepted

commitments similar to those in Intel/McAfee, ensuring the effective access of competitors to interoperability information.

In Cisco/Tandberg we considered however that a structural remedy, in combination with a behavioural remedy, was needed to ensure interoperability with other providers of videoconferencing solutions. The structural aspects included a transfer of intellectual property rights to an independent body, as well as the open sourcing of an IT protocol. The behavioural side concerned Cisco's commitment to continue to implement this protocol and its future versions, as licensed by the independent industry body. This was important because the availability of the protocol would not be of use if Cisco did not itself continue using it.

Remedies relating to access have been more frequent in antitrust, with cases also relating to interoperability - such as the Microsoft 2004 case, or access to transport capacity - EON Gas and GDF. Such remedies may in general be appropriate where the infringement does not derive from the structure of the undertaking but from its conduct on the market.

In the E.ON gas and GDF cases for example, the market foreclosure resulted from the long term booking of a large share of the transport capacity by the gas incumbents. The commitments entailed the immediate divestiture of significant capacity, as well as a commitment not to book more than 50% of the long term bookable capacity for 15 years. These remedies were proportionate to the concerns identified, and there was no clear need in these two cases, to go for the full divestiture of transport networks. The remedies were effective and allowed third parties the access to the transport capacity needed to compete downstream.

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I think the numerous examples I have just given you show that there is increased convergence between antitrust and mergers in our practice on remedies.

This is true both for the types of remedies and the overarching principles of effectiveness, proportionality and legal certainty that guide us.

Over the last years, this convergence has improved the quality of our remedies, their capacity to address competition concerns and, in parallel, their workability for companies.

This brings me to the final issue, that of implementation.

### **3. Implementation and monitoring**

The principles of effectiveness and proportionality also underpin our remedy policy in the implementation and monitoring phase.

In this respect the Remedies Notice has clearly set the ground in mergers and we constantly draw inspiration from it in our antitrust cases too.



Implementation should be quick, simple and observable.

Swift implementation is key. It ensures that a merger does not lead to anticompetitive conditions on the market and that antitrust concerns are quickly eliminated. For example, in divestitures, time is crucial if the divested business is expected to remain an active competitor in the market. This is why the Commission insists on short divestiture deadlines: the faster the divestiture, the shorter the need for on-going monitoring, "hold-separate" obligations, firewalls and so on.

As I mentioned earlier, we also attach great importance to market testing in both instruments because it helps us tailor the remedies on the basis of concrete evidence.

Market-testing allows us to anticipate problems that could arise in the implementation phase. This is why we need to hear directly from industry which options are viable and which are not and why we encourage interested parties to reply to our market tests. This is very useful in achieving effective and proportionate remedies.

Implementation should also be observable: monitoring should be as effective and easy as possible, for all remedies. Here too proportionality is important. We can choose from an array of tools like: own screening of the market, reporting obligations, trustees, or we can leave it to the vigilance of market players.

As you know, we are investigating the alleged breach by Microsoft of its commitments to provide Windows users with a choice screen between internet browsers.

Such alleged breaches go to the core of the effectiveness and proportionality of our remedies policy: if companies enter into commitments, they must do what they have committed to do or face the consequences.

In this sense, we are considering the strengthening of our monitoring for remedies decisions when need be, for example through a more frequent appointment of monitoring trustees.

## **Conclusion**

To achieve their purpose, remedies must be well-designed and fully implemented: this is key in enforcing competition policy effectively and allowing markets and companies to develop to their fullest potential.

Remedies should generate legal certainty, be effective and proportionate. Most of all, they should have a positive impact on the market.

I hope you will agree with me that our practice in the last years and convergence between merger and antitrust remedies has helped us meet these standards.