European Commission

ICN Merger Working Group

Effective Remedies

Josep Carpi Badia
Head of Unit, Mergers Case Support and Policy
DG Competition, European Commission

16 February 2017
Washington DC

Introduction

Remedies in merger cases

- Proportionate solution to address competition concerns
  - ➢ Main intervention tool
- Requirements:
  - ➢ Remove competition concerns entirely
  - ➢ Viability
- Necessary to address risks
  - ➢ Composition risk, purchaser risk, asset risk
- Consequences for design and implementation of remedies
- ICN Guidance:
  - Merger Remedies Guide (2016)
  - Recommended Practices for Merger Notification & Review Procedures – Section XI (2005)
- Guidance EU Commission:
  - Commission Notice on remedies (2008)
  - Standard model texts for divestiture commitments (revised 2013)

European Commission

STRUCTURAL
VS.
NON-STRUCTURAL REMEDIES

Structural vs. non-structural remedies

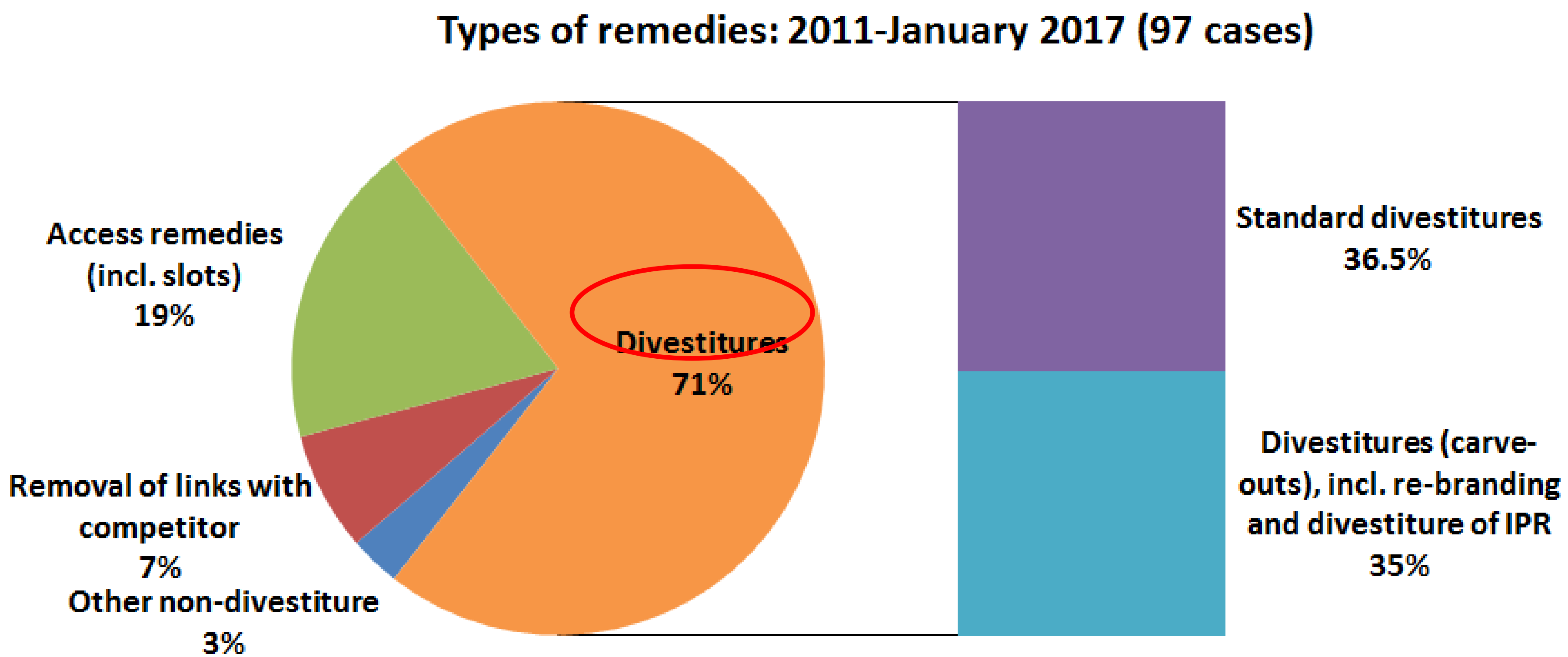
- Structural
  - "One-time remedies intended to maintain or restore the competitive structure of the market" (Remedies Guide, p. 8)
  - Typically the sale of one or more businesses, physical assets or other rights (Remedies Guide, p. 8)
- Non-structural = conduct = behavioural remedies
  - Modify or constrain future conduct of merging firms (Remedies Guide, p. 8)

European Commission

Structural vs. non-structural remedies

- Preference for structural remedies (Remedies Guide, p.9; EU Remedies Notice, para. 15)
  - Merger results in lasting structural change → remedy should also have lasting effect
  - Do not require long-term monitoring
- But often accompanied by non-structural remedies to ensure effectiveness (Remedies Guide, p. 8)
  - Interim supply obligation
  - Hold separate obligations

Preference for structural remedies:
Stats EU Practice



European Commission

Structural remedies:
Divestiture of a standalone business

"Divestiture of an intact, ongoing, standalone business has the lowest composition risk" (Remedies Guide, p.11)

- Examples in the EU:
  - ✓ M.7801 – Wabtec / Faiveley
  - ✓ M.7737 – Honeywell/Elster
  - ✓ M.7678 – Equinix/Telecity
  - ✓ M.7408 – Cargill/ADM/Chocolate Business

Structural remedies:

Divestiture of less than a standalone business

(Remedies Guide, p.11)

- If assets are sufficient to allow buyer to compete effectively
- But merging firms have incentive to divest fewer assets than required → burden on parties to show that asset package is sufficient
- Preferably all assets from one party (no "mix and match")
- Examples in the EU:
  - ✓ M.7555 – Staples/Office Depot
  - ✓ M.7278 – GE/Alstom

When possible, structural remedies also for vertical mergers

- Example in a vertical case: *Abbott/ Alere* (2017)
  - Input foreclosure concern: the target (Alere) supplies BNP tests to a 3rd party for use in lab machines. The buyer (Abbott) competes with this 3rd party in lab machines.
  - Remedy: divestment of Alere's BNP production

European Commission

Remedies other than divestitures: Different types

- Removal of links with competitors
- Access remedies
- Contract concluded during proceedings with key customer(s) + commitment for others

European
Commission

WHAT ASSETS SHOULD BE DIVESTED?

Scope

- Cover **all problematic markets** – informed by competitive assessment

- Include **all assets** necessary to compete effectively

    - Tangible (R&D, production, sales, marketing) and intangible (IPRs, know-how) assets, personnel, permits, contracts, customer records, etc.
    - Benchmark – current operations of the divestment business
    - Any exclusions have to be justified (Remedies Guide, p. 12; EU: in Schedule / Form RM)
    - EU: "Catch-all clause": assets or personnel used and required for continued viability/competitiveness, even if not explicitly covered in the Schedule

Scope

- Assessment of viability and competitiveness
  - On a **standalone** basis
    - May **waive** certain assets at the stage of the **purchaser approval** (Remedies Guide, p. 15)
    - Reduced scope may be to some extent compensated by identifying purchaser already during merger review process and before closing of the merger
  - Look at various factors (EBITDA, costs, capacity, utilisation, projections, etc.)

European Commission

FINDING AN APPROPRIATE BUYER

Purchaser criteria (Remedies Guide, p. 16, 22)

- Standard criteria
    - Financial capability
    - Managerial expertise
    - Operational capability
    - Independent from merging parties
    - Demonstrate intent to compete in relevant market
    - Divestiture itself must not raise competition issues

- Specific criteria (e.g. experience in the industry)

European Commission

TIMING

Timing of the purchaser approval

Identification of suitable purchaser:

- Usually allowed after closing of the merger = "post-closing divestiture" (Remedies Guide, p. 13)
  - If authority is confident that divested business will attract suitable purchaser
  - No risk of degradation before divestments
- Sometimes required before closing of merger = "pre-identified purchaser" (Remedies Guide, p. 15; in the EU this is called an "upfront buyer" or, if the purchaser is identified during the merger review process, a "fix-it-first purchaser")

Time period for the sale

- Initial sales period (Remedies Guide, p. 14)
  - Called "First divestiture period" in EU
  - Around 6 months
  - Merging parties can seek suitable buyer
- Subsequent sales period (Remedies Guide, p. 14)
  - Called "Trustee divestiture period" in EU
  - Around 3 to 6 months
  - Trustee in charge of selling
- Until closing of divestiture: hold separate and preservation of assets (Remedies Guide, p. 14)

European Commission

POST-DIVESTITURE RELATIONSHIPS BETWEEN BUYER AND SELLER

European Commission

Post-divestiture relationships

- Sometimes the divested business needs short-term transitional services (Remedies Guide, p. 17)
- Duration should be minimized (Remedies Guide, p. 23)
- Transitional services agreement should be subject to review by competition authority (Remedies Guide, p. 17)
- Independent monitoring of transitional agreement (Remedies Guide, p. 23; in the EU: monitoring trustee)
- No seller financing (Remedies Guide, p. 23; EU Remedies Notice, para. 103)