EUROPEAN COMMISSION

Carles Esteva Mosso,
Deputy Director General – Mergers
Directorate General for Competition
European Commission.

EU merger control:
how to remove anti-competitive effects?

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

Paris, 5th Global Merger Control Conference, 8 December 2017

Competition

Introduction

Conferences on merger control often focus on the *problems* raised by mergers: the theories of harm, the effects on prices, on innovation. Today I want to look at mergers from a different perspective. I'd like to talk about *solutions*, i.e. the remedies which are used to remove anti-competitive effects.

Actually, as merger enforcers, we devote a sizeable part of our daily work to making sure remedies are effective. And rightly so, because all our efforts in accurately assessing the anti-competitive effects of mergers would be in vain if, ultimately, the remedies did not fully remove those effects. Cutting-edge investigative tools and sophisticated econometric studies serve no purpose if we are not equally zealous in getting remedies that effectively protect consumers from the harm we have identified.

We typically try and, in most cases, actually manage to solve competition issues through remedies. This reconciles the need to preserve competition with the parties' interest in completing their merger in markets where it does not raise concerns. Prohibitions, while sometimes inevitable, occur rarely. Actually, in the 27 years since the first European Merger Regulation came into force, the Commission has issued only 27 prohibition decisions. It has, however, adopted more than 400 decisions with remedies.

To evaluate the effectiveness of a merger control authority you should, therefore, look closely at its remedy policy and practice, because the remedies that it imposes are going to eventually determine whether anti-competitive effects are, or are not, actually removed from the market.

To make sure remedies are effective, the Commission has, over the years, developed some principles that are applied when remedies are assessed, accepted and implemented. These principles are enshrined in the Commission's Remedies Notice of 2008. They also inspired the model text for divestiture commitments, last updated in 2013, which assists the Commission and parties in crafting remedies that effectively address the competition concerns.

The principles in the Commission's Remedies Notice were developed based on our experience in past cases. That experience has taught us that the potential for things to go wrong is high: the business to be sold as a remedy can be composed of the wrong assets, it can be sold to the wrong purchaser, or the business can deteriorate during the divestiture process or afterwards. When this happens, it is the consumer that ends up suffering the ineffectiveness of the remedy. This is why one of the key principles of our policy is that these risks have to be borne by the parties to the merger, not by the customers.

To limit and eventually eliminate these risks, we make sure that we learn from past experiences and our practice in this area is therefore in constant evolution. We conduct ex-post studies; our major one to date, back in 2005, evaluated the remedies imposed in 40 different cases and gave us valuable insights in the shortcomings of our previous cases. We also set up a specialised team within DG

COMP's Mergers Case Support and Policy unit to track cases involving remedies, support the case teams in the discussion and implementation of remedies, and ensure a coherent approach across industries.

Today, I would like to share these experiences with you, using some of our most recent cases as examples. I obviously will not refer to mergers currently being investigated and, therefore, the general statements I will make should not be construed as referring to any specific on-going case.

I expect that some of these experiences may also be instructive for businesses envisaging complex deals in the future. To successfully navigate through a merger control procedure it is indeed essential to anticipate the likely requests of competition authorities and plan possible remedies in advance.

Design of remedies – structural solutions preferred

The main requirements for a remedy to be accepted by the Commission are clearly set out in the Remedies Notice and the case law of the European Courts: a remedy must entirely remove the competition concerns raised by the merger, be comprehensive and effective from all points of view, and be capable of being implemented effectively with in a short period of time.

To achieve these goals, the Commission has a clear preference for **structural remedies**, i.e. remedies that change the structure of the market, normally through the divestiture of a business. There is a clear logic to this: a merger by definition results in a lasting structural change in the market, so the remedy also should have a lasting effect. Furthermore, a divestiture is normally a one-off intervention. This means a divestiture does not require long-term monitoring, with all the risks associated with this. It is also a more proportionate interference with the merging firms' freedom to conduct their business than remedies that impose specific conduct over a longer period.

This preference for structural remedies is clearly reflected in our statistics. During the last two years, the Commission required a divestiture in 75% of all remedies cases. In only 25% of those cases were other types of remedies imposed, such as access remedies or removal of links with a competitor.

It is opportune to mention that the Commission's preference for divestiture remedies applies to all sectors: in manufacturing industries (where indeed divestiture remedies have always been standard) but also in more complex and diverse services sectors, such as telecoms.

In recent years the Commission has been confronted with a wave of consolidation in the telecoms sector. Several attempts at merging mobile operators in already very concentrated markets could not be approved in the absence of structural remedies. But, in 2016, the Commission approved a joint venture between two of the four mobile network operators in Italy, after the parties proposed a structural remedy which removed the Commission's competition concerns. The package included divestment of a certain amount of the joint venture's mobile radio spectrum and the sharing of several thousand mobile base station sites, allowing a new mobile network operator – the French telecom operator Illiad - to enter the market.

Divestiture remedies

When it comes to divestiture remedies, the clear preference is for a straightforward divestiture of a **stand-alone business** or subsidiary, since this is the best way of ensuring the market will remain competitive. This is particularly true for remedies in Phase I, which must present a clear-cut solution to the serious doubts identified during the preliminary investigation. A small majority of all divestiture remedies accepted by the Commission in the past two years may be characterized as such standard divestitures.

For instance, the merger of two of the world's largest brewers, AB InBev and SABMiller, was cleared in 2016 subject to the divestiture of SAB Miller's entire business in several Member States. The divested business included SAB Miller's breweries, employees, contracts and assets in those countries, including major beer brands such as Grolsch, Peroni and Pilsner Urquell. Those clear-cut remedies allowed the Commission to conditionally clear such a complex case in Phase I.

Likewise, the Commission cleared Heidelberg Cement's acquisition of Italcementi after the parties committed to divest Italcementi's entire business in Belgium. This removed the overlap in the market where the Commission had concerns, and paved the way for a Phase I conditional clearance.

When a business is divested it must include all the assets which are necessary to ensure its viability and competitiveness. This means the divestiture must not only include the assets and employees that are used to produce and sell its products *at present*, but also the assets and employees that ensure the business' *future*. In other words, the divestiture has to include the business' **pipeline products and research & development (R&D) functions**. If those are not included, the divested business will not be competitive in the long-run and will not do its job of keeping the market competitive on a lasting basis.

This applies to all cases, not only to these where the Commission identifies specific innovation concerns.

For instance, in the recent DOW / DuPont merger, the Commission was concerned by negative effects both on actual competition and future innovation.

The parties committed to divest a significant part of DuPont's existing pesticide business, including almost the entirety of DuPont's global R&D organisation.

But such R&D divestiture has also been required in cases where concerns were not innovation specific. Smiths / Morpho is a good example. That acquisition brought together two suppliers of the equipment used at airports to detect explosives. The Commission had concerns that the deal would harm competition in the market for explosive trace detection equipment. The parties committed to divest Morpho's entire business in that market. This included not only the current manufacturing facilities, but also the R&D facilities and engineers that were working on the next-generation of equipment. In Plastic Omnium / Faurecia Exterior Automotive Business, the Commission had concerns that the transaction would lead to higher prices for plastic bumpers and other car components. The parties committed to divest several production plants where these bumpers are made, including the R&D centre connected to these plants.

In short, whether it is pesticides, bumpers, or equipment to detect explosives, parties have to divest not just the business' present, but also its future.

The Commission will not seek a divestiture of more than what is necessary to remove the competition concerns. This flows from the principle of proportionality. But that principle can never justify a departure from the requirement that the divested business must be competitive and viable. It is therefore not uncommon that a divested business also has activities in markets where no competition concerns are found, simply because the divested business needs them to remain a viable and effective competitor.

For instance, in Cargill/ADM Chocolate Business (2015), the parties divested ADM’s chocolate plant in Mannheim, Germany. This was done in order to remove the Commission's concerns that the acquisition would hurt buyers of industrial chocolate located around the parties’ German plants. Although the concern in that case related to customers in Germany, the divestiture also included the Mannheim plant's contracts with UK customers purchasing specialty chocolate. That line of business was small but profitable and growing, so it had to be included to ensure the divested business was viable.

Although the divestiture of a stand-alone business is the rule, the Commission is also open to discuss, and in fact has accepted in a number of cases, **more complex types of divestitures**. For instance, in a carve-out scenario, one or more assets that in themselves do not constitute a self-standing business are separated from the merged entity and sold to a purchaser capable of running these assets as a competitive force in the market.

The risks of such carve-outs are obvious: support systems have to be split, shared employees may not be willing to move with the divestiture, IT systems have to be cut off, lines of supply have to be renegotiated, etc. We cannot afford, however, that these risks are borne by the buyer of the divested business, and ultimately the European consumer, if the remedy fails to prevent the anti-competitive harm. The more complex the remedy, the more important the risk that something along the way may go wrong. That is why the Commission increasingly requires additional safeguards to deal with these situations.

For instance, we normally prefer a "reverse carve-out". This means the business is divested as a whole to a purchaser but the merged entity may retain one or more assets that are not necessary for the viability and competitiveness of the carved-divestment business. And we try to avoid “mix-and-match”, where assets that previously belonged to separate businesses – possibly from both the acquirer and the target – are sold as a package.

Some advice: if multiple solutions are available, favour simplicity. The gains that this might entail, in particular getting a fast approval, closing the deal earlier and avoiding complex implementation issues, may often outweigh other economic considerations.

Inevitably, in all these discussions about complex divestiture remedies, there is a huge asymmetry of information between the parties and the Commission. The parties tend to have superior knowledge on what would constitute a viable business and which assets, contracts and employees are needed. To mitigate this asymmetry, the parties have a duty to provide accurate information to the Commission. We are committed to protecting the integrity of our rules and the obligations these entail for the parties. When the Commission finds out that the parties have submitted incorrect or misleading information, also with regards to remedies, it can bring infringement proceedings and impose fines.

Remedies purchasers

The identity of the buyer may also be essential to ensure the success of a complex remedy. One way to reduce risks is to set specific purchaser requirements, for example that the buyer must be an established player in the industry or already own certain assets. Another possible safeguard is the requirement of an up-front buyer or – more rarely – a so-called “fix-it-first” remedy.

In case of an **up-front buyer remedy**, the parties can only close the main transaction once they have signed a binding sale and purchase agreement for the divestment business with a purchaser approved by the Commission. This gives the Commission additional comfort that the business will actually be divested to a suitable purchaser before closing of the main transaction may start affecting competition in the market.

An example of a case where an upfront buyer clause was considered necessary is Ball's acquisition of Rexam. The transaction brought together two of three leading suppliers of beverage cans in Europe and world-wide. The decision, issued in 2016, was subject to the divestiture of most of Ball's existing beverage can business in Europe (including central management, R&D and logistics functions) and two can factories owned by Rexam. The parties were able to close the main transaction only after the Commission had approved the purchaser, Ardagh, a global packaging company.

Like an upfront buyer remedy, a **fix-it-first remedy** gives the Commission the assurance that the divested business will be sold to a suitable buyer before the parties close the main transaction. But the difference with an upfront buyer remedy is that the buyer approval process occurs at an earlier point in time. While the buyer in an upfront buyer remedy is assessed and approved after the clearance decision, in a fix-it-first remedy, the buyer and the transaction documents are approved in the decision clearing the main transaction. Such a solution is mostly chosen in cases where from the outset there appear to exist only a very limited number of potential suitable purchasers.

For instance, in 2015, the Commission approved the acquisition of Alstom's energy businesses by General Electric subject to divestment of parts of Alstom's heavy-duty gas turbines business to Ansaldo, by way of a fix-it-first divestiture. The merger as notified would have eliminated one of only four competitors for heavy-duty gas turbines in the EEA and risked eliminating an important innovator. The divestiture package therefore included the technologically most advanced parts of Alstom's heavy duty gas turbine business and key personnel for its further development, including technology for existing turbines, upgrades and future pipelines, engineers, test facilities, and long-term servicing agreements for a significant part of Alstom's installed base of existing turbines. Ansaldo was an existing competitor in the heavy duty gas turbine market. It already had know-how, experience and an efficient factory for gas turbines and other power plant components (such as steam turbines and generators) that are often sold together with heavy duty gas turbines. Two years later it has integrated these business successfully, concluded R&D projects initiated by Alstom and it is actually competing in key market segments.

In the last two years, around 45% of the divestitures we accepted were up-front buyer or fix-it-first divestitures. The remaining 55% of divestitures were regular divestitures, meaning the parties could close the main transaction as soon as they obtained the Commission's clearance decision and they then had to find a suitable purchaser in the months following that clearance decision.

Non divestiture remedies

Although divestitures make up the large majority of our remedies, we have also accepted **non-divestiture remedies** in some cases. In assessing whether they will be effective, divestitures are the benchmark: a non-divestiture remedy can only be considered if it is at least as effective as a divestiture.

Non-divestiture remedies come in many shapes and forms. Parties can remove certain links with competitors, or provide access to a network. They could also commit to continue to offer a product or service to customers.

There is a clear correlation between the type of remedy on the one hand and the theory of harm and specificities of the industry on the other. To remove horizontal unilateral effects, a divestiture – in principle of the full overlap – is almost always the best and only solution. However, sector specificities might, on some occasions, favour other approaches.

For instance, in the shipping industry, where companies are frequently linked to each other through consortia and conferences, removing those links may constitute a remedy for horizontal effects. The remedies in the merger between Hapag Lloyd and CSAV merger provide an illustration.

While horizontal mergers will in principle always require a divestment, vertical or conglomerate mergers more often lend themselves to non-divestiture remedies. In Liberty Global/ De Vijver Media, for instance, we were faced with a vertical merger between a cable operator and a provider of two popular TV channels. The merger could have allowed the cable operator to muscle out competitors by keeping the TV channels exclusively for itself. The remedies in that case guaranteed that competing operators could distribute the TV channels under fair, reasonable and non-discriminatory terms, and thereby removed the input foreclosure concerns.

In some conglomerate cases, we have also accepted so-called interoperability remedies, requiring the merging parties to ensure their systems remain interoperable with the products of competitors. Microsoft / LinkedIn is an example of such a case. In that case, Microsoft committed to keep its Office products such as Outlook interoperable with competitors of LinkedIn.

But even in vertical and conglomerate cases a divestiture or something akin to it may be the most effective solution. In Airbus / Safran, the parties created a joint venture combining a supplier (Safran) and its customer (Airbus). To remove input and customer foreclosure concerns, the parties committed to keeping Safran's plasmic propulsion systems business – an important input for satellite makers such as Airbus - out of the joint venture that they were setting up.

Not all mergers can be cleared with remedies

Not all mergers can be cleared, though. Sometimes, the competition concerns raised by a transaction affect so many areas of the merging firms' activities that an effective remedy package would be excessively complex and entail too many risks. In those cases too, we cannot afford to take a gamble and clear the transaction.

The Halliburton-Baker Hughes merger, which raised concerns in numerous markets for oilfield services and that the parties attempted to resolve through a very complex mix and match solution, might be a good example of this situation. The parties abandoned the deal shortly after receiving a Statement of Objections in the EU and being challenged by the DoJ in the US.

In some other cases, even if suitable remedies may have been identified, the parties might decide eventually not to submit them. In those cases, the Commission has no other choice but to prohibit the deal.
For instance, in Deutsche Börse / London Stock Exchange, a merger between Europe's two largest stock exchanges, concerns arose from the creation of a *de facto* monopoly in fixed income clearing. The parties proposed a divestiture that fell short of fully resolving this issue. A divestment of their trading platform MTS would have removed the Commission's concerns. However, the parties were not prepared to make that commitment and the Commission ultimately had to prohibit the merger.

Prohibiting a merger due to insufficient remedies often involves difficult calls, but at the end of the day, it is the responsibility of the authority to protect consumers. And, in this context, it is also important to bear in mind that our conditional clearance decisions are subject to judicial review. This means that third parties who consider the remedies inadequate can appeal our decisions. This is an important due process feature of the European administrative model, not present in judicial merger control systems.

A number of Commission decisions clearing mergers subject to remedies have been challenged. Several decisions have been confirmed by the European Courts, for instance in Lagardère / Vivendi Universal Publishing, Haniel / Cementbouw / CVK, Air France / KLM or Lufthansa / Austrian Airways. Other decisions challenged by third parties have been annulled, most recently Liberty/Ziggo. Right now, an appeal is pending against the conditional clearance decision in the Italian mobile telecoms case Hutchison 3G Italy / Wind / JV.

Global mergers and international cooperation

Recent years have seen an increase in mergers that are subject to parallel reviews by several authorities around the globe. In more than half of our complex cases – that is cases that go into Phase II or that are cleared with remedies – we cooperate with other authorities. These include the authorities from the United States and China, but also Canada, Brazil, Australia, Japan and many other agencies from emerging countries.

In those cases, international cooperation is crucial to ensure that remedies in various jurisdictions do not conflict. Cooperation is essential when global markets are at stake, and the same remedies might be required by the authorities affected. But cooperation might also be needed even when authorities are assessing regional and national markets, because remedies may be interlinked. In all these situations, the parties need to facilitate cooperation between authorities by giving waivers and facilitating the alignment of timetables.

The General Electric / Alstom case illustrates how such cooperation effectively contributes to consistent remedies. In that case, the Commission cooperated closely with the U.S. Department of Justice in the design and assessment of the remedy, even if the competition concerns were not identical on both sides of the Atlantic. This cooperation resulted in both the Commission and the Department of Justice approving Ansaldo as buyer of the divestment business in both jurisdictions.

And I already mentioned the Ball / Rexam merger where the divested business was part of a larger package of world-wide divestitures, including assets of Ball and Rexam in the US and Brazil. In that case, the Commission worked in close cooperation with the US Federal Trade Commission and CADE, Brazil’s competition authority. All three authorities ultimately approved the same purchaser (Ardagh) for the divested business.

Global mergers also raise a broader challenge that merits some reflection. In some sectors, successive mergers between global players have reshaped the entire industry. But while consolidation is global, merger control authorities are national or, at best, like in the EU, regional. These authorities can and do cooperate, but ultimately, they are responsible for competition in their own market and will accept remedies that remove the concerns there. From a global perspective, however, there is a risk of fragmentation, as different bits and pieces of a global player might end up being divested to different entities in various jurisdictions. One can wonder whether in such circumstances, the divestiture will really create a new player that will be able to compete effectively against the much strengthened player created by the merger. Competition authorities need to be particularly vigilant that the competitive strengths of global players are effectively transferred to the divested business and do not get lost in the remedies process.

Cases such as DOW / DuPont, where several jurisdictions accepted a remedy that entailed a divestiture to a single global player (FMC) may serve as an inspiration on how to deal with such global mergers in the future.

Conclusion

The principles and requirements that I have laid out are meant to ensure remedies are effective. But the proof of the pudding is in the eating. Our 2005 study looked back at our remedies practice in the late nineties and found many shortcomings. This led to a renewed focus on ensuring remedies are effective and to the 2008 Remedies Notice. We'd like to think that our current remedies practice has stayed clear of those pitfalls, but we remain vigilant. Consumers and businesses in the EU are entitled to competitive markets and ineffective remedies deprive them of that benefit. It is our job to ensure that only effective remedies make it through the process and to insist on nothing less than full and proper implementation by the parties.