ICN Merger Working Group: Analytical Framework Subgroup

MERGER REMEDIES REVIEW PROJECT

Report for the fourth ICN annual conference

Bonn – June 2005

Contents

Page

Preface .... **ii**
Part 1 – Introduction **1**
Terms of reference and objectives 1
Scope and context 1
Part 2 – The Principles of Remedial Action **3**
Assessment of remedies 3
Proportionality 3
Effectiveness 3
Potential remedy burdens and costs 4
Transparency and consistency 5
Part 3 – Choice and Design of Remedies **6**
General considerations 6
The merger remedies universe 7
Structural remedies - divestitures 8
Factors affecting the design of divestitures 8
Structural remedies – intellectual property 10
Behavioural remedies 11
Circumstances where behavioural remedies may be appropriate 12
Packages of behavioural remedies 12
Part 4 – Implementing and Monitoring Remedies **14**
Effective implementation 14
Use of trustees 14
Monitoring 15
Arbitration and Dispute Resolution 15
Post implementation modification 16

Appendices
A. Summary descriptions of types of remedies
B. Glossary of terms

Illustrative Case Studies

C. Australia – Val Morgan – Implementing an appropriate package of remedies in a vertical merger
D. European Union – Shell/BASF-IP remedies, patent licensing including know how
E. European Union – CVRD/CAEMI – Enforcement of divestiture commitments and use of a monitoring trustee
F. Finland – Valio/Aito Maito – Devising and enforcing a complex package of commitments
G. Germany – General Electric/InVision – Preserving an effective divestiture package – international cooperation
H. Germany – Shell/DEA and BP/VEBA – Facilitating effective divestiture
I. Hungary – Tirlemontoise/Roosevelt – Remedies enforcement in a trans-national merger
J. Netherlands – Nuon/Reliant Energy – Divestiture of production capacity, a hybrid structural/behavioural remedy
K. South Africa – Mediswitch/QEDI – Facilitating market access and challenges of implementing behavioural remedies
L. UK – Dräger/Air-Shields – Constraints imposed by international mergers

Preface

At the 2004 ICN annual conference in Seoul it was agreed that a review of merger remedies should be undertaken as a part of the continuing programme of the Analytical Framework Subgroup of the ICN. This report is the result of this review. The main focus of the report is on providing a practical guide that outlines key principles and the range of tools in the use of merger remedies, based on and illustrated by remedy practice in a variety of jurisdictions.

In assembling this report we are grateful for the considerable input and comments provided by a large number of competition authorities and NGA's, all of which have enriched the final product. We are especially grateful to the competition authorities who have kindly contributed illustrative case studies to the review of which ten are included in appendices to the report. Our particular thanks go to the team at the Competition Commission and the Irish Competition Authority who assisted greatly in preparing this document and liaised with a wide variety of sources.

Edward Henneberry – Irish Competition Authority
Peter Freeman – UK Competition Commission

Part 1 – Introduction

Terms of reference and objectives

1.1 At the third annual ICN conference in Seoul, it was agreed that a review of remedies in merger cases would be conducted as part of the continuing programme of the Analytical Framework Sub-Group. The Irish Competition Authority was nominated to lead this exercise in conjunction with the UK Competition Commission. These together with the Australian Competition and Consumer Commission and the Hungarian Competition Authority (Gazdasagi Versenyhivatal) constitute the core group for this study.

1.2 The review aims to provide a practical guide to the choice, design and implementation of merger remedies. It seeks to achieve this by summarising key principles and practices employed by a wide cross-section of competition authorities, and then illustrating significant issues through case studies. Choice of remedy, of course, is ultimately dependent on each jurisdiction's merger regime and the case at hand.

Scope and context

1.3 This review focuses on merger remedies and these may be considered as structural and behavioural measures and tools available to competition authorities to remedy competitive detriments resulting from individual mergers, ie, the harm to the competitive process that would contravene the merger law of the jurisdiction. The review avoids procedural issues so far as possible, as these tend to be dependant on the legislative frameworks of individual jurisdictions. Remedies procedures are addressed explicitly by the Notification and Procedures Subgroup of the ICN Merger Working Group. This subgroup has developed a Recommended Practice for merger remedies and the recommendations are referred to in the text below where appropriate. (The Recommended Remedies Practice is available at http://www.internationalcompetitionnetwork.org/guidingprinciples.html.)

1.4 Remedies should only be applied to address the identified competitive detriments expected to arise from a merger transaction. In the absence of remedies, competitive detriments resulting from a merger could only be addressed by prohibiting the transaction in its entirety. The key contribution of remedies is to enable a modified outcome to merger transactions which restores or maintains competition while permitting the realisation of relevant merger benefits, thus achieving a better outcome than straightforward prohibit or permit decisions. From submissions received from 17 competition authorities during this review, it appears that the preferred outcome for cases raising competitive issues is to craft a suitable remedy, as reflected in the majority of contentious cases from 2002 to 2004, rather than resort to prohibition or abandonment.

1.5 For the purpose of this review, prohibition will not be considered to be a "remedy" but will be regarded as an alternative outcome to a merger decision. Where it is necessary to address the competitive detriments of completed mergers, the option of prohibition will not be available and alternatives, such as full divestiture, will need to be considered in the absence of this option.

1.6 In order to put in place an effective remedy, it is necessary first to identify the competitive detriments that would result from the merger. Any decision on remedies must therefore follow a decision on competitive detriments. Early discussion of remedies is desirable but should not distort the process of identifying competitive detriments. As noted by ICN Recommended Remedies Practice A, “A remedy should address the identified competitive harm arising from the proposed transaction”. Merger remedies are not tools of industrial planning and are generally ill suited to achieve aims wider than addressing the competitive detriments.

1.7 Some competition authorities have to take account of broader public interest issues in addition to their core objective of preserving competition. Such issues may include national security considerations, preserving diversity of media ownership, employment and environmental issues etc. The effect of remedies on these broader factors is not considered in this brief review given the variety of issues and the possible complexity of their interaction. In practice, many of these broader issues would need to be considered as specific overlays on the analysis of remedies on competitive detriments and in some instances may distort the optimal competitive outcome.

Part 2 – The Principles of Remedial Action

Assessment of remedies

2.1 Through remedies we seek to restore or maintain competition while permitting the realisation of relevant merger efficiencies and other benefits. In order to achieve this objective, potential remedies should be assessed in relation to their effectiveness in dealing with competitive detriments and their burden of operation in terms of costs incurred and merger benefits foregone. As noted by ICN Recommended Remedies Practice C, "Procedures and practices should be established to ensure that remedies are effective and easily administrable".

2.2 Individual jurisdictions will differ in how this assessment of effectiveness and burden on the competition agency and the merging parties is undertaken. The assessment will be influenced by such factors as the nature of the competitive test and the extent to which the jurisdiction is permitted to take into account relevant merger benefits.

2.3 If a merger were to result in competitive detriments to which there were no effective remedies, the merger would normally be prohibited.[1] In cases where effective remedies are possible, the merging parties will normally have strong incentives to propose acceptable remedies and in many instances, the responsibility for proposing effective remedies should thus fall mainly on these parties. In order for merging parties to propose an effective remedy in a timely manner, it is common for agencies to communicate at the earliest date practicable to the parties the potential nature and scope of the perceived competitive issues.

Proportionality

2.4 Competition authorities normally seek to implement the least burdensome remedy, or package of remedies, that will be fully effective in eliminating the specific competitive detriments expected from a merger. Some competition authorities, however, apply a principle of proportionality, whereby they might decide to permit the merger with no remedies if even the least burdensome effective remedy will be disproportionate compared to the degree of the competitive detriment. This might occur, for example, where the merger concerns a very small market. However, it is recognised that other jurisdictions do not believe it appropriate to apply a concept of proportionality in designing remedies once a finding of competitive detriment has been made in any relevant market.

Effectiveness

[1] Comment A.2 to the Recommended Remedies Practice provides that "there are instances in which only an outright prohibition can address the competitive concerns. The merging parties should be permitted, however, to propose alternative resolutions that permit the transaction to proceed with appropriate modifications, conditions, and/or obligations that restore or maintain competition, consistent with the applicable merger review law".

2.5 Assessing the effectiveness of a remedy, or package of remedies, will involve several distinct dimensions:-

- *Comprehensive Impact.* The remedy should seek to deal with all the competitive detriments expected from the merger

- *Acceptable Risk.* The eventual impact of any remedy, is to some extent, uncertain. Competition authorities will seek to implement effective remedies that generally have low levels of risk of not adequately addressing competitive detriments. This is particularly important where a competition authority is restricted in its ability to modify a remedy in the event of it failing to perform as anticipated.

- *Practicality.* An effective remedy should be capable of practical implementation, monitoring and enforcement within the jurisdiction of the relevant competition authority. This will also imply that the implementation and operation of the remedy should be clearly expressed.

- *Appropriate Duration and Timing.* It is desirable for remedies to address the competitive detriments effectively over their expected duration. Remedies that act quickly in addressing competitive concerns are preferable to remedies that are expected to have an effect only in the longer term or where the timing of the effect is uncertain.

Potential remedy burdens and costs

2.6 The potential burden or cost of using remedies is another element which should be taken into account. Costs may arise in a variety of areas:-

- *Remedy impact costs.* Remedies may result in distortions or inefficiencies in market outcomes. This is more likely to be the case in instances where behavioural remedies are used which intervene directly in market outcomes, especially over a long period. For example, price caps may discourage market entry by creating doubt concerning the ability to recoup investment or to maintain profitability. Similarly, non-price restraints may adversely affect investment decisions.

- *Remedy operating costs.* For those authorities that impose or directly seek remedies, these comprise the directly attributable costs of implementing and, if necessary, monitoring and enforcing remedies eg employing trustees, collecting monitoring information etc.

- *Merger efficiencies or other benefits foregone.* A frequent advantage of remedies is that they enable the realisation of at least some efficiencies or other benefits expected from a merger that would otherwise be lost through prohibition. Particular benefits expected from a merger may include lower prices, higher quality, a greater choice of products or a greater rate of innovation. Jurisdictions differ significantly in how merger efficiencies and other benefits are defined and assessed. However, for those that will consider efficiencies claims, , these benefits are only generally considered relevant to the extent that they arise from the merger and would not have occurred otherwise. In addition, many require that any expected efficiencies to be gained by the merging parties are only likely to be considered relevant if they are expected to result in significant benefits to customers. Moreover, the merging parties will normally bear the burden of demonstrating that relevant merger benefits are likely. A competition authority will generally seek to modify the choice or design of a remedy to minimise the impact on these efficiencies or other relevant benefits. But the competition authority will still wish to ensure that the remedy is effective in addressing the competitive detriments.

Transparency and consistency

2.7 In choosing, designing and implementing remedies, transparency and consistency are desirable principles in their own right in producing just decisions and conferring legitimacy on the outcomes. However, these principles are also important in optimising the effectiveness of remedies.

2.8 As noted by ICN Recommended Remedies Practice B, “The merger review system should provide a transparent framework for the proposal, discussion, and adoption of remedies”. Transparency implies that the principles and major issues in determining remedies in individual cases are visible and intelligible to the merging firms, and, where deemed appropriate, their competitors and customers. The specific application of these principles to an individual case should be clearly explained during the merger review process. As appropriate, agencies should consult third parties and customers on the effectiveness of the remedy. This process should improve the overall robustness of the outcome as illustrated in the Nuon/Reliant Energy case (appendix J) where consultation with parties active in the market resulted in significant modifications in the final proposal. Transparency should not imply disclosure of confidential information.

2.9 Consistency of remedy practice is desirable to provide a reliable basis for corporate decisions and expectations. However, consistency will normally be tempered by the need to deal with each case on its merits.

2.10 Consistency of remedy practice between national agencies is especially desirable in the case of multinational mergers. In these cases it is desirable for competition authorities to coordinate their approaches to avoid inconsistent or divergent remedies being imposed on a merging entity by a number of jurisdictions.

Part 3 – Choice and Design of Remedies

General considerations

3.1 The selection and design of remedies will generally reflect the principles outlined in Part 2 above and the circumstances of each case, in particular, the expected competitive detriments and merger benefits. It is normally preferable to begin consideration of the choice and design of acceptable remedies as soon as the likely competitive detriments become apparent in order to provide sufficient time for refining and market testing the remedies proposals. However, care should be taken to ensure that consideration of remedy options does not distort or displace consideration of findings on the competitive detriments.

3.2 The selection and design of remedy options will also reflect the constraints of national jurisdictions. Particular difficulties will occur where a competition authority has jurisdiction over only a small part of a supra-national merger. In such circumstances, the competition authority may find itself lacking effective powers to prohibit the merger. It may therefore have to rely on remedies to address the competitive detriment in its country from a weak negotiating position. In general, even though an authority may seek structural relief outside its jurisdiction to address domestic competition concerns, there will be a preference for remedies which can be enforced within the jurisdiction of the competition authority, These constraints may also limit choice not only of structural remedies but also of behavioural remedies because of the possible difficulty of enforcing them extra-territorially. The Tirlemontaise/Roosevelt case (appendix I) and the Dräger/Air-Shields case (appendix L) illustrate the constraints imposed by international mergers.

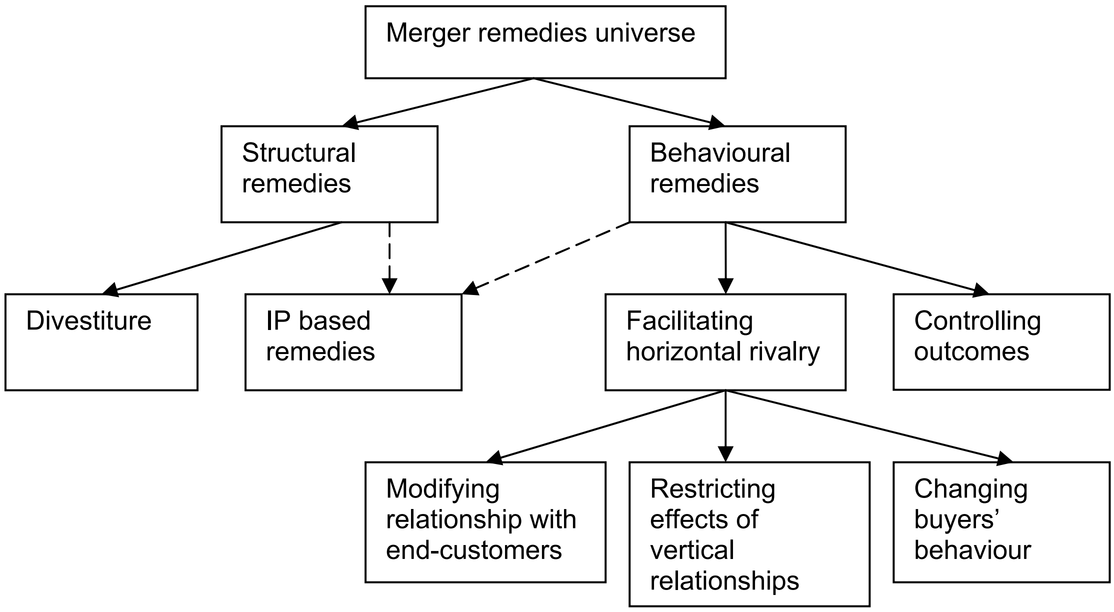
3.3 Co-operation with competition authorities in other jurisdictions is desirable where each is considering aspects of the same merger (see the Shell/BASF case (appendix D) and the General Electric/InVision case (appendix G) as examples of circumstances favouring cooperation between competition authorities). This helps to avoid inconsistency of approach in applying remedies and is normally also in the merger parties' best interests. Such co-operation should take place early enough to be effective but should not affect each jurisdiction's assessment of competitive detriment. It should preferably be with the consent of the merging parties as otherwise restrictions on disclosure may prevent sharing of relevant information.

3.4 Clarity of design is a key virtue in assisting rapid and effective implementation. Conceptual complexity may often lead to a multiplicity of exceptions and consequences not foreseen at the design stage when implementing the remedy.. However, the need for clarity may sometimes require significant detail in order to provide the appropriate level of precision.

The merger remedies universe

3.5 A detailed classification and description of possible remedies is attached as appendix A. An overview is summarised below;

Figure 1: Overview of the merger remedies universe



3.6 Remedies are conventionally classified as either structural or behavioural. Structural remedies are generally one-off remedies that intend to restore the competitive structure of the market. Behavioural remedies are normally ongoing remedies that are designed to modify or constrain the behaviour of merging firms (in some jurisdictions, behavioural remedies are normally referred to as "conduct remedies"). Some remedies, such as those relating to access to intellectual property rights, are particularly difficult to categorise on this basis. An effective package of remedies may contain both structural and behavioural elements.

3.7 In many jurisdictions there is a strong presumption, at least for horizontal mergers, that a structural remedy is preferable to behavioural remedies. A structural remedy, such as divestiture, is likely to be more effective, as it addresses the cause of the competitive detriment directly, and will incur lower ongoing costs of monitoring or possible market distortion. However, as noted later in this section, there may be significant constraints on a divestiture which may significantly affect the design and suitability of this remedy. Some may determine, in such cases, that the best alternative is to prohibit the merger if this is feasible.

Structural remedies - divestitures

3.8 Divestitures are the most common form of structural remedy. In essence, a divestiture seeks to preserve competition in a relevant market following merger by either creating a new source of competition through sale of a business or set of assets to a new market participant or strengthening an existing source of competition through sale to an existing market participant independent of the merging parties. To be effective, a divestiture will require the sale of an appropriate divestiture package to a suitable purchaser through an effective divestiture process. These three key elements may be subject to significant constraints in individual merger cases. The effect of these on the suitability and design of divestitures is explored later in this section.

Factors affecting the design of divestitures

3.9 The key elements of a divestiture, namely the scope of the divestiture package, the purchaser and the disposal process, may be subject to significant risks:

- Composition risks – the scope of the divestiture package may not be appropriately configured to attract a suitable purchaser or allow a suitable purchaser to operate effectively.

- Purchaser risks – a suitable purchaser may not be available or the merging firms may wish to dispose to a weak or otherwise inappropriate purchaser.

- Asset risks – the competitive capability of a divestiture package may deteriorate significantly prior to completion of a divestment, for example through loss of customers or key members of staff.

It should be noted that merging firms may have significant incentives to undermine the future competitive impact of divestitures, thus increasing potential risks. The nature of the perceived risks in an individual case will affect the design of the divestiture and the extent to which protective measures are adopted such as the appointment of monitoring trustees and “up front” buyers which are outlined below. Setting the appropriate time period for a divestiture is also critical to minimising any potential risks.

3.10 The scope of a divestiture package should be sufficient to address the expected competitive detriments and to enable the purchaser to compete effectively in the longer term. In general a suitable divestiture package may be defined as the smallest operating unit of a business (eg a subsidiary or a division) that contains all the relevant operations pertinent to the area of competitive overlap and that can compete successfully on a stand alone basis. Following discussion with the merger parties, competition authorities may permit the scope of the package to be modified, provided the modified package appropriately addresses the detriments. In certain restricted circumstances, for example where speed of divestiture is critical, some authorities may define a broader, more readily divested group of assets (a so-called ‘crown jewels’ divestiture package) to be divested in the event that an initially approved package is not disposed of within a specified period. Other authorities do not favour the use of ‘crown jewels’ and rely on other methods (for example, the use of a selling trustee) to expedite a divestiture, where necessary.

3.11 The divestiture of an existing business operating on a standalone basis is generally preferred over the divestiture of a collection of assets or a part of a business as this will normally entail a much lower composition risk. If it is decided that divestiture of a collection of assets will satisfy competitive concerns, it is preferable that all the divested assets come from one or other of the merging parties because a mixture of assets from both parties (a so called “mix and match” solution) may increase composition risk. If it is necessary to divest a collection of assets or part of a business then the capabilities and assets of a purchaser become more important in determining the likely viability of the divestiture (ie there is increased purchaser risk) than in divestiture of a standalone business.

3.12 In particular circumstances, such as in some cases in the energy sector, divestiture might involve divestment of production capacity for a given period rather than divestment of assets, where this would be sufficient to remedy the competitive detriment. As illustrated in the Nuon/reliant Energy case study (see appendix J) this is a hybrid form of remedy containing structural elements of divestiture but supplemented by ongoing behavioural commitments.

3.13 A competition authority will generally require the right to approve the purchaser as well as the assets to be divested. A suitable purchaser should generally have no significant connection post merger, such as any financial ties, to the acquiring parties. However, it is recognised that purchasers may sometimes require access to key inputs on appropriate terms from the merger parties for an interim period. The purchaser should have the necessary resources and expertise to be an effective competitor and should not itself be subject to significant competitive concerns if the divestiture proceeds. A competition authority will also wish to satisfy itself that the purchaser has appropriate business plans and incentives for competing in the relevant markets before approving disposal to the specified purchaser.

3.14 Where there is perceived to be significant purchaser or composition risk some agencies require the merging firms to identify a suitable purchaser that is contractually committed to the purchase before the merger may proceed, ie an “up front buyer”. In certain cases, the divestiture is accomplished before the merger proceeds; a so called “fix-it-first” solution.

3.15 In some jurisdictions, there is a strong presumption in favour of full rather than partial equity divestiture. This is because retention of equity in the divested business may reduce the incentive of a firm to compete with that divested business. It is for the merger parties to provide convincing arguments as to why they should be allowed to retain equity in the divested business, why the proposed holding does not create a direct or indirect influence, and why the proposed holding does not damage the incentive to compete. They should not be permitted to retain a controlling interest. If a partial equity interest is allowed to be held post-merger, then it is common to require behavioural remedies, such as preventing access to sensitive and confidential competitive information.

3.16 In order to protect a divestiture against likely asset risk, it may be necessary to require the divestiture package to be held and managed separately from the retained business pending divestiture. Appointment of an independent monitoring trustee may be desirable to ensure that these “hold separate” conditions are complied with and that the divestiture package is not allowed to deteriorate. The use of trustees is discussed in more detail in part 4 below and is also illustrated in the CVRD/CAEMI case (appendix E) and the General Electric/InVision case (appendix G)

3.17 Where the merging firms fail to procure divestiture to a suitable purchaser within a required period, an independent divestiture trustee may be mandated by a competition authority to dispose of the package to a suitable purchaser at an unrestricted price.

Structural remedies – intellectual property

3.18 The divestiture or licensing of intellectual property (IP), as already mentioned, may also be considered as a structural remedy and may be viewed, generally, as a specialised form of asset divestiture. However, in certain cases, the terms of a licence may contain ongoing behavioural elements such that the remedy is a structural/behavioural hybrid. The key element is the extent to which, if at all, any material link between licensor and licensee will exist post-license. A remedy that requires an assignment or license of an IP right that is exclusive, irrevocable, and non-terminable with no ongoing royalties will effectively be structural and call for no or very little behavioural commitments, whereas a license that requires a licensee to rely on the licensor for upgrades, supplies, etc. will most likely result in some form of behavioural hybrid remedy.

3.19 IP rights generally enable the remuneration of investment in innovation by granting time limited exclusivity. In considering the design and scope of IP remedies it is therefore particularly important to strike an appropriate balance between preserving incentives for innovation and addressing competitive detriments.

3.20 The appropriate design of an IP remedy may be influenced by a number of case specific factors such as:-

- *The form and jurisdiction of the relevant IP* (eg patent, exclusive licence, trade mark etc.) The appropriate IP to be divested to enable a purchaser to compete, may sometimes include less easily transferable “know how” as well as formal licence rights, as illustrated by the Shell/BASF case (appendix D)

The relative specialisation of the IP. This may impose particular constraints on selecting a suitably competent purchaser or licensee. A competition authority may need suitable independent technical advice for insight on this and other technical aspects of an IP case. For those jurisdictions that lack the ability to revise or amend the terms of a commitment post-remedy to take into account actual experience, the relative specialisation needed to suit individual licensee requirements may create additional burdens or risks in crafting a suitable remedy.

- *The rate of innovation expected in the relevant market.* A high rate of innovation may imply a shorter required duration for a licensing remedy than in a more stable market.

- *The effect of forms of payment for IP*. The form of payment (eg one off payment, royalties, profit shares) may have an effect on competitive incentives.

3.21 Mergers critically dependant on IP rights may have international repercussions due, for instance, to international filing and licensing of patent rights. International cooperation amongst competition authorities is therefore often particularly relevant in these cases as illustrated by the Shell/BASF case (appendix D).

Behavioural remedies

3.22 Behavioural remedies cover a wide range of potential applications but require a substantial amount of monitoring and enforcement. Moreover, as described below, behavioural remedies have significant disadvantages in terms of cost, effectiveness and risk of market distortion. Nonetheless, some jurisdictions use behavioural remedies, where, typically, structural alternatives may not be viable or in multi-jurisdictional transactions where a behavioural remedy could be more easily tailored to the identified competitive harm. A variety of classifications may be employed. A suggested categorisation of the main areas is as follows:

- *Measures facilitating horizontal rivalry.* These comprise three broad types of remedies:

    - Measures which prevent a firm from using its horizontal market position to foreclose the market and lessen competition. Such remedies may include prohibition of tying or bundling, restraints on predatory pricing and preventing the use of exclusive and/or long term contracts.

    - Measures which prevent a firm from using its vertical relationship or extent of integration to distort or limit horizontal rivalry. This may occur for example, where a merged entity controls access to key inputs or facilities that other firms need to compete with it. Measures may include mandating access to key inputs and regulating the price, terms and conditions of that access. The Val Morgan case (appendix C) illustrates issues arising from a vertical merger and certain behavioural measures to prevent discrimination against horizontal rivals. The Mediswitch/QEDI case (appendix K) also illustrates measures facilitating access.

    - Measures aimed at changing buyers' behaviour in order to encourage competition. These measures may include providing information to buyers and facilitating the ease with which buyers can switch sources of supply by, for instance, requiring an open tender process.

- *Controlling outcomes.* In some jurisdictions, this category may include those remedies which seek to prevent exploitation of competitive detriments by directly controlling outcomes such as price and range of products. Examples include price caps, service level agreements and supply commitments. These measures however have significant disadvantages in terms of cost, effectiveness and market distortion. The limits and uses of these are more fully explored in paragraphs 3.25 and 3.26 below.

3.23 Some of the above remedies may well address practices that are in themselves already prohibited under general competition law in a particular jurisdiction. For that reason, many jurisdictions do not include such prohibitions in merger remedy commitments. Other jurisdictions may directly prohibit such practices in order to ease enforcement, if that proves necessary.

Circumstances where behavioural remedies may be appropriate

3.24 Despite the presumption in many jurisdictions in favour of structural relief, , behavioural remedies may be appropriate where, for example:

- A divestiture is not feasible or subject to unacceptable risks (eg absence of suitable buyers) and prohibition is also not feasible (eg due to multi-jurisdictional constraints) or

- the competitive detriments are expected to be limited in duration owing to fast changing technology or other factors or

- the benefits of the merger are significant as, for example, in some vertical mergers the jurisdiction permits these benefits to be taken into account, and behavioural remedies are substantially more effective than divestitures in preserving these benefits in the relevant case.

However, in each of these cases it will be necessary to ensure that monitoring is feasible and enforcement is a practical proposition. It will also be necessary to ensure that the significant remedy impact and operating costs that may ensue from implementing behavioural remedies are fully taken into account before deciding to proceed with a behavioural package. The Valio/Aito Maito case (appendix F) and the Dräger/Air-Shields case (appendix L) illustrate circumstances where divestiture or prohibition were not considered to be practical and therefore behavioural alternatives were required. Behavioural remedies may sometimes be commonly employed to provide interim protection until structural measures are fully operative as illustrated by the Val Morgan case (appendix C).

Packages of behavioural remedies

3.25 Where appropriate, it is desirable to use behavioural remedies that facilitate competition, rather than controlling outcomes, for example improving information to buyers, reducing switching costs and opening up tender processes. These remedies may take time to be effective and a competition authority might wish to combine these remedies with some temporary safeguards (eg price caps, supply commitments) to protect customers. In the Dräger/Air-Shields case (appendix L) for example, a temporary price cap was needed to provide protection to customers until purchasing reforms were fully developed. However, it must be recognised that the temporary safeguards might themselves militate against competitive entry or expansion, eg capping prices at or close to the competitive level removes an incentive for entry. If the primary purpose of the competition authority's remedy is to facilitate horizontal rivalry, it should ensure that any temporary safeguards are clearly time-limited and do not harm the prospects for competition.

3.26 In general, behavioural remedies that control market outcomes tend to be burdensome to operate and monitor, lack effectiveness and are likely to create increasing market distortions over time. These are therefore unlikely to be appropriate other than for a relatively limited duration unless there is no practical alternative to a continuing regulatory solution.

3.27 It will be necessary to consider the appropriate duration for any package of behavioural remedies. A package of remedies can remain in place for a given number of years, specified at the outset, after which they fall away. Alternatively, they can be subject to review after a specified number of years, with the option that, on the basis of the review, they may be kept, removed or adjusted in some way. In general, it is not desirable to put a particular package of behavioural remedies in place indefinitely. This is because as time elapses there is an increasing risk that the behavioural remedy will not be appropriate to the conditions of the market and will create undesirable side-effects.[2]

[2] *See also* paragraph 4.9

Part 4 – Implementing and Monitoring Remedies

Effective implementation

4.1 Several factors may assist in facilitating effective implementation and ongoing administration of remedies:-

- *Clarity.* It must be clear what the remedy is, how it will operate and what constitutes compliance. It must also be clear how the remedy binds the parties and what steps are available to the competition authority to enforce compliance. As complexity of design may increase the problems of implementation and monitoring may also escalate.

- *Consultation and Reporting*. Active consultation with the merging firms and other appropriate parties, during the implementation process, helps to identify unforeseen consequences and improves the achievement of the desired outcome. Periodic reporting is also a useful mechanism for effective implementation.

- *Continuity of staffing.* It is beneficial for a competition authority to provide continuity of staffing between the stages of choosing/designing remedies and their implementation. Continuity helps to ensure that familiarity with the circumstances of a merger is applied to implementation and also assists in anticipating implementation issues when evaluating remedies.

- *Periodic assessment of practice.* It is helpful for competition authorities to conduct a periodic review of their remedies practice to identify learning points for improving impact and effectiveness.

As noted in ICN Recommended Remedies Practice D, "Appropriate means should be provided to ensure implementation, monitoring of compliance, and enforcement of the remedy".

Use of trustees

4.2 A competition authority may appoint, or approve the appointment of, a trustee to assist in various aspects of implementation such as monitoring or divestment, as noted above in the case of divestitures. A trustee or monitoring agent may also be appointed to facilitate the ongoing monitoring of behavioural commitments such as rights of competitive access. This function may include interpreting the application of on-going commitments, as in the Valio/Aito Maito case (appendix F), or providing non-binding views to an authority concerning implementation or effectiveness. The trustee should be managed by the competition authority and acts on behalf of the competition authority in circumstances where the authority lacks the resources or expertise.

4.3 Trustees should be independent of the merging firms, have appropriate qualifications for the task and should not be subject to conflicts of interest. The importance of appointing a suitably qualified trustee is illustrated in the CVRD/CAEMI case (appendix E). The trustee's responsibilities will be specified clearly in the trustee mandate which will be approved or specified by the competition authority. The trustee will carry out the instructions of the competition authority in accordance with the mandate and cannot accept instructions or be dismissed by the merging firms.

4.4 The trustee will generally be remunerated by the merging firms. The trustee's remuneration contract should not compromise its independence and should be subject to approval by the competition authority.

Monitoring

4.5 Effective monitoring is critical to the effectiveness of a remedy – a firm's incentive to comply with a remedy decreases the less effective it perceives the monitoring of its compliance to be. It is necessary to ensure effective monitoring throughout the lifetime of the remedy. In certain cases, market participants may have an interest in ensuring compliance with a remedy, and where appropriate should be involved.

4.6 It is easier to involve market participants, such as customers and competitors, in monitoring where they are relatively well informed and well resourced, or are intended beneficiaries of a remedy. Reliance on market participants, however, may complicate the process, and cause other problems, because they make be seeking to advance their individual interests. Nonetheless, if their assistance is to be encouraged, these third parties must be given clear information as to the nature of the remedy and what the firm must do to comply. They must also know how and to whom they should complain.

4.7 The competition authority should be pro-active in its monitoring; it should not rely solely on complaints. As noted in the previous section, appointment of a trustee or monitoring agent accountable to the competition authority may be necessary to enable the authority to have appropriate resources to carry out monitoring effectively. In general, it is preferable to set up monitoring points throughout the lifetime of a remedy at which the competition authority will assess the firm's compliance. Reporting periods typically can range from monthly, to once per year, depending upon the nature of the remedy, and the intensity or frequency of the commitments undertaken. The competition authority should make clear in its remedy what information the firm will be required to produce at any monitoring points and, if possible, should include a general provision requiring access to information that the authority considers necessary to monitor compliance.

Arbitration and Dispute Resolution

4.8 Access to arbitration may be an appropriate means of providing flexibility in a proposed package of remedies. Arbitration may, for instance, be used to settle matters that are not appropriately determined when the remedies are initially decided on, eg access pricing. A dispute resolution procedure may also be needed to resolve disputes between parties under the terms of a remedy eg preventing contractual discrimination. The Val Morgan case (appendix C) provides a detailed example of such a procedure.

Post implementation modification

4.9 It is desirable for a competition authority as well as parties to have some means of seeking modification of a remedy either to reflect changes in circumstances or problems in the initial design of the remedy. This is illustrated in the Tirlemontoise/Rooseevelt case (appendix I) where it was necessary to change the nominated purchaser for a divestiture. The importance of such a mechanism increases with the duration of the remedy.

Summary descriptions of types of remedies

Structural remedies:

1. ***Full or partial divestiture***

- A direct intervention in the structure of the market.
- Sale of 'divestiture package' to suitable purchaser.
- 'Divestiture package' should generally be the smallest operating unit of a business containing the competitive overlap that will fully address the competitive detriment and provide effective relief.
- Divestiture of a 'standalone' unit preferred.
- Divestiture package comprising assets from one of the merging parties (not 'mix and match') preferred.
- A suitable purchaser is a purchaser with:
  - No significant connection to the merger parties;
  - The resources, expertise and incentive to operate the divestiture package as an effective competitor.
- Could include 'virtual divestiture' in which the merged entity makes productive capacity available for use by competitors, for example by means of periodic auctions. However, note that this may require ongoing commitments that are behavioural in nature.

2. ***Intellectual Property (IP) based remedies***

- In many cases, these may be viewed as specialised types of divestiture. However, in some cases, ongoing commitments may result in this becoming a structural/behavioural hybrid form of remedy.
- Licensing is a major form of IP remedy. This involves licensing IP rights, for a given period, with the aim of reducing or eliminating a barrier to entry into or expansion in the market;
- Licences may take a variety of forms (eg exclusive, sole, multiple) in defining IP access.
- The relative specialisation of the IP may impose constraints on selection of a suitable purchaser or licensee.

Behavioural remedies

3. Facilitating effective horizontal rivalry.
Behavioural remedies cover a wide range of potential applications but require a substantial amount of monitoring and enforcement. Moreover, behavioural remedies have significant disadvantages in terms of cost, effectiveness and market distortion. Nonetheless, some jurisdictions use behavioural remedies. Behavioural remedies aimed at overcoming obstacles to competition can be considered in three distinct forms:

3.1 *Modifying relationships with end customers*:

- Could prevent the merged entity from foreclosing the market to its competitors by preventing for example:-
  - Use of long term and/or exclusive contracts;
  - Creation of switching costs for customers (eg long contractual notice periods, switching penalties);
  - Pricing below cost as a predatory measure;
  - Tying or bundling (eg by prohibiting tying or bundling altogether or by reference to the price of the bundle, or by reference to the incremental prices of the elements within the bundle).

3.2 *Restricting effect of vertical relationships*:

- Where a merged entity controls supplies of key inputs (including access to facilities or networks) that other firms would need in order to compete with it, remedies could include:
  - Controls on the price of the input (see price controls, para 4.1);
  - Commitment to supply the input (see supply commitments, para 4.2);
  - Restriction of access to confidential information ("firewall provisions") eg preventing access to information on competitors' orders to a fellow group company.
  - Commitment that the merged entity will not discriminate (with respect to price or non-price factors) in the supply of key inputs as between itself and its competitors.
- Even where the merged entity does not itself supply a key input, it might be sufficiently powerful to influence the provision by others of key inputs to its competitors. It might then be appropriate to include:
  - Prohibition of exclusive supply arrangements;
  - Prohibition of exclusive distribution arrangements.

3.3 *Facilitating changes in buyers' behaviour*:

- Could include facilitating changes in buyers' behaviour to enable competition, such as:
  - Use of open tender processes;
  - Requirement for a minimum number of suppliers to be contacted in procurement process.
- Could include facilitating changes in buyers' behaviour to maximise any countervailing buyer power, such as:
  - Collective purchasing arrangements;
  - More effective purchasing processes.

4 ***Controlling outcomes***.

These comprise measures to control market outcomes to address competitive detriments. These generally have significant disadvantages in terms of cost,

effectiveness and market distortion, and should therefore normally only be used for relatively short durations and/or in the absence of effective alternatives.

4.1 *Price controls*:

- Involves controlling prices of products affected by the merger, usually by means of a cap.
- Prices can be controlled individually or in a (weighted) basket and are generally set by reference to some standard (eg general measures of inflation, prices of related products).
- Compliance with the control is assessed at specified intervals (eg every six months, every year,).
- Depending on the duration of the price control, it might be necessary to provide for some review at which the ongoing appropriateness of the control could be assessed.
- Could be accompanied by commitment not to discriminate on price (or quality of service).

4.2 *Supply commitments*:

- Commitments to continue to supply a product or set of products in the market affected by the merger.
- The commitment to supply might be:
  - Absolute (eg commitment to continue to supply a specified product or set of products);
  - By reference to products supplied elsewhere
  - By reference to functionality (eg commitment to supply products with the same or greater functionality as particular product(s) supplied pre-merger).
- In whichever way the commitment is specified, care needs to be taken so that it cannot be evaded by superficial changes, eg to the product name.
- Depending on the length of time the supply commitment will operate, it might be necessary to make provision for some products to be withdrawn and new products to take their place in the supply commitment.

4.3 *Service level agreements*:

- Commitment from the merged entity to provide particular standards of service in markets affects by the merger.
- Could include commitments on:
  - Quality of product;
  - Timeliness of supply.
- Commitments given should be measurable and observable by those responsible for monitoring.

Glossary of terms

Behavioural remedy: remedy that addresses the competitive detriment of a merger by changing the behaviour of the merger parties or others (often referred to as a "conduct remedy").

Bundling: occurs when a firm sells two or more separate products together, in a 'bundle'. In a 'pure bundle' the products are only made available together and are not available separately (see 'tying'). In a 'mixed bundle' the products are available separately but are cheaper when bought together in the bundle.

Competitive detriment: harm to the competitive process (caused by the merger) that would contravene the applicable merger review law.

Crown jewels divestiture package: an alternative, more readily divested package that a competition authority may require merger parties to divest in the event that an initially agreed divestiture package is not sold by an agreed date. (Such packages are generally only employed in exceptional circumstances.)

Divestiture: disposal or sale, by an enterprise of a business or a package of assets or productive capacity with the aim of creating or strengthening a source of competition in order to restore or maintain competition in the relevant market

Divestiture package: the business or set of assets or productive capacity disposed of in a divestiture.

Divestiture trustee: This is a firm or person mandated by a competition authority to sell a divestiture package to a suitable purchaser, generally at an unrestricted price. This measure is usually used where the merger parties have failed to carry out the sale within a specified period.

Fix-it-first: this is normally interpreted as a divestiture remedy in which completion of divestiture is required before a merger may proceed.

Horizontal merger: merger of two or more enterprises at the same stage in the process of supply (eg a merger between two retailers).

Merger efficiencies: reductions in unit costs and/or average costs of production enjoyed by the merged entity as compared to the merger parties individually and which are achieved as a result of the merger.

'Mix and match': a divestiture package comprising assets from more than one of the merger parties.

Monitoring trustee: This is a firm or person mandated by a competition authority to monitor the merger parties' compliance with hold separate/ protection conditions or behavioural remedies.

Partial divestiture: sale of part of the equity of an enterprise or a package of assets comprising less than the whole of one enterprise.

Price cap: upper limit imposed on prices, either individually or in a basket.

Relevant merger benefits: benefits considered to arise from a merger, such as merger efficiencies, are often only considered to be “relevant merger benefits” and thus taken into account in designing remedies to the extent that these are expected to result in benefits, such as lower prices or increased quality, to customers.

Service level agreement: commitment from a firm to provide goods and services in accordance with specified quality or response levels.

Stand-alone business: a package of assets that can be operated as a viable business without the need to make use of significant additional assets

Structural remedy: remedy that addresses the competitive detriment of a merger through direct intervention in the structure of the market.

Switching costs: These are costs incurred by buyers in switching between different firms supplying the same product or switching between firms supplying different products.

Tying: occurs when a firm sells two or more products together in a ‘pure bundle’, ie when a firm only makes the products available together and not individually.

‘Up-front buyer’: suitable purchaser required contractually to commit to purchasing the divestiture package before the merger is permitted to proceed.

Vertical merger: merger between two or more enterprises at different stages in the process of supply (eg a merger between a manufacturer and a retailer).

Australian Competition and Consumer Commission (ACCC)

Case Study – Val Morgan

Theme – Implementing an appropriate package of remedies in a vertical merger

Context of case

1. Following consolidation and exits from the Australian cinema advertising industry only one national operator Val Morgan owned by Television and Media Services (TMS), remained in 2002. At the time of the proposed acquisition in December 2002, Val Morgan controlled virtually all cinema advertising in Australia through exclusive advertising contracts.
2. Cinema advertising involves the procurement, production, placement and scheduling of advertising shown on cinema screens. Film advertising is the dominant form of cinema advertising and is typically negotiated on a state or national basis. Conversely, cinema advertising in slide form is typically limited to the immediate local area.
3. Cinema advertisers sell advertising space (in the form of screen time and foyer advertising) to advertising agencies. In return, cinema exhibitors receive a rental payment from the cinema advertisers (usually negotiated under a long term contract). Screen rental represents a considerable part of the revenue of exhibitors, particularly independent exhibitors.
4. In September 2002 TMS, in financial difficulty, attempted to renegotiate contracts with exhibitors. The ACCC was approached by the three major exhibitors: The Hoyts Multi-plex Cinemas Pty Limited (**Hoyts**), The Greater Union Organisation Pty Limited (**Greater Union**) and Village Cinemas Australia Pty Limited (**Village**) (together the **Acquiring Exhibitors**) who proposed to jointly acquire the cinema advertising business of Val Morgan from TMS.
5. Collectively the Acquiring Exhibitors control or have an interest in approximately 60% of cinema screens nationwide, operate a number of cinema joint ventures and have interests in cinema film distribution. The Acquiring Exhibitors, through their joint venture, proposed to own and control the contracts governing their own and their competitors' advertising rights and revenues.
6. Further details of the ACCC inquiry can be found on the ACCC's website at:
    a. http://www.accc.gov.au/content/index.phtml/itemId/331720/fromItemId/267090
    b. http://www.accc.gov.au/content/index.phtml/itemId/470036/fromItemId/570592

Findings on competitive detriments

7. Following detailed investigation and wide consultation, the ACCC concluded that the proposed acquisition would substantially lessen competition for the following reasons:

- The major exhibitors possessed market power in various regional markets for cinema exhibition.
- The major exhibitors had significant vertical interests (including in film distribution) and horizontal arrangements (in the form of a cinema joint venture and other close relationships including partial ownership in each other).
- The proposed acquisition was considered likely to increase the level of vertical integration in the cinema industry and would raise barriers to entry to the detriment of independent exhibitors.
- It was considered that as long as the major exhibitors remained in control, and effectively tied to Val Morgan, it was extremely unlikely that there would be a new entrant in cinema advertising.
- The ACCC considered that, following the proposed acquisition, the major exhibitors would be able to favour themselves as customers to Val Morgan to the detriment of independent exhibitors.
- Through owning Val Morgan, the Acquiring Exhibitors would gain significant power over independent competitors and that through this power the three major exhibitors would have the ability and the incentive, to use this power to the disadvantage of independent exhibitors.

Issues relevant to the choice and design of the remedies

8. A key factor in the ACCC's considerations was the financial impact of cinema advertising revenue on competition in the cinema industry. Val Morgan had become the sole national provider of cinema advertising services and held the advertising contracts for all three major cinema chains in Australia. It negotiated very generous contracts with the major exhibitors as well as with many of the independent operators; as a result many exhibitors were now more dependent on cinema advertising revenue as a major source of their income.

9. However the cinema advertising revenue was not sustainable and by late 2002 Val Morgan was not financially able to meet its contract payments and was in severe difficulty. There was a perceived risk that allowing the Val Morgan business to fail could jeopardise cinema advertising as a viable medium over the longer term, as advertisers might depart to other media and not return.

10. The alternative of industry participants or a third party rescuing the business depended on their ability to renegotiate the existing contracts. However the major exhibitors and others were reluctant to do this unilaterally on their own resources. Proposals by Val Morgan to the wider advertising industry and financial markets were not successful due to the perceived difficulties. However the major exhibitors were willing to renegotiate the existing arrangements and underwrite the business if this could be done on a joint basis with the three major exhibitors acquiring the Val Morgan business and restoring it to viability.

11. The ACCC identified that any remedy sought would need to address its competition concerns and the concerns of market participants by providing:

- significant protections to prevent discrimination against independent exhibitors;
- mechanisms for the resolution of disputes between Val Morgan and independent exhibitors in relation to advertising agreements particularly in the absence of an alternative buyer of advertising rights; and
- mechanisms to address broader concerns about competition issues in the cinema exhibition industry, especially in relation to vertical integration, film distribution and joint venture arrangements favouring the three major exhibitors.

12. In December 2002 the ACCC accepted undertakings offered by the Acquiring Exhibitors. The provisions included:-

- Two of the Acquiring Exhibitors divesting their stake in Val Morgan within 18 months of the acquisition. The length of the Divestment Period was public, and the ACCC was to be notified of the identity of the acquiring party prior to the divestiture taking place.
- A time limit on the length of the contracts existing between Val Morgan and the divesting exhibitors at the time of divestiture. These contracts could not last more than 12 months post-divestiture.
- Guaranteed service and minimum contract terms for Independent Exhibitors, in essence amounting to a 50:50 net revenue split. In relation to film advertising, the Undertaking also allowed for a tiering system to account for the attractiveness of individual cinemas to advertisers. This tiering was based on geographic area.
- Protections regarding the allocation of film advertising. First there was a general obligation for Val Morgan to continue to allocate film advertising revenue based on the principles it used pre-acquisition. As a safety net, the proportion of film advertising revenue to be paid to Independent exhibitors in each financial year of the Undertaking must be at least the proportion paid to them in the 2001 – 2 financial year.
- Independent exhibitors were able to opt out of their contracts with Val Morgan during the first six months of the Undertaking. Independent exhibitors were able to opt back in at any time during the life of the enterprise.
- A dispute resolution procedure to facilitate contractual and other disputes between Val Morgan and independent exhibitors.
- In respect of audit and compliance provisions, the ACCC was to be given significant and detailed information to monitor and enforce compliance with the undertaking. Independent exhibitors were also entitled to independent audits of the revenues paid to them.
- The undertakings were to remain in force until the contracts existing between Val Morgan and the divesting exhibitors' pre-divestiture contracts expired post-divestiture (effectively up to 12 months post-divestiture).

13. The underlying intention for the ACCC was to ensure that the structural issues surrounding the acquisition were overcome within a timeframe that minimised the ACCC's competition concerns while allowing sufficient time for the Acquiring Exhibitors to return the Val Morgan business to viability. In addition, the undertakings were designed to protect industry players from any potential anti-competitive bias otherwise arising from the acquisition.

14. The main structural requirements (divestiture and limited contract terms) were seen as a means of limiting the conflicts of interest between the major exhibitors as joint owners/ operators of Val Morgan as well as being clients in competition with other clients. Limiting the involvement of two of the major exhibitors was intended to keep open the possibility that after a period of time at least two major exhibitors would be potentially free to contract with a new entrant in cinema advertising should one emerge.

15. The behavioural undertakings, designed to regulate the conduct of the Acquiring Exhibitors until such time as that structural solution can be brought about, provide all market players with certainty that they will be treated on a fair and non-discriminatory basis by Val Morgan.

Implementation - dispute resolution process

16. While the ACCC foresaw the possibility of disputes over individual contracts, it did not consider it had the time, resources or expertise to decide on such issues. Instead it accepted a dispute resolution process that set out a common procedure, identified relevant expertise and provided for accountability of its processes and results.

17. The form of the dispute resolution process involved requires written notification within 30 business days of the expiry of the existing agreement or if there was no existing agreement, within 30 business days of the initial request. Once a dispute is notified, the parties must participate in a determination based on the Determination Principles in Schedule 1 of the undertakings which includes the following features:-

- The parties appoint a properly qualified independent expert within 7 days by agreement.
- The party notifying the dispute submits relevant particulars in writing within 20 days to the expert. Material submitted shall be copied to the other party who is allowed a further 10 business days to respond to the expert.
- The expert can request information, assistance or cooperation reasonably relevant to the dispute from any party to the dispute, and all parties must comply with any such request. The expert is authorised to determine all matters relevant to the dispute, including the terms and conditions on which the right to exhibit cinema advertising is acquired from the independent exhibitor.
- Unless otherwise agreed, the expert must determine the dispute within 40 business days of notification. The determination may operate retrospectively

but no earlier than the commencement of the Undertakings. The expert must act as an expert and not as an arbitrator.

- The disputing parties undertake to abide by the determination and to acquire and supply, respectively, the right to exhibit cinema advertising in accordance with the determination. The determination and all information and other material used is to be confidential to the parties.

Summary of learning points

18. ***Use of structural and behavioural remedies in a vertical merger***: In general, structural remedies with definite outcomes are preferred by the ACCC over behavioural remedies. Structural remedies such as divestiture have definite timing and a permanent effect which can dilute the degree of post-merger concentration and open the possibility of new entry. However, in the circumstances of this case it was necessary to supplement structural measures with behavioural undertakings to prevent discrimination against parties outside the vertical combination.

19. ***Use of behavioural remedies***: Such remedies should be limited in scope to specific behaviours with identifiable results and defined time horizons, so as to target specific competition concerns and not hinder wider market developments.

20. ***Use of dispute resolution procedures:*** The design of dispute resolution remedies should ensure a common framework and adequate and informed resources so most matters can be dealt with and resolved at least cost. This requires a gradual escalation from mediation to arbitration and a balance between detailed procedures and effective practical implementation.

Appendix D

European Commission (EC)

Case Study – Shell/ BASF/JV Project Nicole

Theme – I P remedies, patent licensing including know-how - need for cooperation

Context of the case

1. The case involved the creation of a jointly controlled full function joint venture between BASF and Shell to which the parties contributed all of their world-wide Polypropylene (PP) and Polyethylene (PE) interests.

2. The Commission investigated a number of markets and on 29 March 2000 cleared the merger after a first phase investigation under condition of the parties' fulfilment of a number of divestiture remedies, including the commitment to divest BASF's technology licensing businesses for the emerging PP metallocene catalyst technology. The parties notified this matter to the United States after the EC accepted commitments.

Findings on competitive detriments

3. Virtually all PP resins were produced with technology based on Ziegler/Natta (Z/N), or multi-site, catalysts. However, there were technological advances occurring which were expected to lead to commercial production of PP resins on the basis of metallocene catalysts.

4. Both BASF and Shell owned technology licensing businesses based on Z/N catalysts. Shell's Spheripol technology was the leading global technology and accounted for 40-50% of the capacity licensed to third parties. BASF undertook its PP business through its subsidiary Targor. BASF/Targor's Novolen technology was the 3rd or 4th largest player, accounting for 5-15% of capacity licensed and 10-20% of the licenses awarded. While the direct overlap between the parties' Z/N technologies was eliminated by another remedy (sale of BASF's Novolen (Z/N) technology business), the PP technology package licensing market was still considered problematic as a result of BASF's metallocene-based process technology. BASF was a leader in the development of metallocene catalysts and the only company that has built a facility to produce metallocene-based PP resins, albeit for internal use only.

5. During the procedure, the parties argued that the patent situation was too complicated for any metallocene-based PPs to reach the market in the immediate future. However, industry forecasts indicated that within five years or so, the volume of metallocene-based PP resins produced and sold could have overtaken the volume of the alternative copolymers. The Commission was concerned that the combination of the parties' metallocene catalyst technology could well strengthen the probably already dominant position of Shell's Spheripol process.

6. Further details of the EC's decisions can be found on the EC's website at: http://europa.eu.int/comm/competition/mergers/cases/decisions/m1751_en.pdf

Issues relevant to the choice and design of the remedies

7. The parties committed to grant a non-exclusive, non-transferable license on the Targor metallocene catalysts to any interested third party, including the possibility to sub-license under certain payment terms, but only to technology that they own (thus excluding third party patents or know how they were themselves using).

8. The parties also committed not to assert the Targor metallocene patent rights towards any third party in relation to the manufacture of metallocene catalysts, the use of such catalysts for the production of PP resins, and the use and sale of the resins so made. This was meant to enable competitors to operate freely under their own or other parties' metallocene patents without fear of litigation from the combined entity.

9. The Commission decision stated: "The undertakings will also ensure that Nicole will be obliged to make the metallocene technology (BASF/Targor) fully available to the purchaser of the Novolen technology."

10. After the EC decision, the US FTC, upon conclusion of its review, took no action.

Implementation and enforcement issues:

11. In March 2002, the EC received a complaint from the purchaser, the technology consortium ABB/Equistar/Novolen, now Novolen Technology Holding (NTH). NTH submitted that BASF had not complied with the condition to divest the Novolen Technology Business, as regards the obligations concerning metallocene technology. The remedy would be supposed to provide NTH with full access to metallocene patents and know how, but did not. NTH explained that BASF/Basell, referring to third party rights (including secrecy agreements), was not transferring specific metallocene patent rights and know how.

12. Know-how was not mentioned in the commitment text accepted by the EC, but only in the sales and purchase agreement that was reviewed by the US authorities. As a consequence, it was legally difficult for the EC authorities to enforce this part of the sales and purchase agreement.

Summary of learning points

13. ***Scope of the business and inclusion of know-how***: The Commission's commitments text did not specify "know-how". Even though the licensor and the licensee agreed on the transfer of know how in their sales and purchase agreement the mere fact that not 100% of the know-how available to the licensor was transferred to the licensee was sufficient to, in its view, put it at a serious disadvantage vis-à-vis the licensor. In this case bare patent licenses, i.e. licenses

without the transfer of the know-how, could have significantly reduced the scope and value of the licensing commitment.

14. ***Third party restrictions of licences***: Confidentiality agreements concluded with third parties by a licensor can be a serious problem if these preclude the licensor from passing on
this know-how to the licensee. Also, first mover advantages or higher (at least initial) technological and/or financial credibility by the licensor can lead to the licensee's disadvantaged position in itself procuring these rights from the third party who may be little interested to grant them.

15. ***Co-operation with the US authorities:*** The EU could have usefully co-coordinated much earlier with the US authorities, i.e. during the investigation phase when assessing the remedy and not only in the EC remedy implementation stage.

European Commission (EC) Case Study – CVRD / CAEMI

Theme – Enforcement of divestiture commitments outside the European Union and use of a monitoring trustee

Context of the case

1. On 31.5.2001, the Commission received a notification of a proposed concentration by which Mitsui and Companhia Vale do Rio Doce ("CVRD", Brazil) would acquire joint control of Caemi Mineração e Metalurgia S.A.("Caemi", Brazil).

2. The operation concerned the mining industry, namely the production and selling of iron ore, kaolin and refractory bauxite. CVRD is the world's largest iron ore producer. It already jointly or solely controls almost all of the Brazilian production, with the exception of MBR, a subsidiary of CAEMI. Mitsui is a Japanese company conducting worldwide trading in various commodities, including iron ore, and having minority and controlling stakes in a number of Australian and Indian iron ore mining companies, including a 33% interest in the world's second largest mine, Robe River. The target, CAEMI, is also an iron ore producer which controls two production companies, namely Mineraçoes Brasileras Reunidas ("MBR") (in Brazil) and Québec Cartier Montréal ("QCM") in Canada. The merging companies' turnover in Europe met the thresholds set out in the EU merger regulation

Findings on competitive detriments

3. The Commission's investigation identified serious competition concerns in i) the market for the supply of iron ore pellets to all seaborne customer areas;[3] ii) the hypothetical market for the supply of DR pellets to all seaborne customer areas, and iii) the hypothetical market combining DR pellets and DR lump to all seaborne customer areas. To remove those concerns, CVRD and Mitsui agreed to the divestiture of Caemi's 50% stake in Québec Cartier Mining Company ("QCM"), a Canadian producer of fines and pellets which is jointly controlled by Caemi and Dofasco. The Commission cleared the transaction on 30.10.2001 on condition that the divestment of QCM would be carried out within a period of 12 month.

4. The original divestment period was extended in September 2002 by a further twelve months as the divestiture proved more difficult than had been anticipated. On 22.04.03, prior to divestment, the Commission received another

3 Iron ore is transported to its ultimate customers either by rail (in the case of regions with large domestic production such as China, Russia or the USA) and/or by dedicated ships. Iron ore delivered by ship is designated as"seaborne sales". A distinction therefore exists between (i) those customers based in countries with domestic iron ore production (who may in some cases have a choice between indigenous and seaborne supplies); and (ii) those customers without indigenous production (such as West European and Japanese steel producers), who can only obtain supplies from seaborne producers. That is why, in previous cases, the Commission identified a market for seaborne sales.

notification of a proposed concentration by which CVRD acquired sole control of the whole of Caemi. This second operation, a change from joint to sole control, was considered not to have a significant impact on the affected markets, as it did not alter the pre-existing competitive situation resulting from the previous transaction. CVRD assumed full responsibility for complying with the commitments submitted jointly by CVRD and Mitsui with regard to the initial transaction, and this second transaction was cleared subject to the same commitments as in the first case. Further details of the EC's decisions can be found on the EC's website at:
http://europa.eu.int/comm/competition/mergers/cases/index/by_nr_m_48.html#m_2420
http://europa.eu.int/comm/competition/mergers/cases/index/by_nr_m_63.html#m_3161

Issues relevant to the choice and design of the remedies

6. The remedy to divest the 50% stake in QCM eliminated all the overlaps in pellets, DR pellets and DR pellets and DR lump identified by the Commission and thus removed the competition concerns. The other 50% in QCM was held by Dofasco. However, this was not considered significant since Dofasco's stake was also for sale at the time.

7. The commitments included provisions that QCM conducts its business in the ordinary and normal course, is kept separate from all other business of CVRD and Caemi, that no confidential information concerning the QCM is exchanged between it and CVRD and/or Caemi, that the full economic viability, marketability and competitiveness of QCM is preserved pending its sale, and that QCM is preserved and not altered in its nature, scope of activity, industrial, commercial or investment strategy in a manner that may be detrimental to its viability, marketability and competitiveness.

8. The commitment prohibiting the exchange of confidential information excluded information reasonably necessary for the sale of the interest. Such reasonably necessary information could be made available only to pre-designated named personnel (including outside advisors) involved in the negotiation and evaluation process, who would be under a duty to maintain the confidentiality of such information and to use the same solely for purposes of negotiation and evaluation.

9. The purchaser had to be a viable existing or prospective competitor unconnected to and independent of the parties, possessing the financial resources and proven expertise and having the incentive to maintain and develop it as an active competitive force. In addition, the purchaser had to be reasonably expected to obtain all necessary approvals from the relevant competition authorities.

Implementation and enforcement issues

Monitoring trustee

10. To facilitate monitoring, it was agreed that an independent monitoring trustee would be put in place to oversee the sales process, the interim preservation and hold separate arrangements and comment on the proposed purchaser. The monitoring trustee was paid for by the merging parties but was independent of the parties and received its instructions from the EC. The trustee's mandate included the sale of QCM in case the parties would not be able to complete the sale within a pre-determined deadline. The trustee proposed by the parties and accepted by the Commission was a major UK accounting firm. It was chosen, because they had sufficient representation, local business knowledge and language capacities also in French speaking Québec. This was important since under the commitments the trustee would have to represent Caemi's interests on the management board of QCM.

Financial difficulties of the divested business and extensions of the divestiture deadline

11. The initial sales process was not successful as QCM started to experience strikes and financial difficulties due to a downturn in the seaborne pellets market. The parties requested a 12 months extension of the divestment deadline since a solution involving the Québec government was being pursued. When the government changed after an election further delays accumulated. The situation was complicated by the fact that Dofasco, holding the remaining 50% of the shares in QCM, was reluctant to contemplate or support a unilateral exit by Caemi.

12. During this long interim time it was crucial for the Commission's follow up of the implementation that the trustee was knowledgeable and had a local presence in situ to deal with management issues arising as a result of these negative interim developments.

13. To successfully lead through these complicated sales discussions, CVRD/Caemi needed access to certain information about the divested business, QCM. This was granted to certain of its key personnel notwithstanding the general hold separate obligations. In December 2003, a financial rescue plan was agreed among Caemi, Dofasco, and the Québec government, which ensured the continued viability of QCM over a period of 13 years or more.

Summary of learning points

14. ***Constraints of overseas mergers***: There were no ascertainable constraints in this case which might have ruled out QCM as a viable remedy at the design stage of the remedy.

15. ***Use of interim safeguards/Trustee***: The replacement of Caemi's management on the board of QCM by representatives of the Trustee was intended to ensure that the divested business was held separate from CVRD/Caemi. However, this of course meant that managers who had intimate knowledge of the business were replaced at a key juncture. Nevertheless, this worked reasonably well despite the considerable upheaval which faced the business. This was due in part to the fact that QCM had another industrial shareholder with knowledge of the business who remained involved in its running. Moreover, the chosen Trustee had considerable local relevant knowledge to deal with such issues. This highlights the importance of appointing a suitably qualified Trustee for the interim period.

16. **Use of behavioural remedies as a temporary safeguard**: Although under the hold separate arrangements foreseen in the commitments QCM had to be held separate from CVRD/Caemi, nevertheless, the commitments allowed certain key personnel from the merged entity to have access to certain commercially sensitive business information of QCM solely for the purposes of carrying out the sales process. This was subject to them entering into appropriate confidentiality agreements with QCM not to share this information which CVRD/Caemi. This demonstrates how certain behavioural remedies are used as an adjunct to the effective implementation of structural remedies, since without this the sales process would have been unmanageable for CVRD/Caemi in the face of hold-separate obligations.

Finnish Competition Authority

Case Study – Valio / Aito Maito

Theme – Devising and enforcing a complex package of commitments to preserve competition

Context of case

1. Valio notified a proposed acquisition of the dairy and marketing businesses of the Co-operative Dairy of Kainuu, the Co-operative Dairy of the Maito-Pirkka and Aito Maito Fin Oy in March 2000. Valio is the market leader in several dairy products in Finland and has the most comprehensive product range out of all the dairies operating in the country. Already prior to the acquisition the FCA had found that Valio had abused its dominant position in the market for liquid milk products, a decision which had been confirmed by the Supreme Administrative Court in 1998.

2. The co-operative dairies of Kainuu and Maito-Pirkka had an exemption order from the FCA to exercise co-operation in marketing of their products. The dairies were in economic difficulties and were no longer paying competitive prices to their milk producers, which had led to a situation where the milk producers were leaving the target dairies. The acquirer pleaded the failing firm defence in the notification, but this approach was rejected by the FCA since it was established, that the difficulties of the dairies were mainly due to their aggressive pricing strategy in the market for liquid milk products. It was also established that Valio was not the only operator interested in the dairies in question, and that the other prospective buyers would have formed a concentration less detrimental to competition.

3. The parties to the concentration had overlapping activities in several markets, including: i) purchasing and collecting of raw milk from the milk producers, ii) raw milk sales to other manufacturers of foodstuff, iii) standardised milk, iv) skimmed milk, v) liquid milk products (milk, sour milk, cream, sour whole milk) and v) milk powder.

Findings on competitive detriments

4. In the market for purchasing and collecting raw milk from the milk producers the concentration had a market share of 75-85 %. Valio already had a dominant position in the market, which was further strengthened by the acquisition. At the time, the milk production in Finland exceeded the demand for milk products by 20 %. However, several market players claimed that the competitors of Valio had significant difficulties in obtaining sufficient amounts of raw milk. This was supported by the fact that Valio's market share in procuring raw milk exceeded its market share in the processed products and the fact that Valio's export ratio was higher than that of its competitors.

5. In the market for sales of raw milk to other dairies and food producers the market share of the concentration according to the parties was 30-40 %. Some third parties were of the opinion that the market share was somewhat higher. Valio appeared to have no incentives to sell raw milk to its competitors as it had the possibility of refining the excess milk into butter and milk powder for export sales. The somewhat low market shares were found to underestimate Valio's market power in the market as the other dairies were not in a position to increase their deliveries of raw milk due to the fact that they had difficulties in procuring sufficient amounts of raw milk themselves. The concentration was found to have a dominant position in the market.

6. The concentration was also found to have a dominant position in the market for standardised milk, skimmed milk and cream (all these are used as raw material by foodstuff industries). Here also the competitors posed no constraints on Valio's market power due to their inferior position in the market for raw milk procurement.

7. Liquid milk products were considered a relevant product market as it is necessary for food retailers to have the whole product range of liquid milk products (milk, sour milk, cream, sour whole milk) for sale. Here Valio had a market share of 60-65 % and the target dairies 10-15 %. There was little constraint on Valio's market power by the competitors or by imports in this market. Valio's already dominant position was strengthened through the acquisition.

8. The concentration was also found to have a dominant position in the market for milk powder. Although milk powder is traded internationally it was established that there was a separate market for domestic milk powder due to the rules for indicating domestic origins of foodstuff. These rules stated that in order to apply the sign to foodstuff or prepared food all the milk used in the production had to be of domestic origins. Thus the food producers wanting to use the domestic origins of a product in their marketing were constrained to purchasing of domestic milk powder.

Issues relevant to the choice and design of the remedies

9. The responsibility to propose suitable remedies lies with the notifier of the concentration. After receiving the proposal for conditions the FCA investigates the effectiveness of the proposed remedies by inviting opinions from third parties.

10. In this case the FCA imposed an extensive package of remedies, most of which were behavioural in character but some (eg items 2 and 4 below) were structural in orientation. The package imposed the following conditions on the acquisition:

    1) Valio's competitors could purchase from Valio an annual maximum of 150 million litres of raw milk. The milk could also be purchased skimmed,

standardised or as cream. The sales price of raw milk equalled the average purchase price of Valio's own dairy industry.

2) Valio was obliged to sell the "Aito" and "Into" brands owned by the Aito Maito Group to a competitor.
3) Valio was obliged to make export purchases of raw milk referred to in point 1 or of refined products on the basis of market prices and reasonably in discriminatory export costs.
4) Valio agreed to offer the production plants under the threat of closure or the related equipment for sale without any restrictions in use.
5) Valio agreed to offer logistical services to competitors.
6) Valio was obliged to offer normal dairy processing and packaging services for the products referred to in point 1.
7) Valio agreed to sell to domestic customers all the usual domestic milk powder brands manufactured by Valio at the market prices of the EU area.
8) An independent expert approved by the FCA was to be appointed to monitor the following of the commitments. The expert would make a proposal for a decision in case of a possible conflict.

11. The reason for the use of quite an exceptional package of commitments was that prohibiting the concentration or common structural conditions would not have had the desired effect of maintaining competition. This was because it was not possible, by the FCA's decisions, to influence which dairies the milk producers were willing to deliver their milk to. Prohibiting the deal was likely to result in milk producers switching supplies to Valio in due course thus creating a greater shortage in milk deliveries for the co-operatives, the objects of the acquisition.

Implementation and enforcement issues

12. This remedies package is an illuminating example about the difficulties involved in implementing an extensive package of conditions and the need for flexibility in interpreting such conditions. So far, these have included e.g.:
    - Condition 1) leaves open how to proceed if the demand exceeds 150 million litres. This question may have a considerable practical effect on the operations of the dairy market.
    - With respect to condition 2), the FCA was obliged to decide how to proceed when there were no interested buyers for the brands. The FCA changed its decision and cancelled the condition on selling the brands but simultaneously ordered that Valio could not use them either.
    - The demand of condition 4) that the closed production facilities be sold has required interpretation when it transpired that Valio did not own the facility to be closed but governed it as a tenant. The FCA also had to consider if the transfer of a production line from a dairy under the threat of closure was possible.
    - With respect to condition 6), the FCA has had to advise on whether the ordinary processing involves e.g. the manufacture of UHT milk.

The Valio case shows that an extensive package of ongoing commitments easily leads to problems in interpretation and the competition authority seems to be tied to constant control of the fulfilment of the conditions.

13. It should be pointed out, however, that a trustee has been appointed to solve the problems in interpretation, and his suggestions have so far been sufficient to solve all disagreements that have arisen. It should be noted that the FCA has not ordered that an expert definitively solve the discrepancies caused by interpretation because it is ultimately a question of enforcing the FCA's administrative decision and the FCA cannot transfer these powers to others.

14. In 2004 Valio acquired the cheese manufacturing business from co-operative dairy Milka. The acquisition entailed an agreement according to which Milka will sell to Valio all the raw milk it collects from its milk producers. By its decision of 8 October 2004, the FCA approved the concentration but attached here also conditions to the decision. The maximum of the quota 150 million litres of raw milk to be sold to competitors as described above in point 1) was raised by 35 million litres. Concerning this raised quota the conditions described in points 3) and 6) above also apply.

Summary of learning points

15. In some cases structural remedies are just not possible. Ultimately all the competitors announced that they were not interested in purchasing any of the businesses to be divested.

16. The FCA did not want to prohibit the acquisition either, since the likely consequence would have been a situation where the milk producers would have transferred to Valio anyway. By attaching conditions to the clearance of the concentration the FCA wanted to ensure that competing dairy producers would have access to raw milk supply. This would have not been possible by a prohibition.

17. The appointment of a trustee has proven to be very effective. His suggestions have so far been sufficient to solve all disagreements that have arisen. It should be noted that the FCA has not ordered that an expert definitively solve the discrepancies caused by interpretation because it is ultimately a question of enforcing the FCA's administrative decision and the FCA cannot transfer these powers to others.

18. It is also important to note that the conditions attached to the concentration form a package. None of the conditions described above alone would have had the desired effects.

Bundeskartellamt (Bka)

Case Study - General Electric / InVision [4]

Theme – Preserving an effective divestiture package – international cooperation

Context of case

1. In April 2004 the merging parties filed the planned acquisition of InVision Technologies, Inc. (InVision) by General Electric Company (GE) with the Bundeskartellamt. GE is a widely diversified technology, media and financial services company with a worldwide turnover of about 120 bn Euro.

2. GE's products and services include aircraft engines, power generation turbines, financial services, medical imaging, television programming and plastics. InVision was active in two business areas: explosive detection systems and x-ray systems for non-destructive testing (NDT) and achieved a worldwide turnover of approximately 370 Mio Euro. GE was also active in both InVision business areas.

3. The project was also examined by other competition authorities in Europe and America and was dealt with by the Bundeskartellamt in close cooperation with the US Federal Trade Commission (FTC) in particular. In the course of both the US and the German merger review proceedings, the parties offered to sell the respective InVision subsidiaries which were active in NDT systems in order to accommodate the competition concerns. In close cooperation, the Bundeskartellamt and the FTC reached an agreement not only on the respective obligations and time limits but also on the nomination of a security trustee to prevent potentially conflicting provisions from the start.

4. It was also in the interest of the undertakings concerned to ensure smooth negotiations between the competition authorities leading to an agreement on the clearance conditions. Therefore they decisively supported this process by waiving their confidentiality rights at an early stage to ensure a smooth exchange of documents and other information between the Bundeskartellamt and the FTC.

Findings on competitive detriments

5. The merger affected two sets of relevant markets: Explosives detection systems and non-destructive testing systems (NDT systems). NDT systems are used to detect material defects in all kinds of different products without destroying the product or reducing its quality.

[4] The full text of the decision can be downloaded (in German) at the Bundeskartellamt's website: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion04/B7-65-04.pdf

6. Whereas the merger created no competition concerns in the explosives detection systems market(s), it would have led to a dominant market position in an NDT systems market.

7. After the merger there would have been only very few and small competitors to GE/InVision left in this relevant market. Therefore, in the absence of remedies, the merger would have been enjoined by the Bundeskartellamt.

Design of the remedies

8. The Bundeskartellamt cleared the merger in August 2004 subject to obligations. The set of obligations imposed by the Bundeskartellamt included:

    - *Divestiture obligation*: GE/InVision were obliged to sell the relevant NDT systems business of InVision to a third (independent) company within a fixed time-frame. The acquirer had to be able and willing to act as a lasting competitor to GE/InVision. The acquirer had to be approved by the Bundeskartellamt. If GE/InVision did not succeed in divesting the business on time, a divestiture trustee was to be installed to ensure timely divestiture.

    - *Hold-separate obligation*: Until the divestiture had become effective, GE/InVision had to operate the NDT systems business entirely separate from their other businesses and had to maintain the competitive value of the business to be divested. The hold-separate obligation included, inter alia, that no business secrets or employees were to be exchanged between the two entities. The hold-separate obligation was to be monitored by a security trustee.

    - *Reporting obligations*: GE/InVision had to report continuously to the Bundeskartellamt on their efforts to divest the InVision NDT business. Also the security trustee had to report on the implementation of the hold-separate obligation every 60 days. Similarly, in case of need for a divestiture trustee, he/she had to report every 60 days on the progress made.

    - The security trustee was installed immediately after the clearance decision in August 2004. The trustee reported positively on the implementation of the hold-separate obligation. The Bundeskartellamt also conducted interviews with managers responsible for the business to be divested. An appropriate acquirer was found with the financial investor Gerhard Andlinger Trust.

    - The acquisition of the InVision NDT systems business by Andlinger was cleared by the Bundeskartellamt in early December 2004.

Summary of learning points

- ***Maintaining the competitive potential of assets to be divested.*** In order to maintain the competitive potential of the assets to be divested, the competition authority should a) normally provide for hold-separate obligations under supervision of a security trustee during the divestment process and b) ensure timeliness of the divestiture through strict timelines and provision for a divestiture trustee.

- ***Value of international cooperation between competition authorities.*** Early cooperation between the BundesKartellamt and the FTC ensured that a consistent approach to remedies was followed.

Bundeskartellamt

Case Study - Shell/DEA and BP/Veba [5]

Theme – Facilitating effective divestiture

Context of case

1. After they had initially been notified to the European Commission, the planned mergers of Deutsche Shell GmbH, Hamburg (Shell) with DEA Mineralöl AG, Hamburg (DEA) and of Deutsche BP AG, Hamburg (BP) with Veba Oel AG, Gelsenkirchen (Veba Oel) were referred in August 2001 to the Bundeskartellamt.

2. The markets affected by the mergers were the domestic petrol, jet fuel (Jet A1) and bitumen markets.

Findings on competitive detriments

3. According to investigations by the Bundeskartellamt the mergers would have led to a joint dominant position of the three largest companies, Shell/DEA, BP/Veba Oel and Esso with a combined share of well over 60 per cent in the domestic petrol and Jet A1 markets.

4. Due to the market conditions there was no reason to believe that those suppliers would enter into substantial competition with each other after the mergers. Competition in terms of quality is virtually impossible because fuels in particular are physically homogeneous and largely identical standardized products. Market transparency, low price elasticity and stagnation of overall demand made price moves unlikely since these were easily identifiable and offered little chance of success because of similar reprisals which could be expected from the other companies.

5. Also, it was not probable that the oligopoly would meet with significant competition from other companies. Smaller competitors were dependent to a great extent on the companies involved in the mergers, as they procure the bulk of their fuel requirements from them.

Issues relevant to the choice and design of the remedies

6. In view of the competitive detriments, the mergers could only be cleared In December 2001 subject to obligations.

---

[5] The full text of the decisions can be downloaded (in German language) at the Bundeskartellamt's website: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion01/B8-120-01.pdf and http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion01/B8-130-01.pdf

7. With regard to the domestic petrol market, Shell/DEA and BP/Veba Oel had to sell 5.3 per cent and 4 per cent, respectively, of the total sales volume of the domestic petrol stations to third companies. With a network comprising around 16,000 petrol stations, the market share reduction involved the sale of approx. 1500 petrol stations.

8. The divestiture obligations were complemented with interim behavioural obligations to offer the buyers of the petrol stations the supply of fuel on favourable terms for several years post-transaction. Another set of obligations concerned the markets for jet fuel.

9. The divestiture obligations were fulfilled by the companies within the specified time limit. The Polish company ORLEN and the Austrian OMV which had acquired approx. 500 and 280 petrol stations respectively from BP/Veba Oel's pool of petrol stations had previously either not been represented in the German petrol station business at all or only to a small extent.

10. A third large acquiring company was TotalFinaElf which acquired about 130 petrol stations from the Shell/DEA pool. Also a large number of small and medium-sized mineral oil companies and petrol station operators have taken over small groups of or individual petrol stations from Shell/DEA.

11. The fuel supply to these new owners will in part be effected independently of the sellers' sources. The mineral oil volumes newly brought to the German market by ORLEN are provided from its own capacities; OMV acquired refinery capacities in the southern German area for this purpose but also brought mineral oil from its own capacities onto the German market.

Summary of learning points

12. ***Preference for structural remedies.*** Due to the ultimate goal of merger control as well as monitoring and enforcement issues, the Bundeskartellamt will normally seek structural remedies as opposed to behavioural remedies. However, as shown in this case regarding the requirement to offer supplies of fuel on favourable terms to the divested entities, behavioural remedies may be required as an ancillary interim commitment to facilitate effective divestiture.

13. ***Importance of capability of purchasers.*** The market position and competence of a potential purchaser is often critical in ensuring effective divestiture. In order to ensure that the acquirer is capable and willing to act as a lasting competitor, the buyer approval of the competition authority should normally be required.

Hungarian Competition Authority (GVH)

Case Study – Tirlemontoise/Roosevelt

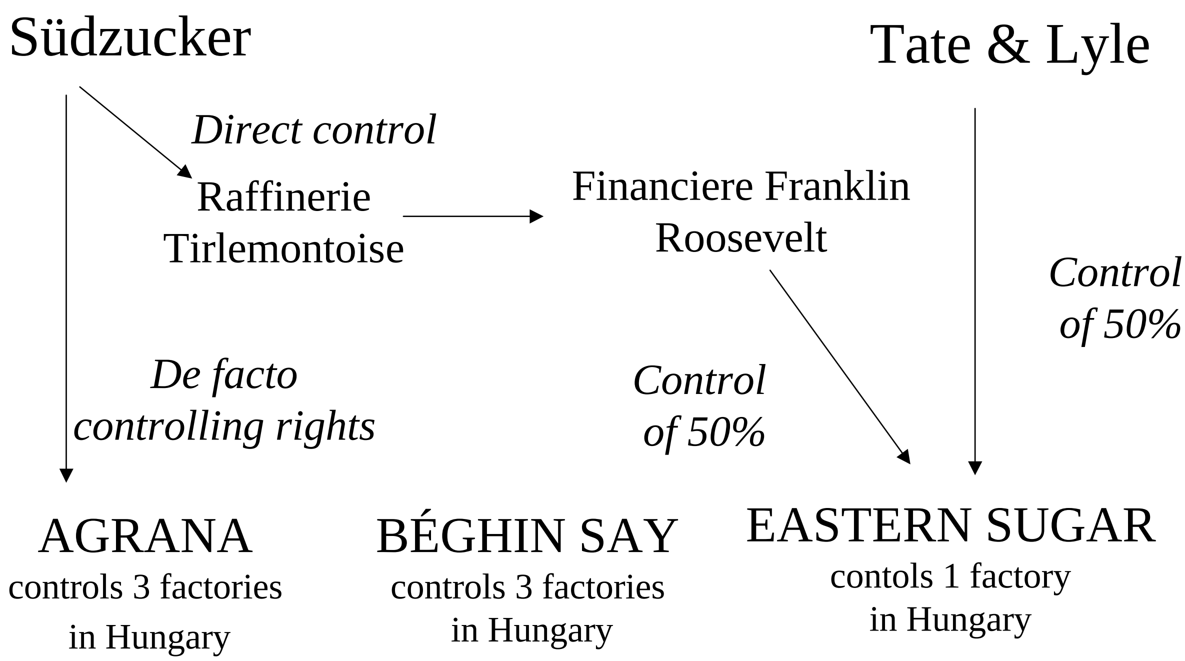
VJ-127/2001 Acquisition of control over Financiére-Franklin Roosevelt SAS by Raffinerie Tirlemontoise SA

Theme – Remedies enforcement in a trans-national merger

Context of the case

1. The Belgian company Tirlemontoise, a subsidiary of Germany's Südzucker AG ('Südzucker'), applied for the authorization of the competition authority in July 2001 concerning its acquisition of sole control over Financiere-Franklin Roosevelt SAS ('Roosevelt'). The transaction affected indirectly two of the three groups with an interest in the sugar market in Hungary.
2. The seven sugar factories in Hungary belong to three separate groups. Magyar Cukor, which owns three factories, is controlled by Agrana. A large production site at Kaba belongs to Eastern Sugar, while another three plants form part of the French owned Eridania Béghin Say. The total amount of marketed sugar was 340 000 t in 2000. Agrana (Magyar Cukor) had a market share of 37.1 per cent, Eastern Sugar 26.2 per cent and Béghin Say 36.7 per cent.
3. Südzucker, through its control of the Austrian company Agrana Beteiligungs AG ('Agrana'), already had indirect control over Magyar Cukor Rt. ('Magyar Cukor'). As a result of the transaction, Südzucker would gain indirect control over Eastern Sugar BV, the parent company of Eastern Sugar through Tirlemontoise. .

The following picture illustrates the control relationships in the Hungarian sugar market.



Findings on competitive detriments

4. The transaction raised serious competition concerns. These included strengthening the relations between the competitors and weakening incentives to compete. Südzucker besides having sole control over Agrana /Magyar Cukor, would gain joint control over Eastern Sugar, thereby without its consent, it would have been impossible to act against its interest.
5. The Competition Council (CC) raised the issue of collective dominance, stating that even at present the market structure is characterised by collective dominance. According to the CC, it is for competition policy to prevent the creation or, in this case, the strengthening of these detrimental market structures.
6. The parties submitted that benefits would accrue from the merger, but these were not very convincing for the CC. The international dimension and the parties' initial willingness to cooperate in finding an appropriate remedy helped to avoid a prohibition decision, and a possible remedy was considered.

Issues relevant to the choice and design of the remedies

International nature of the merger

7. A particular problem in this case was that the takeover which resulted in the change of controlling rights in the Hungarian sugar market was completed in a foreign jurisdiction. Although the Hungarian Competition Act provides room for extraterritorial jurisdiction, in the given case no steps were taken to block the transaction after the condition set in the decision was not fulfilled. If the transaction was blocked, or the condition not fulfilled, the question arises about the validity of the underlying contract and the enforcement of the Hungarian decision.
8. One possible outcome would be the voidness of the whole contract. In several jurisdictions, for certain contracts to come into existence an official authorization is needed: lacking this, the contract will be non-existent. The question arises, whether an authorization of a foreign competition authority (in this case the GVH) is a necessary condition for the acquisition contract to come into effect. If this were the case, the whole contract would be void.
9. Another alternative would be the voidness of the contract in its Hungarian part. However, this would raise additional concerns in the enforcement field. It raises serious doubts regarding whether a national competition authority could examine the exercising of controlling rights in a foreign jurisdiction, and whether the GVH has enough bargaining power against the companies concerned.

Negotiating the merger remedy

10. The parties offered several remedy possibilities: First they offered the re-allocation of voting rights in the Sugar Product Council (where all Hungarian sugar producers are members). This could have hardly eased the competition concern of facilitated collusion. Other possible commitments were that prices set by Hungarian factories would not exceed prices by other EU-factories and that Südzucker would not close any factory in Hungary for the coming three years. Given the limited controllability of a price regulation, and that the

maintenance of the number of sugar plants would not solve the competition concern mentioned earlier, the CC did not accept either of these remedies. A fourth commitment raised by the parties was the transfer of control rights of the factory owned by Eastern Sugar to the other owner, Tate & Lyle.

11. In its first decision of 21st March, 2002, the Competition Council authorized the acquisition of control over Roosevelt by Tirlemontoise with the precondition that the control over Eastern Sugar would be divested to the Tate & Lyle group. Following the fulfilment of this condition, the applicant had the obligation to submit to the Competition Council all the decisions and minutes made by the board of Eastern Sugar for a duration of three years.

Implementation issues – modification, flexibility

12. Although Tate & Lyle was explicitly proposed as the buyer by the acquiring party, the negotiations between Südzucker and Tate & Lyle did not bring any result. As a result of this the Competition Council established in its decision of the post investigation (second decision of 30th June, 2003), that the precondition set in the previous decision had not been fulfilled, but the acquisition of Roosevelt had been completed. Having regard to the completed transaction, and the failure of the negotiations between Südzucker and Tate & Lyle, the Competition Council decided to alter its remedy. In this second decision, the Competition Council authorized the acquisition while obliging the Südzucker group to eliminate its control rights over Eastern Sugar in favour of a buyer independent from this group.

13. In a further decision of 20th February, 2004 the Competition Council found, that by selling stock in Eastern Sugar B.V. to the independent Zuckerfabrik Jülich AG, the Südzucker group is not in a position to control the activity of the Hungarian Eastern Sugar company any more.

Summary of learning points

1. **Enforcement in the case of multi-jurisdictional mergers.** As already indicated, any decision concerning remedies may result in a sub-optimal outcome when assessing international mergers. The legal consequences caused by a breach of a remedy imposed by a foreign jurisdiction should be clarified (full or partial voidness of a contract, other methods to ensure compliance).

2. **Need for the ability to impose monetary penalties to ensure compliance with the decision.** The Hungarian Competition rules do not allow for any sanctions if a condition is not fulfilled. Since the legal consequences of this kind of behaviour are highly uncertain in the case of international mergers, additional powers for national competition authorities may be appropriate.

3. **Need for legal commitment of an up-front buyer**. Although the parties explicitly named Tate & Lyle as the potential buyer, no agreement was reached with this purchaser. This could have been avoided by requiring the purchaser and the parties to be legally committed to the divestiture before the approval of the Competition Council was given

4. **The value of flexibility to amend a remedy.** The GVH could use its powers to modify the remedy. The Competition Act explicitly provides for this possibility of an amendment in Article 32 Section 2: "The Office of Economic Competition may amend its decision made pursuant to Article 30 where the obligee is in breach of any obligation, or unable to satisfy any of the conditions, attached to the decision but where the obligee has not been found negligent".

5. ***Additional information on the case study*** *A somewhat longer summary of the case is available in English under* http://www.gvh.hu/index.php?id=2608&l=e *The Competition Act is available in English http://www.gvh.hu/index.php?id=575&l=e*

Netherlands Competition Authority (NMa)

Case Study – Nuon/Reliant Energy

Theme – Divestiture of production capacity, a hybrid structural/behavioural remedy

Context of case

1. On 2 April 2003 the NMa was notified of the proposed acquisition of Reliant Energy Europe B.V. (Reliant) by N.V.Nuon (Nuon).

2. The Nuon group was active in the transmission, trading and supply of energy (electricity, gas, heating), electricity generation, water supply and several related areas in the Netherlands. Reliant was active in generating, trading and supply of electricity in the Netherlands.

3. The Dutch electricity sector is largely liberalised. Generation, trading and supply is not regulated but transmission and distribution networks remain subject to regulation. Supply to small customers was liberalised from 1 July 2004.

Findings on competitive detriments

4. The activities of Nuon and Reliant mainly overlapped in the areas of generating and wholesale trade in electricity. Nuon was mainly active as a supplier and had limited generating capacity at its disposal. As a result of the proposed merger, Nuon would become both an important generator and an important supplier of electricity.

5. The Netherlands was considered to be a relevant geographical market for the wholesale supply of electricity but it was necessary to take into account the competitive pressures exerted by electricity imports in assessing the effects of the proposed merger.

6. Due to the specific characteristics of the electricity market (notably – fluctuations in demand, the absence of stocks, low demand elasticity, capacity limitations and the use of different technologies) the effects of the merger were likely to vary depending on the situation of demand and supply in the market within relatively short time periods.

7. It was considered that the combined entity would achieve a dominant position in the wholesale market at particular levels of demand or when certain elements of capacity were not available. Since these situations were likely to take place regularly, it was concluded that the dominance would have a structural character.

8. In order to calculate the prospective effects on prices of the merger, simulation models were used which showed that the likely increase in prices in the wholesale market in relevant situations could be considerable.

Issues relevant to the choice and design of remedies

9. During the course of the investigation, the parties, in consultation with NMa made proposals aimed at eliminating the competition concerns identified by the NMa. The proposal finally approved by the NMa required Nuon to auction 900mw of firm generating capacity for a five year period with the intention of repeating the auction every five years. At least 88% of the nominated capacity should be generated by Intergen (one of Nuon/Reliant's production units). Capacity would be sold in capacity blocks of 10mw. The NMa has to approve the auction rules and criteria for admittance to the auction. A monitoring trustee was appointed to supervise compliance with the requirements.

10. The effect of the proposal was simulated and from this calculation the divestment was sufficient to solve the competition concerns. The auctioning of capacity had previously been used in Europe in the EDF/EnBW case and it appeared from research carried out by the NMa that the auctioning of capacity by EDF was effective.

11. In the NMa's Guidelines for Remedies, remedies should preferably have a structural character. The proposal was effectively a quasi-structural remedy as it removed control of capacity from Nuon but had certain ongoing characteristics which were more akin to that of a behavioural remedy.

12. The proposal was subject to comment from other parties in the market and other respondents. As a result of these comments a number of modifications were incorporated in the final proposal including:-
    - Preventing Nuon influencing the level of the exercise price.
    - Excluding other large Dutch energy groups from participating in the auction and preventing the possibility of onward sale to Nuon and these entities.
    - A maximum has been set for the amount of capacity that a single purchaser could buy at each auction.

14. Two other proposals were also presented for comment namely a back-to-back onward sale of capacity for five years of the output under the Intergen contract combined with an undertaking by Nuon not to acquire more than its legal maximum import capacity. The second alternative was back-to-back onward sale combined with a tolling agreement from Nuon to a party approved by the NMa. Most respondents preferred the auction proposal outlined above.

Implementation and enforcement issues

15. After the NMa issued its decision Nuon sought changes to the remedy. Nuon lodged an interim appeal and the court accepted an auction for a shorter period pending the final judgement.

16. Nuon also sought to change the original remedy because it was planning to sell some capacity to another company. The NMa accepted some reduction in capacity for the first auction pending this divestiture.

Summary of learning points

17. Auctioning of generating capacity may be a feasible option in addressing competitive detriments in the particular circumstances of the energy sector.

18. Consultation with market participants is likely to be valuable in refining the form and operation of potential remedies.

19. Auctions may be complex and time consuming to arrange and monitor and the ongoing nature of the commitment may be subject to continuing debate with the parties.

Competition Commission South Africa (CCSA)

Case Study – Mediswitch/QEDI

Theme – Facilitating market access and challenges of implementing behavioural remedies

Context of case

1. In April 2001, the CCSA approved, subject to conditions, the merger between Mediswitch (Pty) Limited (Mediswitch) and QEDI (Pty) Limited (QEDI). As this merger was categorised as a small merger, the merging parties had not originally notified the merger to the CCSA. The CCSA caused the parties to notify the merger, after implementation, under Section 13(3) of the South African Competition Act.

2. The parties were involved in the business of electronic medical claims switching services. They provided systems that allowed claims to be electronically conveyed between medical practitioners and healthcare funders. The provision of these services comprised:

   - Practice Management Applications (PMA): these enable doctors and other suppliers of medical services to organise their business operations and to prepare medical scheme claims for onward transmission. A subsidiary of Mediswitch controlled a significant portion of the PMAs market. It conducted the business of developing, licensing and maintaining the software used by doctors and other medical services providers known as practice management software.

   - Switching Market: For switching to take place, a so-called interface, known in the industry, as an application programme interface (API) is required.

   - In order to ensure competition, competitors of the merged entity required access to the merged entity's PMA. A so-called front-end access agreement had to be reached to ensure competition in the market.

3. Further details of the matter can be found on the Competition Tribunal's website at: http://www.comptrib.co.za/decidedcaes/html/41AMJun02.htm

Findings on competitive detriments

4. The parties were found to control significantly high market shares in the relevant markets. QEDI and Mediswitch together controlled most of the switching market. Additionally, Mediswitch controlled 60-65% of the PMA market.

5. All the independent PMA systems were fully interfaced with competitors in the switching segment. However, the PMA systems of Mediswitch were only interfaced with QEDI. The
vertical integration nature of the merger would have excercibated a serious vertical foreclosure problem that existed even prior to the merger.

6. It was the CCSA view that the transaction would have led to a substantial lessening of competition (SLC) in the electronic claims switching market.

Issues relevant to the choice and design of the remedies *- Facilitating access to the merged party's relevant software applications*

7. The CCSA was of the view that access to the relevant software applications would significantly remedy the competition concerns. However, in order to achieve this, it would be necessary to regulate the terms and conditions under which access would be provided. This involved designing behavioural remedies relating to, amongst other things, access prices, setting the time period over which an agreement should be concluded, and ensuring inter-operability of competitors practice management software (PMS) systems.

8. The CCSA invited the parties to provide measures that would remedy its competition concerns. The CCSA considered that the parties' proposals did not fully address its concerns. The CCSA, with the cooperation of the parties, recommended measures that would remedy its concerns.

9. The CCSA considered that behavioural remedies that facilitated access would address the SLC problem. Therefore, the merged entity was required to, on reasonable written request by any healthcare switch entity, integrate the applicable latest versions of PMS packages that it owns or controls with an application program interface that interfaces with the switching technology of the healthcare switch entity requesting such integration.

Need for Market testing

10. Notwithstanding the fact that the South African Competition Act does not provide for an extension of the merger review period to assess remedies, the CCSA considered it necessary to market test the appropriateness and workability of the proposed remedies by obtaining the views of market players. That exercise enabled the CCSA to reach a determination that the proposed remedies were appropriate and applicable in addressing its competition concern.

Need for temporary safeguards

11. Pursuant to a reasonable written request, the merged entity was required to use all reasonable endeavours to conclude a written agreement with the requesting healthcare switch entity concerned, within a period of 60 days after

receiving such request, containing commercially, financially and technically reasonable terms.

Need for monitoring

12. The merged entity was required to provide a quarterly report to the Commission, for a period of 12 months after the date of approval:

    - Detailing all requests by third party healthcare switch entities to integrate their application program interface and functionality with the PMS packages owned or controlled by the merged entity; and

    - Detailing the agreements and time frames concluded with such third party healthcare switch entities in respect of the integration process.

Implementation and enforcement issues

13. The CCSA was responsible for ensuring compliance with the compliance with the remedial conditions. Although the remedies were easy to understand and implement, just a year after the merger was approved, the CCSA found that the merged entity was in breach of the remedial conditions. The CCSA had to dedicate resources to deal with the continuous allegations and counter allegations of the parties involved in the negotiations.

14. In May 2002, the CCSA issued a Notice of Apparent Breach (Notice) to the merged entity. That Notice was challenged by the merged entity on appeal to the Competition Tribunal (Tribunal). In February 2004, the Tribunal issued its reasoned decision in favour of the CCSA. Specifically, the Tribunal found that the merged entity had substantially failed to comply with the obligations contained in the conditional approval of the merger.

Summary of learning points

- ***Challenges of behavioural remedies***: Behavioural remedies by their very nature provide ongoing challenges in implementation and monitoring. This is one of the key reasons why the CCSA might prefer structural to behavioural remedies.

- ***Ensuring adequate monitoring***: It is important that a remedy is well crafted with sufficient safety mechanisms to prevent the conditions being abused or manipulated. Pro active rather than re-active monitoring is advised.

- ***Ongoing dispute resolution***: Even relatively straightforward, ongoing undertakings may give rise to disputes between parties. It is advisable for a competition authority, where possible, to provide for independent dispute resolution rather than being drawn into detailed adjudication and absorbing limited resources.

UK Competition Commission (CC)

Case Study – Dräger / Air-Shields

Theme – Constraints imposed by international mergers on choice of remedies.

Context of case

1. In December 2003 the CC began considering the proposed acquisition by Dräger Medical AG & Co ('Dräger') of the Air-Shields business of the Hillenbrand Industries group. These two businesses supplied warming therapy products, designed to support new born babies in a controlled environment. Their product ranges were distributed worldwide and included:
    - Closed care incubators: providing a closed environment in which temperature and humidity can be maintained;
    - Open care incubators: comprising a bed warmed either by a heated mattress or by a radiant warmer, providing open access;
    - Transport incubators: self-contained incubators on trolleys ;
    - Phototherapy lights: used for the treatment of jaundice.

    The UK market comprised less than 10% of the global value of revenues in the warming therapy market in 2002.

2. Dräger manufactured neonatal warming therapy products in Lubeck, Germany and Air-Shields manufactured in Pennsylvania, USA. In some countries, including the UK, they both had their own, wholly-owned, distribution arms while in others, such as Portugal, they sold through independent distributors. The UK distributors were the only parts of the two groups based in the UK.

3. The deal was considered by several other national competition authorities. However, in most other countries the combined entity had a much lower share of the market than in the UK. The Portuguese Competition Authority (PCA) was the only other competition authority, of which the CC was aware, that had expressed concern about the deal. The CC liaised with the PCA during the inquiry. The PCA decided to permit the merger with behavioural remedies.

4. In the UK almost all warming therapy products are purchased by hospital trusts operating within the National Health Service (NHS). Individual hospital trusts had generally purchased warming products independently through local tender processes.

5. Further details of the CC inquiry can be found on the CC's website at: http://www.competition-commission.org.uk/inquiries/completed/2004/dragair/index.htm

Findings on competitive detriments

5. Separate relevant markets were considered to exist for each of the types of warming therapy products and their accompanying services, ie closed care

incubators, open care incubators, transport incubators and phototherapy lights. For each product, the relevant geographical market was the UK because of the need to have a service and support capability available at short notice to customers. In closed care incubators, open care incubators and transport incubators, the merged entity would have a market share in excess of 60%. Competitors were relatively small and successful entry had to overcome significant barriers.

7. It was concluded that the merger would result in a substantial lessening of competition (SLC) in respect of the supply of closed care incubators, open care incubators and transport incubators, but not in phototherapy lights. These SLCs were expected to result in higher prices, and a reduction in choice in the affected products.

Issues relevant to the choice and design of the remedies

International nature of the merger – constraints on prohibition and divestiture

8. The only part of the deal that could have been effectively prohibited by the CC was the merger of the two UK distribution arms. However, in order for this to address the competition problems it would have been necessary to regulate the terms on which the merged offshore parent would supply the two distribution arms. This may have included a wholesale price control, non-discrimination conditions and supply commitments. However, it would be difficult to implement these complex arrangements effectively and enforcement outside the UK's normal jurisdiction would have been problematic. Similar issues would have affected divestiture of part of the two UK businesses.

9. The CC considered a series of possible remedies including proposals from the merging parties. In view of the obstacles to effective prohibition and divestiture, it chose to remedy the SLCs primarily through facilitating more effective purchasing. This was supported by short term price controls and other temporary safeguards.

Facilitating effective purchasing through the NHS Purchasing and Supply Agency

10. The NHS Purchasing and Supply Agency (PASA) had been established in England (with equivalents in Scotland, Wales and Northern Ireland) with the aim of improving the efficacy of NHS purchasing. These institutions had the potential to act as powerful buyers, securing advantageous deals through larger scale purchases and also helping to create a more competitive market by facilitating entry. At the time of the inquiry, PASA had not been significantly involved in the warming products market.

12. The CC can normally only impose remedies on parties involved in a merger. However, the CC can make non-binding recommendations to others. The CC formulated and discussed a set of recommendations with PASA and its

equivalents that would help them to counteract the effects of this merger. It was agreed that these bodies would:

- Strengthen the buyer power of the NHS by establishing a series of framework agreements which would include maximum prices. In doing this they should also facilitate the sharing between NHS trusts of (anonymised) information on the prices negotiated by those trusts.
- Investigate potential entrants into the UK market, share information about the UK market with such firms, and in particular provide information on potential UK distributors.
- Facilitate the development of a stakeholder network to allow for information sharing between professional associations, clinicians and purchasing departments.

12. The recommendations made were as specific as possible and the agreement of PASA and its equivalents to them was recorded in the final report.

Need for temporary safeguards

13. Although PASA and its equivalents agreed to take steps to improve purchasing and facilitate competition, it would take time for the recommendations to have full effect. Undertakings (commitments) were therefore secured from the parties to ensure that the merged entity would:
    - Continue to supply to UK hospitals the full range of closed care incubators, open care incubators, related products and support services;
    - Maintain 2003 list prices;
    - Ensure than the average percentage discount off list price it gives in any year is no less than the average percentage discount off list price given in 2003.

    The price control is expressed in terms of percentage discounts off list price, to reflect the way in which firms arrive at realised prices in this market. It was decided that the safeguards should remain in place for just over three years, until the end of 2007. It was important to include a public expiry date to maximise the incentive on PASA and its equivalents to implement the recommendations and to contain any disincentive for entry or other distortions created by the safeguards.

Implementation and enforcement issues

15. To facilitate monitoring, it was agreed that an independent monitor would be put in place to oversee the price control and supply commitments. The monitor is paid for by the merging parties but is independent of the parties and is controlled by the Office of Fair Trading (OFT). This reflected the fact that, although the price cap was relatively straightforward, its monitoring would still require the processing of a considerable volume of information which would have been a significant burden to the OFT.

Summary of learning points

- ***Constraints of overseas mergers***: These constraints might rule out some remedy options and increase the risk associated with enforcement of others with the result that it is necessary to consider alternative forms of remedy to provide an effective solution. In such cases, it is also instructive to understand the situation and proposed approach of other national competition authorities to avoid conflicting approaches.

- ***Use of behavioural remedies as a temporary safeguard***: Where remedies which control outcomes are used as temporary safeguards alongside other remedies intended to facilitate competition in the longer term, it is necessary to ensure that the former do not materially reduce the chances of entry or create other distortions.

- ***Ensuring adequate monitoring***: Where remedies involve ongoing monitoring it is important that practical monitoring issues are taken into account in the choice and design of the remedy and that adequate resources are provided, where necessary by the merging parties, to facilitate the monitoring process.

- ***Use of recommendations****:* It is important to discuss and agree with those responsible, any recommendations for remedial measures before they are made and to be as specific as possible in what should be done, by whom and by when.