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Structural remedies: A unique antitrust tool

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STRUCTURAL REMEDIES UNDER EUROPEAN UNION ANTITRUST RULES

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1. As we pass the milestone of a decade since the adoption of European Council Regulation 1/2003,¹⁷ it is appropriate to reflect upon the impact which the European Union's Modernisation Package¹⁸ has had on the crafting and negotiation of remedies in competition cases.

2. It was Regulation 1/2003 that codified the residual powers of the European Commission (the "Commission") to impose or negotiate remedies, whether structural or behavioural (or both), that are designed to address market failures in competition law infringement cases. Such remedies have developed, over time, to go well beyond traditional forms of declaratory relief, on the one hand, and the imposition of simple behavioural mandates, on the other. These powers have especially been explored under the formal settlement procedure that was first introduced under Article 9 of Regulation 1/2003, comprising an EU regime which reflects the Consent Decree regime in the United States.

3. While the majority of remedies that have been imposed under the "Article 9" settlement regime have fallen short in practice of full divestitures, they have nevertheless included a wide range of quasi-structural remedies, including *inter alia* obligations to license on fair, reasonable and non-discriminatory ("FRAND") terms, commitments to expand capacity, and detailed access-related commitments. Notably, the most dramatic case-law developments have occurred in sectors which are subject to sector-specific regulatory regimes.

4. Increasingly, there has developed a growing degree of convergence between the remedies imposed by the Commission in competition infringement actions and those imposed by it in merger review cases. We seek to identify some of the policy drivers behind such a development, and also to appraise whether this is likely to have a positive impact upon the enforcement of EU competition policy more generally.

I. European Union legal principles governing structural remedies

5. In considering the European Union's current approach to structural remedies, it is worthwhile recalling the evolution, over time, of the procedural powers enjoyed by the Commission.

6. Under the predecessor to Regulation 1/2003, Regulation 17/62,¹⁹ no explicit provision was made for any remedies to be imposed on undertakings found guilty of infringing Articles 81 and 82 EC (*i.e.*, now respectively Articles 101 and 102 TFEU²⁰). At that time, the Commission had power only to "require the undertakings or associations of undertakings concerned to bring such infringement to an end."²¹

7. This position evolved over time, with the European Court of Justice confirming in the *Commercial Solvents* cases that the power of the Commission to bring an infringement to an end was not limited to a cease-and-desist order, but included the power to order the defendant(s) to perform certain acts or to provide certain advantages that had been wrongfully withheld from an undertaking. To this end, the Court acknowledged the Commission's ability to require the undertaking concerned to submit proposals to remedy the infringement, "with a view to bringing the situation into conformity with the requirements of the Treaty."²² Thereafter, the amendments introduced by Regulation 1/2003 provided expressly that the Commission could "impose (...) any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end."²³

8. Moreover, Regulation 1/2003 addresses the specific issue of structural remedies in some detail, with Article 7(1) stating that: "[s]tructural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy." Recital 12 further notes that any structural remedy which makes changes "to the structure of an undertaking as it

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17 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1/1, 4 January 2003).

18 See Commission press release IP/04/411, 30 March 2004.

19 EC Council Regulation 17/1962 (OJ 13, 21 February 1962, pp. 204-211).

20 Treaty on the Functioning of the European Union.

21 Regulation 1/2003, *op. cit.*, Article 3(1).

22 Cases 6/73 and 7/73, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v. Commission* [1974] ECR 223, § 45.

23 Regulation 1/2003, *op. cit.*, Article 7(1).

existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.”

8. Regulation 1/2003 also introduced another element which is highly relevant to the development of remedies policy: namely, the commitments procedure. Article 9(1) specifies that, where the Commission “intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings.”

9. While the legislation speaks only of remedies bringing infringements effectively to an end, the relevant jurisprudence and administrative practice go many steps further. In identifying an appropriate remedy, the Commission has the power not only to bring an infringement to an end, but also to remedy its continuing effects.²⁴ As the European Court of Justice held in *Akzo v. Commission*, the Commission can therefore impose remedies that “prevent repetition of the infringement and...eliminate its consequences (...) [and] re-establish the situation that existed before the dispute.”²⁵ Indeed, the Court has found that the Commission not only has the discretion to require remedies in these circumstances, but it may even have a duty to do so. In his Opinion in *UFEX v. Commission*, for example, Advocate General Ruiz-Jarabo referred to what is now Article 105(1) TFEU, which requires the Commission to “ensure the application” of the principles laid down by Articles 101 and 102 TFEU. In the Advocate-General’s view, “[t]he Commission (...) has an obligation to restore freedom of competition in the sector concerned.”²⁶

II. The nature of structural and quasi-structural remedies

10. Before analyzing the Commission’s practical application of structural remedies, the parameters of the term “structural” require some consideration. A purely structural remedy involves the discontinuation of a part of the infringing undertaking’s business or its sale to a third party. By contrast, a behavioural remedy involves a pledge to act or not to act in a particular manner, which can include but need not be limited to a cease-and-desist order or commitment.

11. Over the course of time, the Commission has developed a notable preference for a particular category of remedy, generally referred to as an “access” remedy, which falls somewhere between the extreme forms of structural and behavioural remedies on the spectrum of solutions that can be identified to address market failures. Typically, access remedies involve granting direct or indirect competitors access to an essential technology or infrastructure, or ensuring the interoperability of the access seeker’s products

²⁴ *Commercial Solvents*, *op. cit.*

²⁵ Case C-62/86, *Akzo Chemie BV v. Commission*, Judgment of 3 July 1991, § 155 and 157.

²⁶ C-119/97 P, *Ufex and Others v. Commission*, Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 26 May 1998, § 72.

or services with the key services, products and platforms of the defendant undertaking.

12. Given that such access remedies may need to be prescribed in great detail and the fact that their impact might play a fundamental role in the shaping of the affected industry’s structure, or given that the defendant undertaking might need to restructure its corporate configuration in order to be able to fully satisfy access requests (as defined), it is clear that such remedies go well beyond what has been traditionally considered to be a behavioural remedy, and can be considered quasi-structural.²⁷

III. Relationship between commitments decisions (settlements) and structural remedies

13. The growth of structural and quasi-structural remedies in competition cases is in practical terms closely intertwined with the Commission’s marked preference for reaching commitments decisions under Article 9(1) of Regulation 1/2003, as opposed to carrying through to the adoption of infringement decisions under Article 7(1). Since the commitments procedure was introduced, the vast majority of completed non-cartel competition cases have been concluded under the Article 9(1) regime, rather than that of Article 7(1). At the same time, structural and quasi-structural remedies have only been relied upon by the Commission in commitments decisions under Article 9 and never in infringement decisions adopted under Article 7.

14. The appeal of negotiating commitments decisions from the Commission’s perspective is clear. The flexibility of the Article 9 procedure has been well documented, as is the possibility it affords for concluding cases within a much abbreviated timeframe, accompanied by the inevitable lessening of strain on public resources. In parallel, undertakings under investigation often see considerable benefits in reaching a settlement. Thus, the successful use of the Article 9 procedure circumvents the need for the adoption of a formal decision finding that an infringement has occurred (and the potentially high administrative fines and reputational damage that could ensue), while also limiting the likelihood of follow-on damages actions since potential claimants would not have the benefit of a pre-existing finding of an infringement upon which to base a private litigation action.

15. A further explanation might also lie in the nature of the legal rights and obligations enjoyed by the Commission under Regulation 1/2003. Thus, whereas the Commission acting under Article 7(1) is required to prioritise behavioural over structural remedies, while also being explicitly bound to respect the principles of proportionality and indispensability in adopting a decision (including remedies), these conditions arguably do not apply to the same extent when the Commission is acting under its Article 9 powers,

²⁷ Indeed, in the Commission’s Merger Remedies Notice (OJ C 267/1, 22 October 2008), access remedies are described as “other structural remedies” in § 17, but bracketed with behavioural remedies as “other remedies” that are distinct from divestiture remedies specified in section III.3.

given that these conditions are not mentioned expressly under that latter provision. Although the Commission always remains bound by general principles of law such as “proportionality” and “indispensability”, it should follow that the scope of those obligations is diluted significantly when the parties propose commitments of their own volition to the Commission. The Commission’s remit is therefore arguably limited to ensuring that the proposed remedies will bring an infringement effectively to an end, and restore competition in the relevant market or sector concerned. As such, if an undertaking wishes to offer a proverbial structural “sledgehammer” to crack a behavioural “nut”, it should be entitled to do so.²⁸

IV. Practical application of structural and quasi-structural remedies

16. As explained in more detail below, in stark contrast to its position when acting under the EU Merger Regulation,²⁹ European Union antitrust policy prioritises the imposition of behavioural remedies above structural remedies. The reasoning behind the historic preference, now enshrined in Article 7(1) of Regulation 1/2003, can be summarised as follows. Antitrust investigations typically concern alleged infringements which are behavioural in nature. Therefore, the most appropriate remedies to resolve market failures or competition concerns flowing from such conduct are also presumed to be essentially behavioural. However, where behavioural issues are reinforced or underpinned by structural problems inherent in a particular sector, structural remedies may provide the only effective tool to resolve the concerns. In this regard, one is particularly mindful of industries or sectors which display “network effects” or “tipping” characteristics (especially where massive economies of scale are involved and the perfect competition model cannot otherwise be sustained).³⁰

17. As noted above, structural remedies for antitrust infringements have thus far only been imposed under commitment-based decisions adopted under the Article 9 regime, and not under the Article 7 procedure. At the time of writing, the Commission had adopted 29 commitment decisions.³¹ Ostensibly “pure” structural remedies were

accepted in three cases, and access remedies of various types were agreed in cases including those discussed below. Structural and quasi-structural remedies are also on the negotiating table in two ongoing cases. The remaining cases were resolved by reference to more conventional behavioural commitments. In several decisions, mixed remedies packages were accepted. We turn now to some of the key elements of those structural and quasi-structural remedies.

V. Structural remedies

18. There exists a natural affinity between structural remedies and network industries and privatized former State-run monopolies, particularly those with the character of a utility, given the importance of infrastructure-based competition issues in such sectors. Indeed, the “pure” structural remedy cases concluded to date (*E.ON (Electricity)*³², *RWE*³³ and *ENI*³⁴) all arose from the Commission’s 2005 inquiry into the energy sector.

19. That inquiry revealed serious structural problems in various electricity markets, and resulted in a large number of individual investigations into dominant undertakings in the gas and electricity sectors. All but one of these investigations were completed after the undertakings in question offered commitments which successfully addressed the Commission’s competition concerns.

20. The *E.ON (Electricity)* cases broke new ground in November 2008, when structural remedies were accepted by the Commission for the first time. At the time, E.ON was found to hold a dominant position on the respective German markets for wholesale and “balancing” electricity,³⁵ especially in light of the fact that it conducted vertically integrated operations including both generating capacity and transmission network operation. The Commission raised concerns that E.ON may have abused its dominance by withholding available generation capacity to drive up prices and by providing its own generation unit with preferential access to the transmission network it also operated. In the circumstances, the Commission accepted the proposition that these discriminatory practices could be addressed by E.ON’s offer to divest around 20% of its generation capacity, as well as its transmission system business.

21. Subsequently, the Commission’s investigations into *RWE* and *ENI* also raised concerns that those undertakings had been able to abuse their respective dominant positions on the German and Italian gas markets, as a result of their vertically integrated structures. At the time, RWE and ENI were active in both the supply and the transmission of gas. The Commission was concerned that both undertakings discriminated in favour of their affiliates’ interests, even going as far as refusing to supply rival undertakings, and leveraging their control of transmission networks to maintain their dominant position in downstream supply markets.

28 Similarly, the procedure for the closing merger investigations in “Phase 1” of a merger review at EU level expressly contemplates that the parties offering commitments are probably going beyond what is strictly necessary to cure the potential market failure identified. See Article 6(2) of Council Regulation (EC) No. 139/2004.

29 Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (OJ L24/1, 29 January 2004).

30 In such markets, it may be impossible to restore competition without re-setting competitive conditions through dramatic structural measures.

31 *DFB* (Case COMP/37.214), *Coca Cola* (Case COMP/39.116), *ArosalDe Beers* (Case COMP/38.381), *Football Association Premier League Ltd* (Case COMP/38.173), *Repsol* (Case COMP/38.348), *Cannes* (Case COMP/38.681), *DaimlerChrysler* (Case COMP/39.140), *Opel* (Case COMP/39.143), *Toyota* (Case COMP/39.142), *Fiat* (Case COMP/39.141), *Distrigaz* (Case COMP/37.966), *E.ON (Electricity)* (Case COMP/39.388), *RWE* (Case COMP/39.402), *Ship classification* (Case COMP/39.416), *GDF* (Case COMP/39.316), *Rambus* (Case COMP/38.636), *Microsoft (Tying)* (Case COMP/39.530), *EDF* (Case COMP/39.386), *Swedish Interconnectors* (Case COMP/39.351), *E.ON (gas)* (Case COMP/39.317), *British Airways/American Airlines/Iberia* (Case COMP/39.596), *ENI* (Case COMP/39.315), *Visa* (Case COMP/39.398), *Standard & Poor’s* (Case COMP/39.592), *IBM* (Case COMP/39.692), *Siemens/Areva* (Case COMP/39.736), *E-books* (Case COMP/39.847), *Reuters Instrument Codes* (Case COMP/39.654), and *Rio Tinto Alcan* (Case COMP/39.230). Structural and quasi-structural remedies are under discussion in the *CEZ* (Case COMP/39.727) and *Continental/UnitedLufthansa/Air Canada* (Case COMP/39.595) cases.

32 Commission Decisions of 26 November 2008 in Cases COMP/39.388, *German Electricity Wholesale Market*, and COMP/39.389, *German Electricity Balancing Market*.

33 Commission Decision of 18 March 2009 in Case COMP/39.402, *RWE Gas Foreclosure*.

34 Commission Decision of 29 September 2010 in Case COMP/39.315, *ENI*.

35 The process of balancing electricity concerns the last-minute supply of electricity to maintain the frequency of the electricity current.

22. In response, RWE offered commitments to divest its entire Western German high-pressure gas transmission network. Similarly, ENI offered to divest its interests in three cross-border gas pipelines and to put an end to the conflicts of interest in its vertically integrated supply and transfer of gas businesses. As the abusive conduct in question arose from the vertically integrated structure of the undertakings on the market, structural remedies were indeed found to provide the most effective solution. The Commission accepted that these divestitures provided clear-cut and enduring solutions to address competition problems that were fundamentally structural in nature.

23. Finally, at the time of writing, the Commission is market-testing the commitments offered by the Czech electricity incumbent in the *CEZ* case,³⁶ to alleviate the Commission's concerns that CEZ may have abused its dominance via the long-term reservation of available capacity in the transmission network, thereby preventing competitors from being able to make new investments in electricity generation. It is widely understood that CEZ has offered to divest significant electricity generation assets in the Czech Republic in order to dilute the anti-competitive impact of such long term capacity commitments.

VI. Quasi-structural remedies

24. In contrast to the relatively limited application of purely structural remedies, quasi-structural access remedies tend to be more flexible in their application, as well as less intrusive in terms of their effect on property rights. As a result, such remedies have been accepted under the regime set forth under Article 9 of Regulation 1/2003, in a variety of economic sectors, including in the fields of information technology, energy and aviation. These cases have involved both alleged abuses of dominance and anticompetitive agreements, whether horizontal or vertical.

1. Information technology

25. In its 2009 decision in the *Microsoft (Tying)* case, regarding Microsoft's alleged abuse of dominance in connection with Internet Explorer, the Commission accepted Microsoft's commitments to un-tie its Internet Explorer product from its Windows PC operating system. To address concerns regarding access, Microsoft also made a non-binding but public undertaking to improve interoperability between its products and third party products by disclosing necessary technical information.³⁷

26. The year 2011 saw *IBM* offer access commitments to meet the Commission's concerns that it might have abused its dominant position in the mainframe maintenance market

³⁶ Case COMP/39.727, *CEZ*.

³⁷ Case COMP/39.530, *Microsoft (Tying)*. This case can be compared with the earlier Commission investigation into Microsoft in 2004, under the Regulation 17/62 regime (Case COMP/37.792, decision of 24 March 2004). In the earlier case, the Commission issued a prohibition decision on the basis that Microsoft had abused its dominant position in the market for PC operating systems by leveraging that dominance onto the respective work group server operating systems and media player markets. The Commission ordered Microsoft to disclose complete and accurate interface documentation necessary to ensure the interoperability between non-Microsoft work group servers and Windows PCs and servers. In addition, the disclosed information would need to be updated each time Microsoft brought new versions of its relevant products to the market.

by imposing unreasonable conditions of supply. *IBM* committed itself to providing access to spare parts and technical information on commercially reasonable and non-discriminatory terms.³⁸

27. Similarly, in 2012, the Commission accepted commitments offered by *Thomson Reuters* to meet its concerns that the undertaking might have abused a dominant position on the market for consolidated real-time data feeds as a result of its restrictive licensing practices regarding its proprietary "Instrument Codes", which are used for data sourcing. Licensees had not been permitted to use the licensed codes to retrieve data from rival data-providers. Reuters committed to granting new licences that encompassed the information necessary for interoperability.³⁹

2. Energy

28. In addition to the straightforward structural remedies discussed above, the Commission also accepted quasi-structural access remedies in two of the cases arising from the energy sector inquiry.

29. In 2009, the Commission accepted commitments offered in the *GDF Suez* case⁴⁰ to address its concerns that GDF may have abused its dominant position on the French gas import and supply markets. The Commission raised concerns that GDF may have abused this dominant position through the long-term reservation of most of its gas import capacity, the determination of its reception capacity and the adoption of restrictive procedures for allocating long-term capacity, and the strategic limitation of investment into additional import capacity. The Commission was satisfied that GDF's offer of a major reduction of its long-term reservations on French gas import infrastructure capacity satisfied its competition concerns.

30. Similarly, in 2010, in *E.ON (Gas)*,⁴¹ the Commission accepted commitments from E.ON regarding its alleged abuse of dominance on the German gas market. In that case, the Commission had raised concerns that E.ON's long-term reservation of available transport capacity at the entry points into its own gas transmission networks may have prevented other suppliers from accessing the German gas market. To alleviate these concerns, E.ON undertook to release significant capacity volumes into the market in two distinct phases.

3. Aviation

31. The cases described above involved alleged abuses of dominance under Article 102 TFEU, where the competition concerns had a structural or quasi-structural dimension, and where structural or quasi-structural remedies were therefore arguably most appropriate. Nevertheless, quasi-structural remedies have also been considered to be appropriate where concerns arise under Article 101 TFEU.

³⁸ Case COMP/39.692, *IBM Maintenance Services*.

³⁹ Case COMP/39.654, *Thomson Reuters Corporation*.

⁴⁰ Case COMP/39.316, *Gaz de France*.

⁴¹ Case COMP/39.317, *E.ON Gas*.

32. In the aviation industry, quasi-structural remedies have been agreed, primarily with a view to opening up the key bottleneck in the industry – airport slots. In 2010, the Commission accepted remedies offered by the Oneworld Alliance members (namely, British Airways, American Airlines and Iberia), designed to meet the Commission’s concerns that a planned extensive form of horizontal cooperation in the form of a joint venture might infringe Article 101 TFEU. The airlines committed themselves to releasing slots at several key airports to facilitate the entry or expansion of competitors.⁴² Currently, the Commission is market testing similar slot release remedies offered by Air Canada, United Airlines, Continental Airlines and Lufthansa as part of its investigation into the potential anti-competitive effects of a joint venture covering the airlines’ passenger air transport services on trans-Atlantic markets.⁴³

4. Other areas

33. Quasi-structural remedies have also been agreed in cases involving vertical agreements. In 2005, the Commission accepted commitments offered by Coca-Cola to make available at least 20% of “Coca-Cola” branded refrigerators for other beverages, where that refrigerator was the only refrigerator in the store. In addition, Coca-Cola offered supporting behavioural commitments regarding exclusivity arrangements in its distribution system, its rebates practices and its leveraging practices.⁴⁴

34. In 2007, the Commission accepted commitments in the four related *Car Makers* cases, which obliged DaimlerChrysler, Toyota, General Motors and Fiat to ensure that independent repairers had access on non-discriminatory terms to technical information, equipment, software and training which was considered to be essential for the repair and maintenance of their branded vehicles.⁴⁵

VII. Convergence between antitrust and merger remedies policy

35. The growing reliance on structural and quasi-structural solutions to resolve antitrust concerns that has occurred since the adoption of Regulation 1/2003 has prompted some observers, including European Commission Director-General, Alexander Italianer,⁴⁶ to identify a convergence in remedy selection between traditional antitrust enforcement and merger control procedures.

⁴² Case COMP/39.596, *BA/AA/IB*.

⁴³ Case COMP/39.595, *Continental/United/Lufthansa/Air Canada*.

⁴⁴ Case COMP/39.116. Note that this finding bears distinct similarities to the Commission decision in *Van den Bergh Foods* (Cases IV/34.073, IV/34.395 and IV/35.436), which was determined under the Regulation 17/62 regime.

⁴⁵ Respectively, cases COMP/39.140, COMP/39.142, COMP/39.143 and COMP/39.141. In May 2010, the Vehicle Emissions Regulation (Council Regulation (EC) 715/2007) entered into force and imposed on all vehicle manufacturers the obligation to provide independent repairers with standardised access to all technical repair information.

⁴⁶ Legal certainty, proportionality, effectiveness: the Commission’s practice on remedies, Speech of A. Italianer, Brussels, 5 December 2012 (see http://ec.europa.eu/competition/speeches/index_2012.html).

36. In determining the extent of this trend towards convergence, it is important to note that the approaches to structural remedy selection in both the antitrust and merger control contexts arise from entirely different working premises. Whereas Article 7(1) of Regulation 1/2003 explicitly prefers the adoption of behavioural to structural remedies, the opposite view is taken with respect to merger control. Since mergers, by definition, bring about a structural change in a market, it follows that structural remedies are typically preferred to address any competition problems arising from the creation of the merged entity. The Commission’s Merger Remedies Notice states that “commitments which are structural in nature, such as the commitment to sell a business unit, are, as a rule, preferable from the point of view of the Merger Regulation’s objective, inasmuch as such commitments prevent, durably, the competition concerns which would be raised by the merger as notified, and do not, moreover, require medium or long-term monitoring measures.”⁴⁷ While it cannot be ruled out that other types of commitments may also be capable of preventing the significant impediment of effective competition, “divestitures are the benchmark for other remedies in terms of effectiveness and efficiency. The Commission therefore may accept other types of commitments, but only in circumstances where the other remedy proposed is at least equivalent in its effects to a divestiture.”⁴⁸

37. In practice, it is clear from the Commission’s administrative practice outlined above that, at least as regards network sectors or other industries displaying bottleneck (or “essential facilities”) characteristics, there has been a clear similarity in approach and effect between merger and antitrust remedy selection.

38. While structural remedies are commonplace in complex mergers across all industries, the recent growth in quasi-structural access-based remedies in antitrust cases is noteworthy. As noted above, several antitrust investigations involving aviation and information technology sector cases have required the consideration by the Commission of complex access-related remedies. Similarly, several airline mergers, including the 2012 *British Midlands/IAG* merger, the 2009 *Iberia/Vueling/Clickair* merger, the 2009 *Lufthansa/Brussels Airlines* merger and the 2009 *Lufthansa/Austrian Airlines* merger, have also been cleared on the basis of slot release remedies.⁴⁹ This analogy also holds true in the IT sphere, where both the 2011 *Intel/McAfee* merger and the 2012 *ARM/Giesecke & Devrient/Gemalto* joint venture were approved by the Commission only after the notifying undertakings offered remedies to ensure effective access for competitors to necessary interoperability information.⁵⁰ Concerns regarding access also lay at the heart of the protracted investigation in the *Oracle/Sun Microsystems* merger, which was ultimately cleared without conditions in 2010.⁵¹

⁴⁷ Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (OJ C 267/1, 22.10.2008), § 15.

⁴⁸ *Ibid.*, § 61.

⁴⁹ Respectively, cases M.6447, M.5364, M.5335 and M.5440.

⁵⁰ Respectively, cases M.5984 and M.6564.

⁵¹ Case M.5529.

39. Similarly, in the energy sector, merger remedies have been crafted in ways which are comparable to their antitrust counterparts. The Commission approved the acquisition by E.ON of MOL's gas business in 2005 on condition, first, that ownership of MOL's retained gas production and transmission activities was fully unbundled from the gas wholesale and storage activities being acquired by E.ON and, second, that E.ON would release significant volumes of gas to competing suppliers on competitive terms.⁵² The 2006 *GDF/Suez* merger was also approved subject to the parties divesting significant assets (Distrigaz, Fluxys and SOE), and making significant investments in Belgium and France with a view to increasing infrastructure capacities and facilitating new entry.⁵³

40. Director-General Italianer credits a “*simplification push*” for the development of a remedies policy, noting that the Commission has “*drawn on the practical lessons learned from mergers*”, while “*convergence has also been brought forward by applying the same guiding principles in both instruments*”. In his view, “*this convergence has led to increased predictability for companies and practitioners and has strengthened our remedy policy overall.*”⁵⁴

41. One cannot doubt that, as a general policy goal, having a strong remedies policy that delivers effective and proportional solutions to competition problems is in the interests of all stakeholders. But by the same token, if Director-General Italianer's goal of “*predictability*” is defined in terms of a set of predetermined outcomes, it is not necessarily the case that it is the most desirable feature of a cohesive remedies policy. Nor can the current situation be described as truly predictable, since forward-looking merger analysis and backward-looking antitrust analysis create the potential to produce an increasingly wide variety of acceptable outcomes.

42. While merging undertakings and undertakings under investigation for alleged antitrust violations all require some general sense of direction as to what lies at the end of their case, it is surely more important that the “right” result is delivered in each individual antitrust infringement action brought under Article 101 or 102 TFEU. It is also the case that a merger review is forward-looking by its very nature, thus requiring remedies to be “future-proof”. By contrast, remedies in antitrust cases are intended to cure past infringements. In antitrust cases, therefore, it is surely the very flexibility and pragmatism of the Commission's developing remedies policy that should be seen in the most positive light, rather than a policy built on predictability as its driving goal. Part of that flexibility should be directed towards tailoring appropriate measures in such a way that as to be able to restore effective competition which might otherwise have been lost as a result of the impugned anti-competitive practices. Such an exercise will of necessity be very fact-specific, particularly when one considers the types of market distortions that might have already occurred in markets characterised by economies of scale and scope, or network effects more generally. Thus, while convergence in remedy selection is unarguably not a bad thing, we should

not lose sight of the fact that different legal instruments are seeking to address market failure in very different ways. Accordingly, the process of convergence should not be given free rein.

43. In addition, given the fact that much of the “*convergence*” taking place in remedies policy is found in sectors that are also subject to some form of sector-specific regulation, greater thought should be given to the expansion of the mandate of such sector-specific regulators to enforce access-related remedies on an ongoing basis, regardless of whether their origin can be found in the antitrust or merger review processes.⁵⁵ There already exists a precedent for this in the media field in the form of the *Telepiu* case,⁵⁶ where the Italian media regulator's ability and willingness to police the Commission's access-related remedies in the context of a merger decision proved to be critical to the decision to grant merger clearance. Given that access-related remedies are the primary quasi-structural solution designed to curb the type of market power arising from vertical integration (especially in certain network industries such as telecommunications and energy), the desired level of convergence might best be seen to straddle the *ex post/ex ante* divide as much as the divide based on antitrust/merger review. This approach also makes sense in light of the Commission's policy line that *ex ante* and *ex post* disciplines are complementary to one another.⁵⁷ Given that a sector-specific regulator is best placed to understand the workings of its industry – and is probably responsible for the imposition of regulatory obligations on the same undertaking – it arguably makes good sense to share competition law competence where possible.⁵⁸

44. Finally, insofar as the convergence envisaged is being pioneered through the ever-greater adoption of settlements through Article 9 commitment decisions, one needs to be cautious as to how such a process of convergence can be reconciled with the Commission's policy commitment to promoting private enforcement.⁵⁹ A commitment to private enforcement will in practical terms be undermined in the absence of a judge not being able to rely on the Commission's fact-finding in terms of the existence of dominance on a relevant product or geographic market, the proof that abusive conduct was put into effect or that an anti-competitive agreement was realized. Thus, to the degree that structural remedies in competition cases resemble their merger review counterparts ever more closely, this should not be occurring at the expense of private enforcement actions. ■

52 Case M.3696.

53 Case M.4180.

54 Speech of 5 December 2012, *op. cit.*

55 This would also address the often expressed concern that fundamentally behavioural remedies (*i.e.* quasi-structural, for our purposes) are ill-suited to the merger review context, because they would require the ongoing vigilance of the merger regulator to enforce them. Such an important implementation concern would evaporate if implementation were left in the hands of sector-specific regulator. Periodic reviews of whether the remedies were still required would also be facilitated by the adoption of such an approach.

56 Case M.2876.

57 See *Deutsche Telekom v. Commission*, Case C-280/08; *Telefónica v. Commission*, Case T-336/07.

58 Many national regulatory authorities already exercise competition law powers; *e.g.*, OFCOM in the United Kingdom and the EETT in Greece in the electronic communications sector. The value of ongoing oversight by sectoral specialists in ensuring the continued implementation of technical commitments can perhaps be seen by comparing and contrasting developments in unregulated sectors. For example, 6 March 2013 saw the first imposition of a penalty for breaching an antitrust commitment given to the Commission, in the *Microsoft (Tying)* case. See Commission press release IP/13/196, 06.03.2013.

59 See <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>