

The Merger Remedies Study—In Divestiture We Trust?

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 [Keywords to Follow]

1. Introduction

In October 2005, DG Competition published a detailed ex-post assessment of merger remedies adopted in 40 cleared mergers over the period 1996 to 2000 (hereafter, “the study”).¹ It is the first review of this kind by competition authorities in Europe,² and it was published amid international discussions between authorities about the design, implementation and effectiveness of merger remedies.³ A similar study, albeit solely related

to divestitures, was conducted by the Federal Trade Commission in 1999.⁴

The EC Merger Regulation allows parties to modify a notified concentration in the course of proceedings in order to render it compatible with the Common Market. The Commission is entitled to accept commitments (or remedies) from merging parties on condition that they are proportionate to the competition problem they are solving and they eliminate it.⁵

Without such remedies, merger decisions would in fact be binary (clearance/prohibition). Remedies therefore constitute an additional tool in the hands of competition authorities, aimed at “fixing” a competition problem generated by a merger while at the same time preserving its economic rationale (i.e. efficiencies). A remedy that is ill-adapted will fail to achieve either or both objectives, imposing an unduly high cost on the merging parties (by depriving them from efficiency gains) and/or harm consumers (by ineffectively protecting competition). Getting it right is therefore particularly important.

In that context, this self-assessment exercise from DG Competition reveals a sensible approach to its enforcement policy in merger control and is a welcome development, signalling the Commission’s willingness to reflect on past decisions in order to improve future decision-making. As a follow-up to the study, the Commission has already announced that its conclusions will be used in the current review of the Merger Remedies Notice and of the Model Divestiture Commitments and Trustee Mandate.⁶ However, as this paper will argue, the study by and large confirmed several of the issues already identified by the FTC in 1999. Moreover, it was limited in scope, leaving aside recent concerns raised by legal and economic commentators about the design of remedies. This may unfortunately limit the contribution of the study to shaping and improving the new Merger Remedies Notice.

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1 “Merger Remedy Study”, DG Competition, October 2005 (available at http://europa.eu.int/comm/competition/mergers/others/remedies_study.pdf). See also A. Kopke, “Merger Remedies Study” (2005) *Competition Policy Newsletter*, autumn, p.3.

2 Last year the UK Competition Authorities published a study on the ex-post assessment of merger decisions but the focus of the review was on the accuracy of market analysis undertaken during investigations. See Joint Report of the Office of Fair Trading, Department of Trade and Industry and the Competition Commission, “Ex-post Evaluation of Mergers”, published in March 2005.

3 Indeed, merger remedies are currently on the agenda of competition authorities and international agencies. The Canadian Bureau of Competition is reviewing its policy on merger remedies (see draft *Information Bulletin on Merger Remedies in Canada*, October 2005). Merger remedies have been the object of an in-depth analysis by the OECD, “Merger Remedies”, DAF/COMP (2004) 21, and at the ICN, “Merger Remedies” (2005). The DOJ published a guide on merger remedies in 2004 while the FTC had summarised the results of its review in 2003 (“Statement of the Federal Trade Commission’s Bureau of Competition on Negotiating Merger Remedies”). For an overview of the main differences between the FTC’s and the

DOJ’s approaches see L. M. Breed and D. J. Michnal, “Merger Remedies: The DOJ’s New Guide to Old Differences with the FTC” (2005) *Antitrust Magazine*, spring, p.37.

4 “A study of the Commission’s Divestiture Process”, prepared by the Staff of the Bureau of Competition of the Federal Trade Commission, 1999.

5 Commission Regulation 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation), [2004] O.J. L24/1, Arts 6(2) and 8(2), Recital 30.

6 Both the Merger Remedies Notice and the Model Divestiture Commitments and Trustee mandate can be found at: <http://europa.eu.int/comm/competition/mergers/legislation/remedies.htm>

The remainder of the paper is structured as follows: Section 2 discusses the study's main findings. Section 3 reviews the insights from the budding economic literature on merger remedies. Section 4 suggests possible ways to improve current practice and finally, Section 5 concludes.

2. A review of DG Comp's remedies study

The study reviews 96 remedies adopted in 40 merger decisions, representing 44 per cent of the decisions involving remedies adopted by the Commission during the five-year period covered by the study (1996 to 2000) and 21 per cent of all remedy decisions adopted under the EU Merger Regulation until the end of 2004. Following an approach similar to the 1999 FTC Study, the analysis relies mainly on qualitative information based on interviews and responses to questionnaires submitted to merging parties, buyers of assets and monitoring trustees. The study's objective was to verify how the implementation of remedies had taken place. A detailed ex-post assessment of the impact of the remedy and of the evolution of the markets affected was not carried out.⁷

The study gives an overview of cases in which the remedies were deemed ineffective in solving the competition problem raised by the merger (these are sometimes referred to as weak type II errors).⁸ The study confirms that divestiture is a risky business: transfer remedies were found to have solved the competition concern only in 56 per cent of cases.⁹ Access remedies

proved to be less effective, as they properly addressed the relevant competition concern only in two cases (out of a total of five).¹⁰

The most notable aspects of the study are reviewed below and relate to the structural/behavioural distinction, the problems encountered in structural commitments and the role of monitoring trustees. Given that a large part of the study is devoted to divestitures and to the reasons leading to inefficiency, our focus will unavoidably also be on divestitures.

2.1. A farewell to the structural/behavioural distinction?

One of the interesting aspects of the study is that the usual distinction between structural and behavioural remedies is set aside. Instead, a "form-based" and wider classification is adopted: (a) transfer of a market position; (b) exit from a joint venture; (c) access granting. This categorisation is somewhat unusual as it does not fit the current Notice on Merger Remedies (see para.13 of the Notice) nor does it fit the economic classification of remedies.¹¹ For the assessment of the remedies, the study actually uses a more detailed categorisation.¹²

While departing from the usual dichotomy, the Commission's approach in the study could be interpreted as being consistent with the understanding of merger remedies offered by the CFI in previous cases.¹³ A wider categorisation may signal the Commission's openness to developing the practice in merger remedies in a less formal way.¹⁴

⁷ The authors of the study are of course well aware of the limitations related to the methodology and of their consequences: "the results should be treated as mainly indicative", study, s.I, para.29.

⁸ The study suggests only a few remedies may have been "superfluous" in emerging markets (see the recent interview of the authors of the study in the *Global Competition Review*). A systematic analysis of remedies was recently undertaken by T. Duso, K. Gugler and B. Yurtoglu in their paper "EU Merger Remedies: A Preliminary Empirical Assessment", WZB Discussion Paper, September 2005. They find that weak type I errors (remedies that were unnecessary) were made in a relatively large number of EU merger decisions. A closer look at merger decisions cleared without remedies would give a more complete picture of merger enforcement (such as the one undertaken by the UK Competition Authorities which focused on the evolution of markets where mergers were cleared without remedies).

⁹ "At first glance, remedies seem very effective since 94% of divested business is still on the market three to five years after divestiture and 81% of total analysed remedies are assessed as totally or partially effective. In fact, these impressive figures

are trees hiding the forest", F. Lévêque, "Quelle efficacité des remèdes du contrôle européen des concentrations?" (2006) 12 *Concurrence* 27.

¹⁰ Unfortunately, the small sample size regarding access remedies does not really allow firm conclusions to be drawn.

¹¹ Economists distinguish remedies on the basis of their impact on property rights: remedies can either reallocate or constrain the exercise of property rights.

¹² The transfer of market position (essentially divestiture commitments) is further sub-divided into: (i) divestiture of a controlling stake in a company; (ii) divestiture of a business unit; (iii) divestiture of mix-and-match assets; and (iv) divestiture or grant of a long-term exclusive licence. Remedies intended to grant access are sub-divided into: (i) access to infrastructure or technical platforms; (ii) access to technology via licences of IPRs; and (iii) termination of exclusive vertical agreements, study, s.I, para.30.

¹³ Case T-102/96, *Gencor v Commission*, judgment of March 3, 1999: "The distinction between structural and behavioural remedies is immaterial", at [319].

¹⁴ G. Drautz, "Remedies Under the Merger Regulation", *Annual Proceedings of the Fordham Corporate Law Institute*, 1996, p.224, "there are some cases in which the remedy

2.2. *In divestiture we trust?*

Divestiture commitments tend to be preferred by competition authorities because they are expected to restore competition without requiring constant monitoring that would use up the authorities' scarce resources.¹⁵ The preference for divestiture as a remedy to merger threatening to create or strengthen a dominant position is clearly stated in the Notice on merger remedies.¹⁶ The study shows that the preference may not be warranted.

Indeed, the study documents the difficulties associated with structural remedies. The Commission has been reluctant to use behavioural remedies in order to clear mergers creating or strengthening a dominant position (or significantly lessening effective competition under

the new test).¹⁷ Despite the Commission's claimed faith in the greater effectiveness of structural remedies, the study revealed their limitations. These limitations have already been widely discussed by competition lawyers and economists and the study in a way vindicated the view expressed by some that the economics of regulation (and hence a greater focus on behavioural-type commitments) may be useful to guide the design of remedies.¹⁸

The results of the study suggest that divestiture remedies have been effective in 56 per cent of the cases, partially effective in 25 per cent,¹⁹ where effectiveness means that the divested entity remained a viable and effective competitor (in three to five years following the divestiture).²⁰ While the overall result is not very impressive, a closer look seems to reveal an even less comforting picture.²¹

accepted may be something of a hybrid creature, combining elements of both a structural and behavioural nature. The Commission must consider the appropriateness of remedies on a case-by-case basis, taking into consideration the specific characteristics of the relevant market under scrutiny". Licensing of IP rights, for instance, has been defined "hybrid remedy" by the International Competition Network in its 2005 study on merger remedies. According to Drautz, trade mark licensing can be structural in so far as it brings a new competitor into the market with an established brand and behavioural where it imposes the seller to withdraw its use of the brand for a specific period. The Commission has accepted trade mark licensing as a remedy in several circumstances, frequently coupling it with divestiture of other tangible assets (Case IV/M.623, *Kimberly-Clark/Scott*, January 16, 1996; Case COMP/M.2337, *Nestle/Ralston Purina*, July 27, 2001). In other cases, however, stand-alone exclusive licensing has been considered sufficient to remedy to horizontal overlaps deriving from a merger (Case COMP/M.2621, *Seb/Moulinex*, January 8, 2002). See also J. R. Loftis and D. K. Moskowitz, "United States Federal Antitrust Merger 'Solutions', not 'Remedies'", *Annual Proceedings of the Fordham Corporate Law Institute*, 2004, "The structure/behaviour dichotomy is false to the extent it divorces solutions from problems and places value on ease of administration. Let the problem define the solution first. Then determine how to administer it".

15 "Structural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market", Guiding Principles of the Antitrust Division Policy Guide to Merger Remedies, October 2004, p.7.

16 "(...) the most effective way to restore effective competition, apart from prohibition, is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture", Commission Notice on remedies acceptable under Council Regulation 4064/89 and under Commission Regulation 447/98, (Notice on Merger Remedies), para.13. Note that the preference for structural remedies is spelt out mainly in Commission's non-binding notices. The EC Merger Regulation, on the contrary, focuses on the proportionality and on the effectiveness of a remedy, and not on its structural nature.

17 This, of course, does not mean that behavioural remedies can be ignored in merger control, as the Court of First Instance (Case T-102/96, *Gencor v Commission*, March 25, 1999 and, more recently, Case T-5/02, *Tetra Laval v Commission* [2002] E.C.R. I-4381, judgment of October 23, 2002) has pointed out. Several mergers have been cleared solely on the basis of behavioural remedies. In Case IV/JV.19, *KLM/Alitalia*, August 11, 1999, the Commission accepted behavioural undertakings because "the usual remedies accepted by the Commission to prevent the creation or reinforcement of a dominant position (i.e. the divestiture of assets) are not suitable" (at [68] of the Decision). In other merger cases behavioural remedies played an important, if not decisive, role. See Case IV/M.877, *Boeing/McDonnell Douglas*, July 30, 1997; Case IV/M.1517, *Rhodial/Donau Chemie/Albright & Wilson*, July 13, 1999; Case COMP/JV.37, *BskyB/KirchPayTV*, March 21, 2000; Case IV/M.1853, *EDF/EnBW*, February 7, 2001; Case COMP/M.2876, *NewsCorp/Telepiu*, April 2, 2003; Case COMP/M.2947, *Verbund/EnergieAllianz*, June 11, 2003; Case COMP/M.3083, *GE/Instrumentarium*, September 2, 2003.

18 See P. Rey, "Economic Analysis and the Choice of Remedies", in *Merger Remedies in American and European Union Competition Law* (F. Lévêque and H. Shelanski, eds, 2003).

19 Effectiveness was gauged on the basis of the following proxies: whether the purchaser was still in business; the market share evolution of the divested business and of the divestor; and a comparison of the two.

20 The effectiveness of Phase I remedies seems to be higher than in Phase II (as if the more you think about it the worse it gets!). There are several plausible reasons for this. The study suggests that Phase I remedies normally address straightforward and clear cut issues, where the competition concern is easier to solve because the anti-competitive effect is weaker. It could also be argued that, due to strict time limits, Phase I remedies tend to be more far-reaching and therefore more effective and easily acceptable by competition authorities. In order to avoid a Phase II investigation, parties may be more willing to offer broader commitments to the Commission.

21 According to the 1999 FTC study (whose benchmark for a divestiture to be successful was merely for the divested business to enter the market, and not to successfully compete) 25% of

The fact that the divested business is still operating in the market does not necessarily mean that the purchaser is effectively competing. The evolution of market shares, therefore, provides additional indications that on the remedy's likely effectiveness. The market share of the divested business decreased in 44 per cent of the cases (sometimes dramatically, losing more than 50 per cent) and remained stable in 34 per cent. Interestingly, the retained business frequently outperformed the divested one (57 per cent of cases).²²

The difficulties related to the implementation of an effective divestiture commitment are numerous. The study enumerates quite a few unresolved issues and serious design/implementation problems and these are reviewed below.²³

2.2.1. Composition risks

The most serious threat to the effectiveness of a divestiture remedy seems to lie in its scope, frequently defined insufficiently and/or inadequately (serious issues have been identified in 79 per cent of the cases).²⁴

Omission of key assets necessary for the viability of the business is one of the sources of inadequacy. Parties are not currently obliged to disclose information on which parts of the business are essential for its viability. This allows for opportunistic behaviour of the seller, with the buyer frequently ending up in ex-post hold-ups.

An additional difficulty lies in the practice of the Commission, which frequently defines the scope of the business to be divested solely referring to the overlap in the parties' market activities. The study recognises that too much weight is given to market structure and market shares, while very little focus is put on the ability of the divested business to restore effective competition. This approach has frequently resulted in insufficient consideration of key factors for the viability of the divested business (e.g. upstream/downstream links

between divested and retained business; critical mass of the divestiture package, role of IPRs).²⁵

Divestiture of a stand-alone business is more likely to be effective than a carve out or a "mix and match" of assets. Serious unresolved problems arose in 18 per cent of the remedies where significant carve out was necessary. The study, while emphasising the need to properly spell out principles governing the carve out of assets and personnel shared between the divested and retained business, confirmed the preference for "clean sweeps", already stated in the Remedies Notice, i.e. divestiture of businesses that can operate on a stand alone basis.²⁶

2.2.2. Purchaser risks

In 48 per cent of divestiture commitments analysed, issues regarding the suitability of the purchaser were raised. In at least 11 cases the choice of a "wrong" purchaser led to a partially ineffective remedy. The study confirms the existence of a purchaser risk, and it acknowledges, at least to a certain extent, that small companies may encounter higher difficulties to compete when acquiring a new business.²⁷

Only one commitment contained an up-front buyer clause. According to the study, the presence of an up-front buyer clause has several positive effects, as it: (i) speeds up the divestiture process; (ii) ensures that mergers are not consummated until the competition concerns are resolved; (iii) reduces risks of deterioration of the business during the interim phase.

While the last two points are either self-explanatory or generally agreed, there is no agreement on the first one. The need to find in advance a suitable buyer can postpone the closing of the merger, with several

the divestitures ordered were completely unsuccessful, with new players quickly exiting the market or not even being able to enter it.

22 While the evolution of market share is a better indicator than mere market presence, the fact that the divested business has lost market share does not necessarily mean that competition has not been effectively restored or protected. The merged entity (or other competitors) may be competing very aggressively with the divested business.

23 While discussing the factors affecting the design/implementation of divestitures the International Competition Network (Merger Remedies Review Project) distinguishes between composition, purchaser and assets risks. The same sub-division is used in the following sub-paragraphs.

24 Ensuring the adequate scope of a remedy while avoiding to over-fix the competition problem. (See Section 3 of this article) is a difficult task.

25 Study, s.II, para.24. This is not always the case. In Case COMP/M. 2286, *Buhrmann/Samas*, April 11, 2001, the assets divested were also related to the markets where the activities of the parties did not overlap. Whilst the concern was related to Buhrmann's distribution of office supplies for large customers, Buhrmann offered to divest the entire contract stationing business in the Netherlands. The Commission accepted the commitment on the basis that its scope would have ensured the viability of the business. Also in Case COMP/M.3558, *Cytec/ECB-Surface Specialities*, December 17, 2004, the Commission acknowledged that the remedy was going beyond what would have been strictly necessary to remove competition concerns, as it was not possible to effectively carve-out a viable business without divesting more than the overlap. In Case COMP/M.4066, *CVC/SLEC*, March 20, 2006, the commitments offered by the parties went well beyond the actual overlaps and the competitions concern identified by the Commission, both in terms of geographic scope and timing.

26 Study, s.II.F, para.2.

27 Study, s.II.I, para.16.

negative consequences (delay in the realisation of any merger-based cost-reduction effect, uncertainty on the status of the divested company, possible reduction of the purchase price of the divested business). Also note the leverage power given to the buyer, who is suddenly given a central role in the whole divestiture process.²⁸

2.2.3. Asset risks

The competitiveness of a remedy package can quickly deteriorate during the divestiture process. The study confirms this point: several of the effectiveness reducing measures were encountered during the interim preservation phase. In order to ensure asset preservation, both the Remedies Notice and the Model Divestiture Commitments set out the following obligations on the parties: (i) to preserve the activities and the value of the assets; (ii) to hold separate assets pending the divestiture process.

According to the study there have been cases in which parties, far from maintaining the viability of the business, have actively contributed to its degradation (for instance through retention of key know-how or adopting front-loading strategies, practicing pricing promotions prior to the divestiture of the business, in order to depress its sales in the post-closing period).²⁹

While in the last years this issue has been dealt with more detail (in the period analysed by the study the figure of the hold-separate manager was just emerging), the study concludes by stating that more guidance is needed on the way to ensure the implementation of the existing provisions related to asset preservation.

Furthermore, the current rules allow parties to steer the divestiture process and to find a suitable purchaser. This freedom, coupled with the scarcity of information

on the divested assets available to purchasers, frequently allows opportunistic behaviour from sellers (having no incentive to co-operate in the choice of the most suitable buyer).

According to the study several “dirty tricks” have been used by the seller to jeopardise the competitiveness of the assets (e.g. divested business inoperational when offered for sale, incomplete transfer of assets, restriction of co-operation to delay the purchaser’s product development).³⁰

2.3. The importance of monitoring trustees

The study carefully assesses the role of monitoring trustees in the implementation of remedies. Notwithstanding the absence of an express legal basis for their appointment, trustees play a central role in the enforcement of competition policy, both in merger control and in Art.82 cases.³¹ A trustee can have several functions in the divestiture process. The Commission currently distinguishes between monitoring (or hold-separate) and divestiture trustees. While monitoring trustees are largely used, divestiture trustees have not been used very often.³²

The usual argument in favour of the appointment of a trustee is almost a truism: remedies need to be monitored and the Commission does not have sufficient administrative resources to devote to such a task. Moreover, the Commission may lack the industry-specific knowledge required to ensure the appropriate monitoring of the divestiture process. There is, however, more than that: the Commission cannot simply rely on market participants to make sure that remedies are properly implemented. Due to information asymmetries, the risk of the Commission being captured either by merging parties or by the buyer, is too high. A third

28 Disagreement on this point is not merely theoretical but is reflected in the different enforcement policies adopted by the US antitrust authorities. While the FTC statement indicates that the Commission will often require an up-front buyer (“Frequently Asked Question About Merger Consent Order Provisions”, Question 27), the DOJ guide is silent on this point and the DOJ has never required a buyer in advance, being in favour of a *fix-it-first* policy instead. “A fix-it-first is a remedy in which the parties to a transaction restructure an otherwise problematic transaction, and the Division’s competitive concerns are resolved without filing a judicial complaint and consent decree”, R. H. Pate, “Antitrust Enforcement at the DOJ—Issues in Merger Investigations and Litigation”, December 10, 2002. According to Pate, “permitting the parties to close prior to the identification of a buyer means that any pro-competitive efficiencies of a deal are realized on a relatively faster basis than might otherwise occur if the parties could not close until a buyer had been approved”.

29 An additional difficulty related to interim preservation is that its failure or success becomes clear only following the transfer of the business to the new owner.

30 Study, s.II.E, para.8.

31 Arts 6(2) and 8(2) of Regulation 139/2004 allow the Commission to attach to its clearance decision conditions and obligations. Obligations consist of implementing steps which are necessary to achieve the final result as described in the condition. The appointment of a trustee is one of the obligations that the Commission usually imposes on the merging parties. In 2001 all but one of the merger cases which involved conditional clearance have been dealt with the help of a trustee, see M. Monti, “The Commission’s Notice on Merger Remedies”, in *Merger Remedies in American and European Union Competition Law*, F. Lévêque and H. Shelanski, eds, 2003), p.9. As for the appointment of monitoring trustees in Arts 81 and 82 cases, a legal basis cannot be found in Regulation 1/2003.

32 This is also due to the power to eventually divest the business at no minimum price if divestiture has not taken place in the first divestiture period.

party, independent and with the necessary expertise, can oversee the activities of the parties and effectively monitor compliance to the conditions set out in the Commission's clearance decision.

The need of a monitoring trustee is obviously not questioned by the study (on the contrary, a trustee was absent in only four of the analysed cases and it appeared that the presence of a trustee could have significantly reduced the risk of ineffective implementation related to interim preservation of the assets).³³ On the other hand, a concern seems to arise regarding the timing of its appointment.³⁴

The study makes it clear that the success of a divestiture is frequently determined by the way the assets are managed in the interim period (in one remedy the parties managed to run down the business even before the sale!). Monitoring the seller's behaviour in this phase is therefore crucial. A trustee had been appointed within one month only in the 40 per cent of the cases. The majority of cases, therefore, lacked effective monitoring in the crucial period of the divestiture, the initial one.

3. Insights from economic analysis

As discussed in Section 2, the study focuses on the implementation success of past remedies and in effect, helpfully provides evidence that the worries about the implementation of divestiture packages are well-founded. However, the study was limited in scope and its contribution to guiding the Commission in the overall review of its practice in the area of merger remedies may therefore be quite narrow.

While still an under-researched area of economics, some recent contributions may provide some further guidance to the Commission in its thinking about the guiding principles that should underpin merger

remedies. Those contributions have: (1) explored the effect of asymmetry of information and strategic behaviour from merging parties on structural remedies; (2) questioned the stated preference by competition authorities for divestitures; and (3) investigated the impact of over-fixing on ex-ante merger incentives. These points are covered in turn.

3.1. Asymmetry of information and strategic behaviour

Remedies design and implementation will be affected by asymmetry of information and strategic behaviour on the part of *both* seller and buyer. It is quite obvious that the purchaser does not have incentives to foster competition by selling valuable assets to a purchaser likely to become a strong rival. The study confirmed that sellers behave in a strategic manner and have strong incentives to avoid creating a strong competitor. Indeed, the study documents instances of asset degradation, inappropriate asset packages or information retention.³⁵ Buyers with limited experience of the industry may be induced to purchase assets of limited competitive value, and fail to successfully compete (as illustrated by the study when assessing the evolution of market shares of divested assets).

While this empirical insight into strategic behaviour suggests that a more careful assessment of divestment packages and a more thorough monitoring of asset preservation are required, it does not address the issue of strategic behaviour on the part of the *buyer*, who is often described as a "victim" of information asymmetry and strategic behaviour, as well as an ally of the Commission.

Indeed, the study at times implies that the buyer is on the same side as the Commission (while merging parties are clearly not). This might be a fairly naïve assumption.³⁶ Buyer and merging parties alike may have a common interest in limiting competition.³⁷

³³ The FTC, on the other hand, seems to rely much less on monitoring trustees, as their appointment is required only when the case is complex and it involves in-depth analysis (Frequently Asked Question About Merger Consent Order Provisions, Question 36). Trustee are usually nominated: (i) to implement a consent decree; (ii) when parties are not able to complete a divestiture within the required period; (iii) when assets deteriorate rapidly and have to be sold quickly in order to represent a competitive threat to the merged entity.

³⁴ Study, s.II.H, para.7. The study also discusses the structure of remuneration of trustees. Agreed fees limit the amount of time and attention which the trustee can devote to its activities. The Commission's current practice of preferring hourly rates is confirmed. In two remedies excessive trustee costs became an issue (in a Phase II remedy the trustee cost the parties €1 million).

³⁵ As mentioned above, section E.2 of the study discusses the observed strategic behaviour and "dirty tricks" found to have been used by sellers.

³⁶ In their recent interview with the *Global Competition Review*, the authors of the study indicated that "The study challenges the Commission's current assumption that the purchaser can defend its interests in the divestiture process, to secure a pro-competitive outcome".

³⁷ As pointed out by J. Farrell, "Negotiation and Merger Remedies: Some Problems", in *Merger Remedies in American and European Union Competition Law* (F. Lévêque and H. Shelanski, eds, 2003), if a truly competitive equilibrium is reached then the "financial pie" to share between the buyer and the merging parties will be smaller.

Careful consideration of the buyer's incentives and price negotiations for the sale of the assets should therefore be carried out (for example, fixed prices for the divestment package could restore incentives for the buyer to ensure the most profitable package).³⁸ More generally, the Commission should not rely on purchasers to ensure that the divested assets will be designed so as to restore competition.

3.2. Are structural remedies necessarily the best cure?

The general view that structural remedies are better suited to solve competition problems and "easier" to enforce tends to fade when it appears that sellers are likely to divest their less performing physical assets, that the appropriate human resources and know-how associated with physical assets are not necessarily identifiable by third parties and therefore, the risk of ending up with competitors owning worthless assets is real. For these reasons (amongst others), not all economists share the authorities' prior that structural remedies are preferable to behavioural remedies.

First, structural remedies may also be the source of additional competition problems, e.g. enhance collusive outcomes. Given that the study did not perform a competitive assessment of the markets involved, no evidence on this potential risk was gathered. Motta *et al.* have warned against the risk that inappropriate divestments may actually facilitate collusion by restructuring an industry in a more symmetric way or multiply multi-market contacts.³⁹ In order to avoid this problem, they suggest that the Commission should also undertake a competitive assessment of the industry with the distribution of assets—*after* divestment (i.e. would the new market structure "*significantly impede effective competition*"?).

Secondly, the disadvantages associated with behavioural remedies do not necessarily apply to the majority of cases. For example, Rey argues that the economics of regulation might actually be useful when thinking about the design of merger remedies.⁴⁰ Regulators tend to

approach remedies in a different way. They are generally more cautious about asset transfers because of their irreversibility and the greater negative impact of inappropriate remedies. Moreover, the general view that behavioural remedies are harder to enforce and costly to monitor is not necessarily correct. Behavioural remedies do not necessarily deal with pricing (which would require constant monitoring), there may already be regulatory monitoring in place (to complement the task of competition authorities) and if the market is in favour (customers for example), monitoring can be more easily shared with market participants.

More generally (and in accordance with the views of the ECJ in *Tetra Laval/Sidel*), behavioural remedies appear appropriate in the context of non-horizontal mergers where anti-competitive effects arise from worries that post-merger conducts could lead to foreclosure (e.g. through bundling or refusal to supply). In sectors where companies are subject to industry-specific regulatory intervention (e.g. telecommunications, media, pharmaceuticals), behavioural remedies may also be favoured. In its review of the remedies guidelines, the Commission should consider adopting an approach that ties the "preferred" remedy to the type of merger and/or industry in question.⁴¹

Another solution to avoid the common incentive to limit post-divestment competition has recently been proposed by US economists.⁴² When divestitures are not possible because they would deprive the merger from desirable cost savings, their proposal is to design a contract between the merging parties and a "contractor" (a third party). Under this contract, the merging parties would commit to paying the contractor a per-unit penalty for lowering production but would be paid a per-unit reward for increasing production. The authors suggest that major lenders to the merging firms could act as contractors (competitors would obviously not constitute appropriate choices when designating the contractor). Their proposal amounts to imposing a behavioural remedy that would replicate the pro-competitive effects of a structural remedy without depriving the parties from merger-specific cost

38 The study refers to a case in which a buyer found it preferable to pay a significantly lower price in return for fewer assets, despite the fact that he would have been not sufficiently equipped to effectively compete against the seller, study, para.46, p.149.

39 M. Motta, M. Polo and H. Vasconcelos, "Merger Remedies in the EU: An Overview", in *Merger Remedies in American and European Union Competition Law* (F. Lévêque and H. Shelanski, eds, 2003), p.106.

40 See reference in fn.18.

41 In its guidelines on the "Application of Divestiture Remedies in Merger Inquiries" (December 2004), the UK Competition Commission provides some instances in which behavioural remedies "may be considered more suitable", such as cases where the competition harm is expected to be short-lived or where structural remedies would deprive the merger from providing substantial efficiencies.

42 See Werden, Froeb and Tschantz, "Incentive Contracts as Merger Remedies", October 2005, Vanderbilt University Law School, Law and Economics, Working Paper No.05-27.

savings. This would also help solving strategic behaviour problems involved in designing divestments from both buyer and purchaser.

Solutions envisaged by economists (incentive contracts, post-remedies competitive assessment) to remedy the problems created by structural remedies actually suggest that there may be no “quick fix” and in that context, the problems associated with behavioural commitments may seem less severe. The preference for divestments is not always justified (empirical observations now confirm theoretical concerns) and therefore, more research on the circumstances in which behavioural or structural remedies are (or are not) appropriate seems necessary.⁴³

3.3. A more in-depth reflection on merger incentives and remedies effects

Another issue that is of importance relates to the impact of merger remedies on ex-ante incentives of firms to seek for efficiency-enhancing merger opportunities. It is often thought that competition authorities may have the tendency to “over-fix” anti-competitive effects created by mergers, i.e. to use remedies to achieve a “more” competitive outcome than pre-existed before the merger.

The problem was for example identified by Farrell and formalised in recent economic research.⁴⁴ The DOJ is well aware of the issue and clearly reminds in its October 2004 policy guide to remedies that the “purpose of a remedy is not to enhance pre-merger competition but to restore it”.⁴⁵ In a recent paper, Vasconcelos shows that in a model where mergers are motivated by efficiency gains, competition authorities will have a tendency to over-fix and this tendency will in turn have the effect of discouraging potentially efficient mergers.⁴⁶ Because the study focused mainly on the implementation issues of divestitures, the issue of over-fixing was not really covered. However, as indicated earlier, the authors of the study recognise that remedies

may have been “superfluous” in some cases (in emerging markets mainly) and recent empirical research suggests that tendency to over-fix may not be theoretical.⁴⁷

Merger remedies may therefore have an economic impact beyond simply solving a competition problem in a particular market. This makes it all the more important to ensure that remedies are adequately targeted to the identified competition problem.

4. What practical solutions?

The previous sections have demonstrated that merger remedies, in particular divestitures, may cause more problems than they actually solve. However, there is no easy cure. The study suggests several changes and improvements to the current regulatory framework. This section discusses tentative solutions and practical ways to improve current practice.

4.1. Regulating the divestiture process from the very beginning?

The divestiture process is thoroughly regulated by the Notice on Merger Remedies and the Commission model texts for divestiture commitments and for trustee mandate. According to the study, however, the procedural framework is loose in so far as the initial part of the divestiture process is concerned.⁴⁸

The Commission model text for divestiture commitments provides for a general obligation on merging parties: they must disclose sufficient information related to the viability and the competitiveness of the divested business.⁴⁹ The study suggests that this problem could be partly addressed by defining conditions and obligations on merging parties in a stricter way. Furthermore, it is submitted that the Commission should have the

43 For example, Cabral (2001) identified that in a spatially differentiated oligopoly with free entry (a crucial assumption), the sale of assets (e.g. stores) as a merger remedy may actually soften competition. The intuition is that selling stores to potential rivals actually limits the opening of new stores and therefore reduces consumer welfare.

44 J. Farrell, “Negotiation and Merger Remedies: Some Problems”, in *Merger Remedies in American and European Union Competition Law* (F. Lévêque and H. Shelanski, eds, 2003).

45 See “Guiding Principles of the Antitrust Division Policy Guide to Merger Remedies”, October 2004.

46 H. Vasconcelos, “Efficiency Gains and Structural Remedies in Merger Control”, March 17, 2005.

47 See fn.8.

48 Parties enjoy a rather wide discretion in steering the divestiture process: “During the Divestiture Phase, the divestiture lies in the hands of the divesting party. The Commission does not have a preference to the method the parties use to select an acceptable purchaser as long as they meet the objective of the divestiture”, Best Practice Guidelines: The Commission’s Model Texts for Divestiture Commitments and the Trustee Mandate under the EC Merger Regulation, para.25.

49 “In order to enable potential purchasers to carry out a reasonable due diligence of the divestment business, (parties) shall provide to potential purchasers sufficient information as regard the divestment business”, Commission’s Model Texts for Divestiture Commitments, May 2, 2003, para.11.

power to approve also transitional agreements with the purchaser, and not only the final text of the sale and purchase agreement.⁵⁰

Unfortunately, the extent to which insufficient information can jeopardise the effectiveness of a remedy becomes manifest only after the transfer of the business to the purchaser has taken place. Nevertheless, *ex-post* monitoring of compliance, coupled with an enhanced disclosure obligation on the merging parties concerning information related to the viability of the business, could partly solve potential issues arising in the initial phase of the divestiture process.

4.2. Up-front monitoring trustees?

The problems of strategic behaviour on both parts may justify the nomination of a trustee as soon as the Commission decision is adopted. The model text for divestiture commitments provides for the parties to propose a list of suitable trustees no later than one week after the date of adoption of the decision.⁵¹ However, the appointment procedure can last longer: the Commission is entitled to reject all proposed trustees and parties will have an additional week deadline to propose two more suitable candidates.⁵²

The appointment procedure could start earlier, at least informally, so that the trustee would be already in place when the decision is adopted. This solution could help the trustee to reach a sufficiently high point of the learning curve of the case from the very beginning and at the same time allow for a stricter control on the parties.⁵³

In addition, trustees are normally released at the closing of the sale and purchase agreement. As it has been highlighted above, risks related to the divestiture process go well beyond this stage, and closing of divestiture does not coincide with the end of the divestiture process. While it is true that competition

law cannot possibly represent a cure and a solution for every fraudulent behaviour of merging parties, there is a clear need of monitoring the transfer process that is taking place after the closing of the sale and purchase agreement. The study shows that this has not happened in the past years.

Finally, it is worth asking whether it is useful for the Commission to always nominate a trustee when accepting commitments from merging parties. Currently, almost every single conditional clearance decision provides for the nomination of a monitoring trustee. In line with the above, there is no doubt that this trend will be confirmed in future practice, monitoring is key to divestiture commitments. On the other hand, and contrary to the general wisdom, it is doubted that the same holds true for commitments other than divestiture. Effectiveness of access remedies is not always enhanced by ongoing regulatory oversight. What is important in this case is to allow for a fast and efficient way of solving disputes related to commitments.

In other words, there seems to be little added value in monitoring an ongoing commitment that functions properly. In case dispute arises, it is better for parties to directly address the problem other than to invoke the intervention of a monitoring trustee. This is being acknowledged by the Commission, that is increasingly resorting to alternative dispute resolution mechanisms in its clearance decisions and has developed a standard model for a “fast track” resolution procedure, used in several recent cases.⁵⁴

4.3. Shifting the risk to merging parties . . .

The risks of a failure in the divestiture process can be partially shifted to the merging parties. Up-front buyer and crown jewels provisions can give additional incentives to parties to effectively run the whole divestiture process, and have already been used by the Commission in its previous practice. Those measures, on the other hand, entail significant costs for the merging parties and should be used only when strictly necessary for the remedy to achieve its scope.

To what extent is an increased use of up-front buyer provisions desirable? Several authors agree that a

⁵⁰ Study, s.V.B, para.16.

⁵¹ Commission Model Text for Divestiture Commitments, paras 16–18.

⁵² The failure to appoint a trustee can amount to a breach of an obligation to which the parties are subject. Parties can be fined and subject to periodic penalty payments, but the decision is not automatically void. However, the Commission has so far never imposed any fine for delays of failure to appoint a trustee.

⁵³ In few of the reviewed cases even an appointment within fairly short deadlines was insufficient to ensure adequate monitoring from the very beginning, due to the complexity of the process, see study, p.156. This approach is probably not feasible in Phase I cases, due to the very tight deadlines to which both the Commission and merging parties are subject.

⁵⁴ See, amongst the most recent cases, Case COMP/M.3770, *Lufthansa/Swiss*, July 4, 2005; Case COMP/M.3687, *Johnson & Johnson/Guidant*, August 25, 2005; Case COMP/M.3280, *Air France/KLM*, February 11, 2004; Case COMP/M.3083, *GE/Instrumentarium*, September 11, 2003.

systematic use of up-front buyers would surely enhance the effectiveness of divestiture remedies.⁵⁵

The Notice on Merger Remedies refers to an up-front buyer when the viability of the business depends to a large extent on the identity of the purchaser.⁵⁶ This provision is probably too narrow: an up-front buyer may play a crucial role also in circumstances other than those when a “purchaser risk” is present.⁵⁷

The viability of the business on sale and identity of purchaser are inevitably linked and it is true that a proper assessment of the final result of a remedy has to be based on the identity of the buyer as well.⁵⁸ On the other hand a systematic use of an up-front buyer is probably excessive, costly and can result in limited benefits for the Commission.⁵⁹

55 “A proper assessment of the likelihood that divestiture restores competition can be done only if the identity of the buyer is known to the Authority. To this purpose, the requirement of an up-front buyer should be systematic”, M. Motta, M. Polo and H. Vasconcelos, “Merger Remedies in the EU: An Overview”, in *Merger Remedies in American and European Union Competition Law* (F. Lévêque and H. Shelanski, eds, 2003), p. 116. See also D.A. Balto and R.G. Parker, *The Evolving Approach To Merger Remedies*, Antitrust Report, May 2000.

56 Notice on Merger Remedies, para.20. See also Case COMP/M.2544, *Masterfoods/Royal Canin*, February 15, 2002, and Case COMP/M.1915, *The Post Office/TPG/SPPL*, March 13, 2001. According to S. Turnbull and S. Holmes, “Remedies in Merger Cases: Recent Developments” [2002] 10 E.C.L.R. 499, the Commission has used an up-front buyer not only in this circumstance, but also when there was a concern that the divested business might have been weakened pre-sale (Case COMP/M.2060, *Bosch/Rexroth*, December 13, 2000) and when it was not convinced that the proposed package would have attracted a buyer (Case COMP/M.2337, *Nestle/Ralston Purina*, July 27, 2001).

57 Mergers in oligopolistic markets, for instance, often require a “zero delta approach” to remedies (no change to the HHI following the merger), the only suitable buyer (if any) being a firm outside the relevant market. See, for instance, Case IV/M.1715, *Alcan/Pechiney*, March 14, 2000, where the only credible purchasers were members of the oligopoly. An up-front buyer is important in this case, as the Commission cannot possibly consider members of the oligopoly as suitable purchasers. Cases in which assets could deteriorate quickly could also be dealt with by an up-front buyer. Mergers in retail markets, for instance, involve brand names which could quickly depreciate during the sale if not adequately maintained. An up-front buyer could in this case reduce the risks of inadequate maintenance pending the divestiture process.

58 The stronger the buyer, the weaker the assets can be (and vice versa). The use of an up-front buyer in cases where the adequate scope of a remedy is “more than the overlap” could induce the Commission to accept a weaker package of assets. An up-front buyer could successfully prove that the combination of the divested package with the assets already owned will create a sufficiently strong competitor. See. J. Ysewyn, “The Commission’s Commitment” [2001] 7 E.C.L.R. 253.

59 W. Baer and R. C. Redcay, “Solving Competition Problems in Merger Control: The Requirements For An Effective Divestiture

The possibility of an increased use of alternative divestiture commitments⁶⁰ (and crown jewels provisions) is discussed in the study. A crown jewel provision ensures that an attractive package of assets is finally provided, and increases the incentives of the parties to divest quickly.⁶¹

The Commission has so far limited the application of crown jewels to cases in which the implementation of the parties’ preferred divestiture option was uncertain. In few cases, though, parties managed to implement their preferred option, leaving scope to the question on the appropriateness of such a commitment in the first place.⁶²

The value of crown jewels, it is said, can be seen also in such cases, as the broader commitment functioned as an incentive for the parties to succeed in their preferred option.⁶³ This is questionable, as the benefit of a crown jewel (and its *in terrorem* value) should, again, be outweighed with costs related to the provision for the merging parties.⁶⁴ As has been pointed out, crown jewel remedies are working as guarantees of the divestiture process in limited circumstances and not as

Remedy”, in *Merger Remedies in American and European Union Competition Law*, (F. Lévêque and H. Shelanski, eds, 2003).

60 Alternative divestiture commitments are meant to replace the original divestiture commitment where parties are not able to put forward their preferred option within the deadline foreseen in the decision. Commission’s practice distinguishes between cases where the original divestiture is subject to the consent of third parties (Case COMP/M.1082, *Allianz/AGF*, May 8, 1998, at [66]–[67]) or so-called “either/or” cases, where parties undertake to divest at least one of the overlapping business (Case IV/M.555, *Glaxo/Wellcome*, February 28, 1995, or Case COMP/M.3225, *Alcan/Pechiney*, September 29, 2003, at [163]).

61 When the alternative commitment has a broader scope or is more attractive for the buyer (e.g. the assets have been “sweetened”, the divestiture package having been enriched) it is frequently referred to as “crown jewel”. A crown jewel remedy gives obviously that a divestiture will finally take place. According to the study in at least 10% of all divestiture remedies a crown jewel commitment could have potentially lead to an effective remedy.

62 See Case COMP/M.2337, *Nestle/Ralston Purina*, July 27, 2001 and Case COMP/M.2922, *Pfizer/Pharmacia*, February 27, 2003.

63 See *Merger Remedies*, OECD, submission of the European Commission, p.257.

64 C. Shapiro and M. Sohn, “Crown Jewel Provisions in Merger Consent Decrees”, 12-Fall, *Antitrust*, 27, p.32, rightly argue that the benefits deriving from adding a crown jewel provision should be discounted by the low probability that this provision will ever need to be invoked and weighted against the immediate costs imposed, including transaction costs and potential loss of efficiencies.

guarantees of the remedial outcome as a whole.⁶⁵ Risk-shifting measures, therefore, should be adopted only when strictly necessary and on the basis of a cost-benefit analysis.

4.4. . . . while keeping an eye on proportionality

The quest for the effectiveness of a remedy should not undermine the importance of the principle of proportionality in merger control. The need to ensure the effectiveness of a remedy goes hand in hand with the necessity to respect the principle of proportionality.

The EC Merger Regulation emphasises that commitments should be: (i) proportionate to the competition problem and at the same time; (ii) entirely eliminate it.⁶⁶ Proportionality, on the other hand, is hardly mentioned in the body of “soft-law” governing remedies adopted by the Commission, which has its focus on the effectiveness of the remedy that can be accepted to solve the competition problem.⁶⁷ Remedies should be proportionate and ensure the maintenance of competition at pre-merger levels. They should not be used to “improve” the competitive state of the market.⁶⁸ Proportionality is fundamental to ensure that the purpose of merger remedies, and ultimately of merger control, is respected.⁶⁹

65 W. Blumenthal, “Reconciling the Debate over Merger Remedies: A Discussant’s Proposed Decision Rule” (2001) 69 *George Washington Law Review* 978. Note that the recent DOJ guide adopts a more cautious approach to crown jewels, as: (i) they enhance opportunity for purchaser manipulation (if the buyer is aware of the existence of such a provision); (ii) they can result in under-inclusive or over-inclusive remedies, ultimately harming the consumers (and punishing the firms, while remedies should merely restore competition). The FTC instead largely favours the use of crown jewel remedies.

66 EC Merger Regulation, Recital 30.

67 To the point that the Notice on Merger Remedies states that it is the responsibility of the merging parties to show that the proposed remedies eliminate the creation or strengthening of the dominant position identified by the Commission (para.6). The CFI has affirmed that such a reversal of the burden of proof is inappropriate, and “it is for the Commission to demonstrate that that concentration, as modified, where appropriate, by commitments, must be declared incompatible with the common market because it still leads to the creation or the strengthening of a dominant position that significantly impedes effective competition”, Case T-87/05, *EDP—Energias de Portugal SA v Commission*, judgment of September 21, 2005, at [64]. The indications from the CFI will certainly be taken into account in the new Notice on Merger Remedies.

68 Section 3 above has highlighted the risks related to over-fixing anti-competitive mergers: potentially efficient mergers could be discouraged and superfluous remedies accepted.

69 Recent case law, however, seems to question this general principle. According to the CFI proportionality functions

The study shows how difficult it is to find an equilibrium between remedies that are too narrow in scope, and hence ineffective, and remedies that, being over-broad, function as a disincentive for parties to merge. Striking a fair balance between effectiveness and proportionality will probably constitute the main challenge for the new regulatory framework.

4.5. Reconsidering the role of behavioural remedies?

In addition to considering improvements to the current system of designing and implementing divestitures, the Commission should revisit its overall stated preference for structural remedies. First, the circumstances and industries where behavioural remedies might be more appropriate should be identified (e.g. non-horizontal mergers, expected changes in the market limiting the duration of anti-competitive effects, regulated industries). Secondly, when structural remedies cannot be suitably implemented (e.g. risk of depriving merger of efficiencies, when the only possible divestment is too wide) alternative forms of remedies should be investigated (licensing, incentive contracts or some forms of price controls).⁷⁰

5. Conclusion

The study published by the Commission on past remedies provides valuable empirical evidence on the problems encountered when implementing divestiture remedies and while limited in scope, it initiates a

as a constraint only upon the Commission, and not on merging parties: “(. . .) notifying parties are not required to confine themselves to proposing commitments aimed strictly at restoring the competitive situation existing before the concentration in order to allow the Commission to declare that transaction compatible with the common market”. Case T-282/02, *Cementbouw Handel & Industrie BV v Commission*, judgment of February 23, 2006, at [308].

70 See, e.g. Case COMP/M.3687, *Johnson & Johnson/Guidant*, August 25, 2005, where the Commission accepted a package of remedies which did not include the divestiture of any physical assets (manufacturing or research facilities), as it would not have been proportionate with the circumstances of the case. For a comment see A. Bacchiega, S. Dionnet, M. Todino and C. Macewen, “Johnson & Johnson/Guidant: Potential Competition and Unilateral Effects in Innovative Markets” (2005) *Competition Policy Newsletter*, Autumn, p.87. See also the remedies adopted by the UK Competition Commission in the *Central/Dynergy* merger, December 18, 2003.

more general debate on the design of merger remedies. Hopefully, the identification of numerous problems and the lack of effectiveness of past remedies will steer a more in-depth rethinking of the guiding principles and implementation rules for EU merger remedies.

Indeed, the findings of the study will be used in a forthcoming review of the current Commission's practice. However, given the above-mentioned limitations in methodology, it seems unlikely that the described results will be sufficient for the Commission to shape a new policy on merger remedies. In fact, the study provided empirical support for the worries voiced in the last few years (and already illustrated by the 1999 FTC study).

A broader analysis seems necessary as to what the guiding principles of remedies implementation are and what the best tools to serve those principles actually are. In particular, economic research should be further developed to identify the circumstances in which behavioural and/or structural-type remedies may be more appropriate and effective. Workable solutions should be devised to reduce the kind of implementation failures identified in practice while at the same time achieve the complex task of promoting efficiency-enhancing mergers and protecting competition.